No. _____

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

APPENDIX

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United States Court of Appeals
For the First Circuit

No. 20-2174

JONATHAN CARVALHO,

Petitioner - Appellant,

v.

STEVEN KENNEWAY,

Respondent - Appellee.

Before

Howard, Chief Judge,
Thompson and Gelpí, Circuit Judges.

JUDGMENT

Entered: December 23, 2021

Petitioner-Appellant Jonathan Carvalho appeals from the order of the district court denying his petition for habeas corpus, filed pursuant to 28 U.S.C. § 2254. We review the district court's denial of habeas relief de novo. Moore v. Dickhaut, 842 F.3d 97, 99 (1st Cir. 2016). We have carefully reviewed all of the parties' submissions, and the record. Largely for the reasons set forth in the district court judge's Memorandum and Order dated November 10, 2020, we affirm the order denying the petition.

The judgment of the district court is affirmed. See 1st Cir. R. 27.0(c).

Petitioner-appellant has also filed a motion for appointment of counsel. "[P]etitioners have no constitutional right to counsel in [habeas corpus] proceedings." Bucci v. United States, 662 F.3d 18, 34 (1st Cir. 2011), cert. denied, 133 S.Ct. 277 (2012). After our review of petitioner's motion and of the entire record, we are not persuaded that "the interests of justice" require appointment of counsel. 18 U.S.C. §3006A(a)(2)(B).

Accordingly, Carvalho's motion for appointment of appellate counsel is denied.

So ordered.

RA
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By the Court:

Maria R. Hamilton, Clerk

cc:
Claudia Leis Bolgen
Jonathan Carvalho
Anna Esther Lumelsky

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United States District Court
District of Massachusetts

Jonathan Carvalho, Petitioner, v. Steven Kenneway, Respondent.	)	Civil Action No. 18-12018-NMG

MEMORANDUM & ORDER

GORTON, J.

In September, 2010, a Massachusetts Grand Jury in Suffolk County indicted Jonathan Carvalho ("Carvalho" or "petitioner") on one count of murder in the first degree and one count of unlawful possession of a firearm without a license. A jury trial was conducted in December, 2011, in Suffolk County Superior Court ("the Trial Court") and Carvalho was ultimately convicted on the firearm charge and on the lesser-included offense of second-degree murder. He was sentenced to life in prison on the murder conviction and a concurrent term of four to five years on the firearm conviction. Carvalho is currently incarcerated at the Massachusetts Correctional Institution in Shirley.

Following his convictions, Carvalho appealed and the Massachusetts Appeals Court ("MAC") affirmed. The Massachusetts Supreme Judicial Court ("SJC") denied Carvalho's application for further appellate review and the United States Supreme Court denied Carvalho's Petition for Certiorari. Thereafter, Carvalho filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Carvalho seeks relief on four grounds: (1) the Trial Court erred by not giving a jury instruction on self-defense; (2) the Trial Court erred by not instructing the jury that reasonable provocation can arise without physical contact; (3) remarks by the prosecutor during her opening and closing argument violated Carvalho's constitutional rights; and (4) the trial judge initiated but failed to proceed properly with a Batson inquiry.

I. Factual Background

In a habeas corpus proceeding instituted by a person in custody pursuant to the judgment of a state court, factual determinations made by a state court shall be presumed to be correct absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1). The Court therefore looks to the facts found by the Trial Court as summarized on appeal by the MAC:

> Shortly after 11:00 A.M. on August 10, 2010, Hugo Valladares left work and returned to his apartment on the first floor of 230 Central Avenue in Chelsea. The

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[petitioner], a childhood friend of Valladares, was at the apartment. [Petitioner] had been dating Daisy Lopez for several months. Lopez's former boyfriend, Emanuel Flores, was friends with the victim, Luis Rodriguez. The victim's girlfriend, Anmeris Burgos, lived on the second floor of the same building as Valladares. The [petitioner] and Emanuel Flores had been involved in a dispute over Lopez, which had led to several prior physical altercations. The victim had also become involved in this dispute, resulting in a "beef" between the victim and the [petitioner]. The [petitioner] had told Valladares that he and the victim were going to "squash the beef," or settle the dispute, through a fist fight. The victim had also told Valladares that he and the [petitioner] were going to fight in order to settle the "beef."

On that morning, when Valladares opened the door to his apartment and found the [petitioner] inside, the [petitioner] told Valladares that the victim's car was outside. He asked Valladares to go upstairs to Burgos's apartment and get the victim, so that he and the [petitioner] could "scrap it out." The victim eventually met the [petitioner] in the parking lot outside of 230 Central Avenue. Geraldo Flores, who witnessed the altercation from the other side of the parking lot, testified that the two walked toward each other and met in the middle of the parking lot. The victim put his fists up while the two were circling one another. The victim was saying "come on, let's go" and advancing on the [petitioner] while the [petitioner] backed away and said, "hold on, relax" and "let me talk to you."

As they moved closer to Geraldo, the victim still coming toward the [petitioner], Geraldo turned to walk away. Two seconds later, he heard the first gunshot. Geraldo turned back to face the pair and saw the [petitioner], about four yards away, pointing a gun at the victim as the victim, about ten yards away, ran back toward the door to 230 Central Avenue. The [petitioner] fired a second shot, hitting the victim in the back and causing him to stumble into the door. A third shot was fired as Geraldo ran from the scene. The victim, who was unarmed, suffered a total of three gunshot wounds. The wound to his back proved fatal, and he died shortly after being taken to the hospital. A jury convicted the [petitioner] of murder in the second degree and possession of a firearm without a license.

Commonwealth v. Carvalho, 90 Mass. App. Ct. 1110, 2016 WL 5955949, at *1 (2016) (footnotes omitted).

II. Analysis

A. Legal Standard

To secure federal habeas relief in the wake of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a petitioner must demonstrate that the "last reasoned state court decision" in the case

> 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); see also Janosky v. St. Amand, 594 F.3d 39, 47 (1st Cir. 2010) ("Because the [Supreme Judicial Court] summarily denied further appellate review, we look to the last reasoned state-court decision — in this case, the [Massachusetts Appeals Court's] rescript."). Here, the last reasoned decision of a state court is the decision of the MAC affirming the Trial Court's conviction of Carvalho.

When determining what constitutes "clearly established Federal law" as determined by the Supreme Court of the United States ("the Supreme Court"), courts are to look only to the

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holdings, and not dicta, of the Court's decisions. Woods v. Donald, 575 U.S. 312, 316 (2015).

The Supreme Court has stated that the "contrary to" and "unreasonable application" clauses of § 2254 have "independent meaning," thus providing two different avenues for a petitioner to obtain relief. Williams v. Taylor, 529 U.S. 362, 405 (2000). A state court's adjudication will be "contrary to" clearly established Supreme Court precedent if it either "applies a rule that contradicts the governing law set forth" by the Supreme Court or considers facts that are "materially indistinguishable" from a Supreme Court decision and arrives at a different conclusion. Id. at 405-06.

On the other hand, a state court's decision will constitute an "unreasonable application" of clearly established Supreme Court precedent if it "identifies the correct governing legal principle" from the Supreme Court but "unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. Consequently, a federal habeas court may not grant relief simply because that court concludes in its independent judgment that the decision of the state court applied clearly established federal law erroneously or incorrectly. Id. at 411. It must further conclude that such an application was unreasonable. Id.

B. Application

1. Jury Instructions

Carvalho contends that the jury instructions at trial were erroneous for two reasons. First, he avers that the Trial Court should have instructed the jury regarding self-defense. Second, he complains that the Trial Court failed to instruct the jury that reasonable provocation does not require physical contact. Carvalho contends that the Trial Court's rejection of his proposed instructions violated his right to due process. The Commonwealth responds that the MAC did not unreasonably apply clearly established law in finding that petitioner was not entitled to either instruction.

A federal habeas court must accept a state court's rulings on state law issues. Rodriguez v. Spencer, 412 F.3d 29, 37 (1st Cir. 2005) (citing Estelle v. McGuire, 502 U.S. 62, 67 (1991)). For that reason, improper jury instructions seldom form the basis for habeas relief. Niziolek v. Ashe, 694 F.2d 282, 290 (1st Cir. 1982). It is not enough that a jury instruction be deemed "undesirable, erroneous, . . . universally condemned" or noncompliant with state model instructions. Gaines v. Matesanz, 272 F. Supp. 2d 121, 131 (D. Mass. 2003) (quoting Cupp v. Naughten, 414 U.S. at 146 (1973) (internal quotation marks omitted)); see also Estelle, 502 U.S. at 71. Federal habeas

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relief is warranted only when an instruction is deemed so erroneous that it violates a criminal defendant's federal right to due process pursuant to the Due Process Clause of the Fourteenth Amendment. Niziolek, 694 F.2d at 287 (holding "errors that render a fair trial impossible will be cognizable in federal habeas corpus, because such errors violate the due process clause"). Individual instructions must be examined in the context of the whole jury charge rather than in isolation and petitioner must show "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Estelle, 502 U.S. at 72; see also Waddington v. Sarausad, 555 U.S. 179, 191 (2009).

i. Failure to Instruct on Self-Defense

Carvalho contends that the Trial Court's failure to instruct the jury on self-defense violates the principle announced by the Supreme Court 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." Mathews v. United States, 485 U.S. 58, 63 (1988). He asserts that he reasonably believed that he was in imminent danger of serious bodily harm because Mr. Rodriguez was the aggressor and that he had tried to avoid a physical

confrontation prior to his use of force. As a result, Carvalho submits that he was entitled to an instruction on self-defense.

Carvalho's assertions are unavailing. As a preliminary matter, the First Circuit Court of Appeals ("the First Circuit") has rejected the view that the Mathews principle is clearly established federal law for purposes of federal habeas review. See Hardy v. Maloney, 909 F.3d 494, 500 (1st Cir. 2018) (noting that the Supreme Court has not applied the language in Mathews in any other case or to any defense "other than the entrapment defense at stake in Mathews" and describing the statement as "dicta, not a holding"). Therefore, this Court cannot conclude that the MAC acted contrary to clearly established federal law based on the principle in Mathews.

Even if the First Circuit did consider the language in Mathews to be clearly established federal law, a defendant is only entitled to an instruction as to a defense if a reasonable jury could find in his favor based on the evidence. Mathews, 485 U.S. at 63. The MAC determined, however, that the evidence viewed in the light most favorable to Carvalho indicated that he was not entitled to a self-defense instruction because he did not "use[] all reasonable, available means of retreat" before using force, as required by Massachusetts law. See Carvalho,

2016 WL 5955949, at *2 (citing Commonwealth v. Harrington, 379 Mass. 446, 450 (1980)). The MAC emphasized that

> the altercation took place in the middle of the day, in a parking lot abutting a public street. There was no evidence that the defendant's means of egress was blocked, or that he, armed with a gun, could not have simply run away from the victim's raised fists.

Id. Carvalho does not dispute that the escape options discussed by the MAC were available to him. Instead, he contends that he did sufficiently retreat by backing away from Mr. Rodriguez and attempting to resolve the matter verbally. The MAC's determination to the contrary, however, was not unreasonable.

Furthermore, the Trial Court found that Carvalho had shot the victim in the back as he fled and that the shot to the back was the cause of death. Accordingly, Carvalho has not shown that the refusal to instruct the jury on self-defense "so infected the entire trial that the resulting conviction violates due process." Cupp, 414 U.S. at 147.

ii. Erroneous Reasonable Provocation Instruction

Carvalho also avers that the instructions given to the jury were erroneous because they did not specify that reasonable provocation, which negates the malice necessary for a defendant to be found guilty of murder, does not require physical contact.

The Trial Court instructed the jury using the then-applicable model instruction on reasonable provocation, which

stated that "physical contact, even a single blow, may amount to reasonable provocation." Carvalho, 2016 WL 5955949, at *2 (quoting Model Jury Instructions on Homicide 29 (1999)). Standing alone, that instruction may be misleading because a finding of reasonable provocation does not require physical contact. See, e.g. Commonwealth v. Fortini, 68 Mass. App. Ct. 701, 706 (2007) (holding that a defendant was entitled to a reasonable provocation instruction when the "unexpected and aggressive approach" of the victim could have caused a reasonable person in defendant's position to feel "an immediate and intense threat"). In fact, the 2018 edition of the Massachusetts Model Jury Instruction on reasonable provocation was amended to state explicitly that "[r]easonable provocation does not require physical contact," the precise instruction requested by petitioner.

Individual jury instructions are not to be viewed in isolation, however, and instead "must be viewed in the context of the overall charge." Cupp, 414 U.S. at 146-47. The Trial Court provided a second instruction to the jury that defined reasonable provocation as 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.

Carvalho, 2016 WL 5955949, at *3. The additional instruction included no reference to physical contact as a prerequisite for reasonable provocation. As a result, the MAC held that the additional instruction cured any potentially incorrect understanding created by the previous instruction and found that there was no possibility that the jury interpreted the instructions as Carvalho suggested. Carvalho, 2016 WL 5955949, at *3. Carvalho has not met his burden of proving that the MAC's determination was unreasonable. Therefore, petitioner's habeas challenge on the basis of improper jury instructions will be denied.

2. Prosecutorial Misconduct

Carvalho next argues that habeas relief should be granted because comments made by the prosecutor impermissibly appealed to jurors' sympathy. Specifically, he cites five instances during the government's opening and the closing argument in which the prosecutor noted that the victim had learned that he was to become a father on the same day he was killed. Petitioner contends that those comments prejudiced the jury to such a degree that he was deprived of due process.

Federal habeas relief is rarely granted based on comments made by prosecutors because the issue is limited to "the narrow one of due process, and not the broad exercise of supervisory

power." Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974). For relief to be granted, "it is not enough that the prosecutors' remarks were undesirable or even universally condemned." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (internal quotation omitted). Convictions can be reversed based upon the comments of a prosecutor only if those comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. The statements therefore must be viewed in the context of the entire trial. United States v. Young, 470 U.S. 1, 11 (1985).

Here, the MAC found that the prosecutor's comments "were within the scope of permissible argument" because they helped establish why the victim was present at the apartment building that day. Carvalho, 2016 WL 5955949, at *3. Furthermore, even if the references to the victim's expectant fatherhood did have the power to influence the jury, the Trial Court provided a curative instruction noting that comments made by the prosecutor during opening and closing statements are not evidence to be considered by the jury. The petitioner conceded as much in his memorandum in support of his petition.

Viewing the comments in light of the totality of the evidence of Carvalho's guilt presented at trial, the MAC's finding that the prosecutor's comments did not amount to a

violation of due process is a reasonable application of the Supreme Court's pronouncement in Darden. Accordingly, habeas relief will not be granted on that ground.

3. Batson Violation

Finally, Carvalho contends that he is entitled to habeas relief because the government improperly exercised peremptory challenges in a discriminatory manner during jury selection.

The Supreme Court held in Batson v. Kentucky, 476 U.S. 79 (1986) that excluding jurors on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment. To prove a Batson violation, courts have applied a three-pronged test:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Davis v. Ayala, 576 U.S. 257, 270 (2015).

To establish a prima facie case of discriminatory motivation under the first prong of Batson, a petitioner must show that the facts "raise an inference that the prosecutor used [peremptory challenges] to exclude the veniremen from the petit jury on account of their race." Batson, 476 U.S. at 96. The Court in Batson directed courts to "consider all relevant

circumstances" in determining whether a petitioner has met his or her burden. Id.

When a petitioner seeks federal habeas relief based upon a Batson challenge, courts must give significant deference to the findings of the trial judge. In addition to the presumption of correctness afforded to all state court factual findings under 28 U.S.C. § 2254(e)(1), determinations of trial judges with respect to peremptory strikes are entitled to particular deference because they are in the best position "to evaluate context, nuance, and the demeanor of the prospective jurors and the attorneys." Caldwell v. Maloney, 159 F.3d 639, 649 (1st Cir. 1998).

Petitioner asserts that, during jury empanelment, the Trial Court judge engaged in a sua sponte inquiry regarding the prosecutor's peremptory challenges under Batson's first prong but erroneously failed to proceed to the second step of the analysis. He cites an exchange between the trial judge and counsel in which the judge inquired about whether the government had challenged any Hispanic jurors. The Commonwealth responds that the MAC found that the trial judge made no inquiry into the motive behind the challenges and thus had not invoked a challenge under the state law equivalent of Batson, Commonwealth v. Soares, 377 Mass. 461, 490 (1979). Alternatively, the

Commonwealth proffers that, even if the trial judge's comments are considered to be an implicit Batson inquiry, he proceeded to find no prima facie discrimination.

As a preliminary matter, the brief, ambiguous exchange between the trial judge and the parties did not constitute a Batson inquiry. At no point during that colloquy did the judge seek any explanation from the prosecutor or give any indication that he thought that any strike was improper. Petitioner offers no clear and convincing evidence that rebuts the MAC's factual finding that the conversation did not constitute a Batson inquiry. Consequently, this Court will not discredit the holding of the MAC on this issue.

Relief may still be warranted on habeas review notwithstanding a trial judge's failure to initiate a Batson inquiry if a prima facie showing of discrimination was in fact made. See Sanchez v. Roden, 753 F.3d 279, 288 (1st Cir. 2014) (ordering the district court to complete a Batson inquiry even though no such inquiry had previously been initiated).

Carvalho has not, however, met his burden of making the requisite prima facie showing. Here, unlike in Sanchez, defense counsel did not object to any of the government's peremptory strikes and did nothing more than repeat comments made by the trial judge. A trial court is under no obligation to conduct a

Batson inquiry under such circumstances. See United States v. Snyder, 658 F.App'x. 859, 861 (9th Cir. 2016) (holding that the trial judge's failure to initiate a sua sponte Batson inquiry was not erroneous when defense counsel did not request an inquiry into the government's reason for a peremptory strike). Under these circumstances, the MAC's finding that the peremptory challenges were not based on discriminatory intent is a reasonable application of clearly established federal law articulated in Batson and its progeny. Therefore, habeas relief will not be granted based upon that ground.

C. Certificate of Appealability

1. Legal Standard

Section 2253(c) of Title 28 of the United States Code provides that a Certificate of Appealability ("COA") may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In order to make a "substantial showing", a petitioner seeking a COA must demonstrate that

> reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). To meet the debatable-among-jurists-of-reason standard, the petitioner must

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prove "something more than the absence of frivolity or the existence of mere good faith." Miller-El v. Cockrell, 537 U.S. 322, 338 (2003).

2. Application

Petitioner has not made a substantial showing that the exclusion of an instruction on self-defense, the prosecutor's comments about the victim's expectant fatherhood or the prosecutor's peremptory strikes denied him a constitutional right warranting habeas relief.

Petitioner has, however, made a substantial showing 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. When hearing the general instruction that "any physical contact, even a single blow, may amount to reasonable provocation," Carvalho, 2016 WL 5955949, at *2, outside the context of the second instruction given 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. Accordingly, a Certificate of Appealability should issue on Carvalho's claim that an erroneous instruction on reasonable

provocation was given to the jury in violation of his constitutional right.

ORDER

For the foregoing reasons, the petition for writ of habeas corpus of Jonathan Carvalho (Docket No. 1) is **DISMISSED** but the Court sua sponte enters a certificate of appealability with respect to petitioner's claim as to the jury instruction on reasonable provocation.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated November 10, 2020

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90 Mass.App.Ct. 1110
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

COMMONWEALTH
v.
Jonathan CARVALHO.

No. 13–P–1594.

October 14, 2016.

By the Court (KAFKER, C.J., COHEN, GREEN, MASSING & SACKS, JJ.[1]).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 In the defendant's appeal from his conviction of murder in the second degree, he argues that (1) the trial judge committed numerous errors in her jury instructions, (2) the prosecutor improperly appealed to juror sympathy during her opening and closing arguments, (3) his motion to suppress certain statements he made to the police should have been allowed, and (4) the judge should have required a reason for one of the Commonwealth's peremptory challenges of a potential juror.[2] We affirm.

Background. We recite the facts in the light most favorable to the defendant in order to determine whether he was entitled to jury instructions on self-defense. See *Commonwealth v. Pike*, 428 Mass. 393, 396 (1998). We reserve further factual background for the discussion as required to address the remaining issues raised by the defendant.

Shortly after 11:00 *A.M.* on August 10, 2010, Hugo Valladares left work and returned to his apartment on the first floor of 230 Central Avenue in Chelsea. The defendant, a childhood friend of Valladares, was at the apartment. The defendant had been dating Daisy Lopez for several months. Lopez's former boy friend, Emanuel Flores, was friends with the victim, Luis Rodriguez. The victim's girl friend, Anmeris Burgos, lived on the second floor of the same building as Valladares. The defendant and Emanuel Flores had been involved in a dispute over Lopez, which had led to several prior physical altercations. The victim had also become involved in this dispute, resulting in a "beef" between the victim and the defendant. The defendant had told Valladares that he and the victim were going to "squash the beef," or settle the dispute, through a fist fight. The victim had also told Valladares that he and the defendant were going to fight in order to settle the "beef."

On that morning, when Valladares opened the door to his apartment and found the defendant inside, the defendant told Valladares that the victim's car was outside. He asked Valladares to go upstairs to Burgos's apartment and get the victim, so that he and the defendant could "scrap it out." The victim eventually met the defendant in the parking lot outside of 230 Central Avenue. Geraldo Flores,[3] who witnessed the altercation from the other side of the parking lot, testified that the two walked toward each other and met in the middle of the parking lot. The victim put his fists up while the two were circling one another. The victim was saying "come on, let's go" and advancing on the defendant while the defendant backed away and said, "hold on, relax" and "let me talk to you."

As they moved closer to Geraldo, the victim still coming toward the defendant, Geraldo turned to walk away. Two seconds later, he heard the first gunshot. Geraldo turned back to face the pair and saw the defendant, about four yards away, pointing a gun at the victim as the victim, about ten yards away, ran back toward the door to 230 Central Avenue. The defendant fired a second shot, hitting the victim in the back and causing him to stumble into the door. A third shot was fired as Geraldo ran from the scene. The victim, who was unarmed, suffered a total of three gunshot wounds. The wound to his back proved fatal, and he died shortly after being taken to the hospital. A jury convicted the defendant of murder in the second degree and possession of a firearm without a license.

*2 *Discussion.* 1. *Jury instructions.* The defendant takes issue with various aspects of the judge's instructions to the jury, which included the charges of murder in the first degree, murder in the second degree, and voluntary manslaughter. We consider in turn each of the defendant's claims of error.

a. *Self-defense.* The defendant contends that it was error for the judge to deny his request for a self-defense instruction.[4] In a case such as this, a defendant who employed deadly force is entitled to a self-defense instruction if the evidence warrants "at least a reasonable doubt that the defendant: (1)

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had reasonable ground to believe and actually did believe that he was in imminent danger of death or serious bodily harm, from which he could save himself only by using deadly force, (2) had availed himself of all proper means to avoid physical combat before resorting to the use of deadly force, and (3) used no more force than was reasonably necessary in all the circumstances of the case." *Commonwealth v. Harrington*, 379 Mass. 446, 450 (1980).

The defendant was not entitled to a self-defense instruction, because the evidence, viewed in the light most favorable to him, did not raise even the possibility that he used all reasonable, available means of retreat before resorting to the use of force. Even assuming that the victim was the aggressor and the defendant reasonably feared imminent risk of death or serious bodily harm, the evidence is uncontroverted that the altercation took place in the middle of the day, in a parking lot abutting a public street. There was no evidence that the defendant's means of egress was blocked, or that he, armed with a gun, could not have simply run away from the victim's raised fists. See *Commonwealth v. Curtis*, 417 Mass. 619, 632 (1994); *Commonwealth v. Berry*, 431 Mass. 326, 335 (2000); *Commonwealth v. Espada*, 450 Mass. 687, 693 (2008).

Necessity is the touchstone of self-defense. "The right of self-defence does not accrue to a person until he has availed all proper means to avoid physical combat." *Commonwealth v. Kendrick*, 351 Mass. 203, 212 (1966). See *Pike, supra* at 399 (defendant must use every available means of escape available before acting in self-defense). Because the evidence, viewed in the light most favorable to the defendant, does not show that he was entitled to use self-defense, the trial judge did not err in failing to so instruct the jury.

b. *Reasonable provocation.* Defense counsel made a pretrial request for an instruction informing the jury that heat of passion upon reasonable provocation may arise from the victim's "aggressive approach," which need "not include ... that the victim struck a blow." The trial judge instead gave the model jury instruction on reasonable provocation, which states that "physical contact, even a single blow, may amount to reasonable provocation." Model Jury Instructions on Homicide 29 (1999). The defendant objected and maintains on appeal that the instruction improperly conveyed to the jury that physical contact was required in order for them to conclude that the victim's approach constituted reasonable provocation.

*3 Reading the instructions as a whole, see *Commonwealth v. Jiles*, 428 Mass. 66, 71 (1998), we do not believe reasonable jurors would have understood that they could not find reasonable provocation in the absence of physical contact. The judge's instructions 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." This closely tracked the model instructions then in effect. See Model Jury Instructions on Homicide 28. This avoided any possibility that the jury would reasonably have interpreted the phrase "physical contact" in the manner suggested by the defendant. The case the defendant relies upon, *Commonwealth v. Morales*, 70 Mass.App.Ct. 526, 531–533 (2007), is not on point, as there this court held it error for the trial judge to have expressly instructed the jury that physical contact was required in order to find reasonable provocation.

c. *Sudden combat.* In her instructions on mitigating circumstances, the judge instructed the jury that "[s]udden combat involves unplanned combat." The defendant takes issue with these instructions for the first time on appeal, arguing that neither the 1999 nor the 2013 versions of the Model Jury Instructions on Homicide includes the word "unplanned." He argues that this term led the jury to believe that *combat* could not be sudden if, as in this case, the *meeting* at which the combat took place was planned. We disagree. Nothing in the judge's instructions suggested that "unplanned combat" could not occur at a meeting that was planned. The jury were free to consider whether the alleged assault of the defendant by the victim was "sudden" so as to mitigate the charge from murder to voluntary manslaughter.

2. *Alleged prosecutorial misconduct.* The defendant argues that a new trial is required because the prosecutor improperly played on the jury's sympathy and emotion during her opening and closing statements by repeatedly referring to the fact that the victim was an expectant father. He argues that the error was compounded by "the constant presence in the courtroom of a picture of the deceased, as well as the crying and angry family members of the deceased exhibiting themselves to the jury venire and the jury." He contends that the judge erred in failing to give a curative jury instruction regarding the

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"spectacle" of family members in the courtroom combined with the prosecutor's comments.

Among the challenged conduct, only the prosecutor's own comments are attributable to the Commonwealth. Furthermore, defense counsel objected only to the prosecutor's opening statement. We discern no error, as the prosecutor's comments were supported by testimony and within the scope of permissible argument. "The prosecutor is entitled to tell the jury something of the person whose life [has] been lost in order to humanize the proceedings." *Commonwealth v. Rodriguez*, 437 Mass. 554, 566 (2002) (quotation omitted). Her three comments that the victim was about to become a father again (two of which described the anticipated testimony of two prosecution witnesses) did not rise to the level of improper appeals to sympathy or emotion. Contrast *Commonwealth v. Santiago*, 425 Mass. 491, 494–495 (1997) (twelve references to victim's being seventeen and pregnant); *Commonwealth v. Rosa*, 73 Mass.App.Ct. 540, 545 (2009) (nineteen references to victim's being a firefighter or being on fire engine). See Mass. G. Evid. § 1113(b)(3)(C) & note (2016). Even if the comments had amounted to prosecutorial misconduct, we have considered the factors bearing on whether such misconduct requires reversal, see *Santiago, supra* at 500, and concluded that reversal would not be warranted here.

*4 3. *Miranda issues.* Shortly after the shooting, the defendant boarded a bus bound for Florida. He was apprehended en route in Savannah, Georgia, and held at the county jail in that city. A Massachusetts State police trooper and a detective flew to Savannah the following day. They took custody of the defendant, transported him to the Savannah airport, and traveled with him by plane to Atlanta. The three then boarded a connecting flight from Atlanta to Boston. During the trip, the defendant made numerous statements to both the detective and the trooper, some of which implicated him in the crime. The defendant was not advised of his Miranda rights until he was booked at the Chelsea police department following his arrival in Boston.

The defendant filed a pretrial motion to suppress all of his statements made during the trip. The motion judge denied the motion, concluding that although the defendant was in custody, none of his statements between Savannah and Boston was the product of police interrogation. She found that the detective and the trooper did not engage the defendant in conversation or do anything to provoke or elicit his statements, which were "spontaneous and volunteered" by the defendant of his own accord. She thus concluded that the officers were not required to provide Miranda warnings.

The defendant contends that, under art. 12 of the Massachusetts Declaration of Rights, the statements should have been suppressed because the atmosphere of "sustained and prolonged custody in close quarters with two officers" was "presumptively coercive" and Miranda warnings were required. We disagree. Miranda warnings were not required simply because the defendant was in police custody. See *Commonwealth v. Torres*, 424 Mass. 792, 796–797 (1997) (Miranda doctrine safeguards defendant's rights during custodial interrogation, not mere custody itself). Custody during a long period of transport does not itself require that the defendant be Mirandized. See *Commonwealth v. Figueroa*, 56 Mass.App.Ct. 641, 645 (2002). We decline the defendant's invitation to expand the protections afforded by art. 12 by holding that Miranda warnings are required under these circumstances.

4. *Peremptory challenge to juror no. 3.* The Commonwealth exercised six peremptory challenges to prospective jurors, including juror no. 3, who was Hispanic. The judge then asked, "[A]re there any other [people] of Hispanic descent still on the jury?" The prosecutor did not know the answer, and neither she nor the judge pursued the matter further. Defense counsel did not object. Relying on *Commonwealth v. Maldonado*, 439 Mass. 460, 463 n.5 (2003), the defendant claims on appeal that the judge's sua sponte inquiry into the challenge was, in effect, a prima facie finding of impropriety in jury selection under *Commonwealth v. Soares*, 377 Mass. 461, 490, cert. denied, 444 U.S. 881 (1979), requiring the judge to ask the prosecutor for an explanation. We disagree.

*5 In *Maldonado*, unlike in this case, the judge, on her own initiative, "demanded a reason" for the prosecutor's challenge to the only black potential juror. 439 Mass. at 461. The Supreme Judicial Court held that the judge's sua sponte inquiry included an implicit finding under *Soares* that a prima facie case of discrimination was made. See *id.* at 463 n.5. Here the judge made no such inquiry and thus no such implicit finding. There was no error.

Judgments affirmed.

All Citations

90 Mass.App.Ct. 1110, 60 N.E.3d 1198 (Table), 2016 WL 5955949

Footnotes

1 The panelists are listed in order of seniority.

2 The defendant was also convicted of carrying a firearm without a license. He makes no separate argument regarding that conviction in this appeal.

3 Geraldo Flores is of no relation to Emanuel Flores. Because they share a surname, we refer to them using their first names.

4 The defendant concedes that he used excessive force, but argues that he was nevertheless entitled to an instruction on self-defense employing excessive force.

End of Document

A27

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Jonathan Carvalho
Plaintiff

v.

Steven Kenneway
Defendant

CIVIL ACTION

NO. 18-cv-12018 – NMG

ORDER OF DISMISSAL

Gorton, D. J.

In accordance with the Court's Memorandum and Order dated November 10, 2020, it is hereby ORDERED that the above-entitled action be and hereby is dismissed.

By the Court,

11/12/2020
Date

/s/ Leonardo T. Vieira
Deputy Clerk

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8/3/99

MODEL JURY INSTRUCTIONS ON HOMICIDE

second degree. If, however, after your consideration of all of the evidence, you find that the Commonwealth has not proved any one of these elements beyond a reasonable doubt, you must not find the defendant guilty of felony murder in the second degree.

Supplemental Instruction 9 - Unanimity Instruction pp. 63-64

The degree of murder is to be determined by you the jury.

For murder cases in which voluntary manslaughter is also covered.

In order to prove that the defendant acted with malice, the Commonwealth must prove beyond a reasonable doubt the absence of certain mitigating circumstances. Mitigating circumstances are circumstances which lessen a defendant's culpability for an act. Both the crimes of murder and voluntary manslaughter require proof of an unlawful killing, but the killing may be the crime of voluntary manslaughter if it occurred under mitigating circumstances so that the Commonwealth cannot prove beyond a reasonable doubt that the defendant acted with malice. In order to obtain a conviction of murder, the Commonwealth must prove beyond a reasonable doubt the absence of this/these mitigating circumstance[s]. Based on the evidence in this case, the mitigating circumstance[s] that you must consider is/are:

(1. heat of passion upon a reasonable provocation;)

(2. heat of passion induced by sudden combat;)

(3. excessive use of force in self defense or in defense of another)

Let me explain (this) (these) mitigating circumstance(s).

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1. Heat of Passion Upon Reasonable Provocation

Heat of passion includes the states of mind of passion, anger, fear, fright and nervous excitement.

Reasonable provocation is provocation of the type which would be likely to produce in a reasonable person such a state of passion, anger, fear, fright or nervous excitement as would overcome his capacity for reflection or restraint and did actually produce such a state of mind in the defendant. The provocation must be such that a reasonable person would have become sufficiently provoked and would not have cooled off by the time of the killing, and that the defendant was so provoked and did not cool off at the time of the killing. In addition, there must be a causal connection between the provocation, the state of heat of passion and the killing. The killing must follow the provocation before there is sufficient time for the emotion to cool and must be the result of the state of mind induced by the provocation rather than a preexisting intent to kill or injure.

Mere words, no matter how insulting or abusive, standing alone do not constitute reasonable provocation.

For appropriate cases

[However, the existence of sufficient provocation is not foreclosed because a defendant learns of a fact from a statement rather than from personal observation. If the information conveyed is of the nature to cause a reasonable person to lose his self-control and did actually cause the defendant to do so, then a statement is sufficient.]

Physical contact, even a single blow, may amount to reasonable provocation. Whether the contact is sufficient will depend on whether a reasonable person under similar circumstances would have been provoked to act out of emotion rather than reasoned reflection. The heat of passion must also be sudden; that is, the killing must have occurred before a reasonable person would have regained control of his emotions.

If the Commonwealth has not proved beyond a reasonable doubt the absence of heat of passion upon reasonable provocation, the Commonwealth has not proved malice.

2. Heat Of Passion Induced By Sudden Combat

Sudden combat involves a mutual and sudden assault by both the deceased and the defendant. In sudden combat, physical contact, even a single blow, may amount to reasonable provocation. Whether the contact is sufficient will depend on whether a reasonable person under similar circumstances would have been provoked to act out of emotion rather than reasoned reflection. The heat of passion induced by sudden combat must also be sudden; that is, the killing must have occurred before a reasonable person would have regained control of his emotions and the defendant must have acted in the heat of passion without cooling off at the time of the killing. If the Commonwealth has not proved beyond a reasonable doubt the absence of heat of passion induced by sudden combat, the Commonwealth has not proved malice.

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SUPREME JUDICIAL COURT

MODEL JURY INSTRUCTIONS ON HOMICIDE

April, 2018

1. Heat of passion on reasonable provocation. Heat of passion includes the states of mind of passion, anger, fear, fright, and nervous excitement.[159]

Reasonable provocation is provocation by the person killed[160] that would be likely to produce such a state of passion, anger, fear, fright, or nervous excitement in a reasonable person as would overwhelm his capacity for reflection or restraint and did actually produce such a state of mind in the defendant.[161] The provocation must be such that a reasonable

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[159] Commonwealth v. Walden, 380 Mass. 724, 728 (1980) ("in an ordinary person such a state of passion, anger, fear, fright, or nervous excitement as would eclipse his capacity for reflection or restraint, and . . . actually . . . produce such a state of mind in the defendant").

[160] Commonwealth v. Hinds, 457 Mass. 83, 90-91 (2010), quoting Commonwealth v. Ruiz, 442 Mass. 826, 838-839 (2004) ("provocation must come from the victim"). Note, however, that the doctrine of transferred intent can apply where the evidence raises the possibility of reasonable provocation, in which case the provocation could arise from someone other than the victim. See Commonwealth v. Camacho, 472 Mass. 587, 603 (2015) (noting, in dicta, "agree[ment] with th[e] general proposition" that, "in circumstances where one (A) who is reasonably and actually provoked by another person (B) into a passion to kill B, shoots at B but accidentally hits and kills an innocent bystander, A's crime is voluntary manslaughter"), quoting Commonwealth v. LeClair, 445 Mass. 734, 743 n.3 (2006).

[161] Commonwealth v. Burgess, 450 Mass. 422, 439 (2008), quoting Commonwealth v. Walden, 380 Mass. at 728 ("in an ordinary person such a state of passion, anger, fear, fright, or nervous excitement as would eclipse his capacity for reflection or restraint, and . . . actually . . . produce such a state of mind in the defendant"); Commonwealth v. Colon, 449 Mass. 207, 220 (2007) (provocation must be sufficient to cause accused to "lose his self-control in the heat of passion"); Commonwealth v. Lacava, 438 Mass. 708, 721 n.15 (2003), quoting Commonwealth v.

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person would have become incapable of reflection or restraint and would not have cooled off by the time of the killing, and that the defendant himself was so provoked and did not cool off at the time of the killing.[162] In addition, there must be a causal connection between the provocation, the heat of passion, and the killing.[163] The killing must occur after the provocation and before there is sufficient time for the emotion to cool, and must be the result of the state of mind induced by the provocation rather than by a preexisting intent to kill or grievously injure, or an intent to kill formed after the capacity for reflection or restraint has returned.[164]

Walden, 380 Mass. at 728 (provocation must "eclipse . . . capacity for reflection or restraint").

[162] Commonwealth v. Glover, 459 Mass. at 841, quoting Commonwealth v. Acevedo, 446 Mass. 435, 443 (2006) ("defendant's actions must be both objectively and subjectively reasonable. That is, the jury must be able to infer that a reasonable person would have become sufficiently provoked and would not have 'cooled off' by the time of the homicide, and that in fact a defendant was provoked and did not cool off" [internal quotation omitted]); Commonwealth v. Garabedian, 399 Mass. 304, 313 (1987) ("reasonable person would have become sufficiently provoked and that, in fact, the defendant was provoked").

[163] Commonwealth v. Burgess, 450 Mass. at 437-438, quoting Commonwealth v. Garabedian, 399 Mass. at 313 ("voluntary manslaughter requires the trier of fact to conclude that there is a causal connection between the provocation, the heat of passion, and the killing").

[164] Commonwealth v. Anderson, 408 Mass. 803, 805 n.1 (1990) (judge's instructions to this effect upheld).

Mere words, no matter how insulting or abusive, do not ordinarily by themselves constitute reasonable provocation.[165] [But there may be reasonable provocation where the person killed discloses information that would cause a reasonable person to lose his self-control and learning of the matter disclosed did actually cause the defendant to do so.][166]

Reasonable provocation does not require physical contact.[167] But physical contact, even a single blow, may amount to reasonable provocation. Whether the contact is sufficient will depend on whether a reasonable person under similar circumstances would have been provoked to act out of emotion rather than reasoned reflection and on whether the defendant was

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[165] Commonwealth v. Tu Trinh, 458 Mass. 776, 783 (2011), quoting Commonwealth v. Vick, 454 Mass. 418, 429 (2009); Commonwealth v. Mercado, 452 Mass. 662, 672 (2008) (proper instruction explained "the distinction between mere words, which 'no matter how insulting or abusive, standing alone do not constitute reasonable provocation,' and statements that convey information 'of the nature to cause a reasonable person to lose his or her self-control and did actually cause the defendant to do so . . . '").

[166] Commonwealth v. Schnopps, 383 Mass. 178, 180-181 (1981) (wife's sudden admission of ongoing adultery sufficient provocation to warrant instruction on voluntary manslaughter); Commonwealth v. Bermudez, 370 Mass. 438, 441-442 (1976) ("A reasonable man can be expected to control the feelings aroused by an insult or an argument, but certain incidents may be as provocative when disclosed by words as when witnessed personally"). Generally, for words or statements to incite heat of passion, they must contain new information as distinct from mere insults, taunts, or previously known, if inflammatory, information. See Commonwealth v. Ruiz, 442 Mass. at 839-840.

[167] Commonwealth v. Morales, 70 Mass. App. 526, 532-533 (2007).

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in fact so provoked.[168] The heat of passion must also be sudden; that is, the killing must have occurred before a reasonable person would have regained control of his emotions and the defendant must have acted in the heat of passion before he regained control of his emotions.[169]

If the Commonwealth has not proved beyond a reasonable doubt the absence of heat of passion on reasonable provocation, the Commonwealth has not proved that the defendant committed the crime of murder.

2. Heat of passion induced by sudden combat. Sudden combat involves a sudden assault by the person killed and the defendant upon each other. In sudden combat, physical contact, even a single blow, may amount to reasonable provocation.[170] Whether the contact is sufficient will depend on whether a

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[168] Commonwealth v. Felix, 476 Mass. at 757 (physical contact between defendant and victim not always sufficient to warrant manslaughter instruction, especially "where the defendant outweighs the victim and is physically far more powerful").

[169] Commonwealth v. Smith, 460 Mass. at 325, quoting Commonwealth v. Colon, 449 Mass. at 220 ("Provocation and 'cooling off' time must meet both a subjective and an objective standard"); Commonwealth v. Acevedo, 446 Mass. at 444-445. Cf. Acevedo at 444 n.14, citing Commonwealth v. Ruiz, 442 Mass. at 839 (where victim's slaps and physical contact never posed threat of serious harm to defendant, this did not "warrant a manslaughter instruction, even when the victim initiated the contact").

[170] Commonwealth v. Espada, 450 Mass. 687, 696-697 (2008) (sudden combat as basis for voluntary manslaughter requires that "victim . . . attack the defendant or at least strike a blow against the defendant").

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Volume: VIII
Pages: 102

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* * * * * * * * * * * * * * * * *

COMMONWEALTH OF MASSACHUSETTS

v.

JONATHAN CARVALHO

* Docket No. SUCR 2010-10961

* * * * * * * * * * * * * * * * *

JURY TRIAL
BEFORE THE HONORABLE REGINA QUINLAN

APPEARANCES:

For the Commonwealth:
Suffolk County District Attorney's Office
One Bulfinch Place
Boston, Massachusetts 02114
By: Amy J. Galatis, Assistant District Attorney

For the Defendant Jonathan Carvalho:
11 Dartmouth Avenue
Needham, Massachusetts 02494
By: William E. Davis, Jr., Esquire

Boston, Massachusetts

Date December 14, 2011,

Audio recording produced by Court Reporter:
Paula Connelly.
Transcript produced by Approved Court Transcriber:
Karen A. McGill

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malice. When the evidence raises an issue (Inaudible) Commonwealth has the burden of proving the absence of mitigation beyond a reasonable doubt. It should be remembered that the defendant has no burden to prove mitigating circumstances, but the Commonwealth has the burden of proving the absence of such circumstances.

Voluntary manslaughter is the unlawful killing arising not from malice, but from mitigating circumstances of heat of passion induced by reasonable provocation or similar conduct. While voluntary manslaughter the difference from murder because of the acts of some malice -- acts of some malice, voluntary manslaughter requires and involves the intentional and unjustified killing.

In order to convict the defendant of murder, the Commonwealth must prove beyond a reasonable doubt the absence of those mitigating circumstances. The first mitigating circumstance that the Commonwealth must prove the absence of is heat of passion (Inaudible) provocation. Where the evidence raises the possibility that the defendant may have acted on reasonable provocation, the Commonwealth must prove beyond a reasonable doubt that the defendant did not act in a heat of passion upon reasonable provocation. Heat of passion includes state of mind such as passion,

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anger, fear, fright, nervous excitement. Reasonable provocation is provocation of the type which would likely produce in a reasonable person the state of passion, anger, fear, fright or nervous excitement as a way of overcoming his capacity for reflection (Inaudible) and did actually produce such a state of (Inaudible) of the defendant. Provocation must be such that a reasonable person would become sufficiently provoked and would not have cooled off by the time of the unlawful killing. And the defendant was so provoked and did not cool off at the time of the killing.

In addition, there must be a cause or connection between provocation as stated (Inaudible) in the killing. The killing must (Inaudible) the provocation before there was sufficient time for emotion to cool and it must be the result of the state of mind induced by that provocation rather than the pre-existing intent to kill or injure. No matter how insulting or abusive standing alone do not constitute reasonable provocation. Physical contact, even a single blow may amount to reasonable provocation depending upon the circumstances. Whether the contact is sufficient or depending upon whether a reasonable person under the same or similar circumstances would

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have been provoked or acted under emotion rather than reasonable reflection. The heat of passion must also be sudden and that is the killing must have occurred before a reasonable person (Inaudible) to regain control of his emotions.

If the Commonwealth has not proven beyond a reasonable doubt the absence of heat of passion (Inaudible) reasonable provocation, the Commonwealth has not proven malice. And if the Commonwealth has proven beyond a reasonable doubt the absence of passion upon reasonable provocation, then you should consider whether the Commonwealth has proven that the killing -- let me do that again -- when we were talking about these is proving a negative, so if the Commonwealth has proven beyond a reasonable doubt the absence of heat of passion on the defendant, the killing was not committed in the heat of passion upon reasonable provocation that the Commonwealth -- then you should consider whether the Commonwealth has also proven that the killing was done -- was not with malice. And I think I just made a mistake, so I'm going to start that one over again because I didn't understand it and if I didn't understand it, you're not going to.

The Commonwealth has to prove that the killing was not committed in the heat of passion or

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reasonable provocation. If the Commonwealth proves that beyond a reasonable doubt then that would not mitigate or reduce or preclude you from find that the Commonwealth has proven malice beyond a reasonable doubt. If the Commonwealth has proven the absence of reasonable -- heated passion, the killing committed in the heat of passion or reasonable provocation, then the Commonwealth has proven -- you may consider whether or not the Commonwealth has proven malice as I defined it to you, specific intent either to kill, the three products of malice. If the Commonwealth has failed to prove or you have a reasonable doubt as to whether or not the killing was committed in the heat of passion or a reasonable provocation, you cannot find that the Commonwealth has proven malice. And that reasonable doubt mitigate the crime assuming there was an unlawful killing (Inaudible) manslaughter. Did that make sense? I saw some shakes.

And under the second mitigating circumstances that you may consider in this case is that in sudden combat. An unlawful killing upon sudden combat is mitigated circumstances which would reduce the offense of manslaughter -- to voluntary manslaughter. Sudden combat involves unplanned combat and sudden assault on the defendant which escalates into mutual violence by

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THE COURT: Anything? Anything else?

MS. GALATIS: That's all that I have.

MR. DAVIS: Yes. Could I? For the record, -- that's it for you, right?

MS. GALATIS: Yes, it is.

MR. DAVIS: For the record, you know --

THE COURT: With respect to you self-defense and the others, right?

MR. DAVIS: Yeah. My objection to that and my objection to the instruction on extreme atrocity and cruelty. Well, consider statements made by the defendant, I think was somewhere in my request, but in any event, --

THE COURT: I did.

MR. DAVIS: You did?

THE COURT: I put those in for state of mind also the humane --

MR. DAVIS: All right.

THE COURT: -- practices.

MR. DAVIS: Okay. And I think this is what she was asking about, what you did instruct that if all factors are proved, you should find the defendant guilty of murder in the first degree and I would object to that phraseology. Lastly, I object to in your instruction about heat of passion upon reasonable

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provocation that you did not instruct as requested that adequate provocation can arise not necessary from the blow was struck, but from aggressive approach. That was part of my request, yeah, and I object to (Inaudible) again, that's all.

THE COURT: Okay. All right.

MS. GALATIS: Thank you.

THE COURT: Have you -- this is the one, right?

MS. GALATIS: I have seen this one.

THE COURT: Is this okay?

MS. GALATIS: Yes. I am content with the verdict slips.

MR. DAVIS: Fine.

THE COURT: Okay.)

THE COURT: With respect to the deliberations (Inaudible) it's important that you do when you do go out, first of all we'll reduce your number to 12 because the law requires 12 jurors to decide (Inaudible) case. And when you go up it's important that you discuss the evidence, that you talk about it and you review the physical exhibits that are up there waiting (Inaudible) before you decide to take any vote and that you'll consider all of the evidence and talk to each other (Inaudible) that opportunity to discuss

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(Inaudible) add (Inaudible) one of the factors.

THE COURT: What I'll do is (Inaudible) go through it and I will (Inaudible)

MR. DAVIS: (Inaudible)

THE COURT: (Inaudible) since there's an objection (Inaudible) I will (Inaudible) and go over it (Inaudible)

MR. DAVIS: Your Honor, (Inaudible) that you go over the outline (Inaudible)

THE COURT: (Inaudible)

MR. DAVIS: (Inaudible)

THE COURT: I'll give you (Inaudible)

MR. DAVIS: Well, that's (Inaudible) because I (Inaudible) that I consider to be important or not (Inaudible)

(Pause)

(Jury enters courtroom.)

THE COURT OFFICER: Please be seated.

THE COURT: It seems that (Inaudible) your question which has been labeled Exhibit V asking for a handout of what is the second and what's manslaughter and that's not available to have the judge go over verbally the differences, so now I don't have a transcript of the original charge that I gave you, I will go over the murder, in the first, second and the

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killing being committed in the heat of passion on reasonable provocation, the Commonwealth has the burden of proving beyond a reasonable doubt that the killing was not done in the heat of passion or reasonable provocation.

The second mitigating factor that you may consider is sudden combat, an unlawful killing upon sudden combat is a mitigating circumstance which reduce -- would reduce the offense from murder in the second degree to voluntary manslaughter. Where there is a suggestion or a possibility of a killing in sudden combat, the Commonwealth bears the burden of proving that the killing was not committed in sudden combat. Sudden combat involves an unplanned combat or sudden assault on the defendant which escalates into mutual violence with both the deceased and the defendant. There must be evidence that would warrant a reasonable doubt that something happened between they're likely to produce in an ordinary person's state of passion, anger, fear, fright or nervous excitement which would eclipse the capacity of the person reflect or restrain his conduct and that would happen actually did produce that state of mind -- that type of state of mind than the defendant. If the Commonwealth has not proven beyond a reasonable doubt the absence of the killing in

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[Defense counsel objection to re-instruction page 100]

MR. DAVIS: I have the same objection as I had previously and I --

THE COURT: (Inaudible) lack of aggression?

MR. DAVIS: Yes. Yes. Um-hum.

THE COURT: Okay.

MR. DAVIS: Thank you.

THE COURT: Anything?

MS. GALATIS: I'm content.

THE COURT: Okay.)

THE COURT OFFICER: Jurors, please step down.

(Jury exits courtroom.)

(Court stands in recess; Resumes later)

(Jury enters courtroom.)

THE COURT: It's my understanding you've completed your deliberations for the day. So what we will do is suspend until tomorrow morning at 9:00. And let me just give you some continued instructions. We refer to the old rule, it's important that you not talk among yourselves or with anyone else about the case and that you not discuss it outside of the formal deliberations. And there's a reason for that. It means that when you discuss it in formal deliberations, everybody hears what everybody has to say. When you -- so if you break off into groups that creates friction

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corrected according to the Agreed upon changes/additions set forth in the attached "Exhibit One" which shall be made part of the official record of proceedings. Fecteau, RAJ

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT
INDICTMENT NO. 2010-10961

RECEIVED
AUG 26 2014
By

COMMONWEALTH
v.
JONATHAN CARVALHO,
Defendant

JOINT MOTION FOR AN ORDER CORRECTING THE RECORD PURSUANT TO A STIPULATION OF THE PARTIES

Counsel for the Defendant Jonathan Carvalho and the Commonwealth jointly request pursuant to M.R.A.P. 8(e) that this Court enter an order correcting the record in this matter in conformance with the parties' stipulation as follows:

1. The parties agree that numerous inaudible and/or garbled words, phrases and parts of sentences in the transcript shall be corrected in conformance with Exhibit 1 hereto, and made a part hereof.

Respectfully submitted,
for the Commonwealth

DANIEL F. CONLEY
DISTRICT ATTORNEY
For the Suffolk District

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Respectfully submitted,
Jonathan Carvalho

By his attorney,

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Dated:

14 SEP 15 PM 1:05

stipulation.transcript.wpd

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Exhibit 1

Vol. 2 Page Number	Line Number	Stipulation of the Parties
181	2	Luis, but he said he shot my friend

Vol. 8 Page Number	Line Number	Stipulation of the Parties
4	21	on self defense
	24	I object to the lack of self defense and excessive use of self defense instruction
	25	my closing argument. I started to rearrange it last night
57	21	until he is proved guilty. If upon such
58	2	likely true than not, but the evidence must establish the
	13	malice. Murder committed with deliberate premeditation and
68	21	at the time he acted. And under this third meaning of
	25	conduct created a strong likelihood that
69	3	proven this third meaning of malice, you must consider the
	4	defendant's actual knowledge of the circumstances
	7	with malice, the Commonwealth must prove beyond a
	20	Both the crimes of murder and voluntary
	22	crime of murder requires the Commonwealth to prove
70	1	malice. When the evidence raises an issue of mitigation the
	10	provocation or sudden combat. While voluntary
	11	manslaughter differs from murder because of the
	12	absence of malice -- absence of malice, voluntary
	20	upon a reasonable provocation. Where the evidence raises the
71	6	or restraint and did actually produce such a state of
	7	mind of the defendant. Provocation must be such
	13	In addition, there must be a causal
	14	connection between the provocation, the state of heat of passion and
	15	the killing. The killing must follow the
	19	pre-existing intent to kill or injure. Mere words, no matter how
	24	is sufficient will depend on whether a reasonable
72	2	reasoned reflection. The heat of passion must also
	4	before a reasonable person would have regained
	8	upon reasonable provocation, the Commonwealth
73	11	prongs of malice. If the Commonwealth has failed to
	17	killing from murder in the second degree to voluntary
74	5	fear, fright or nervous excitement as would eclipse his
	21	defined it for you, then that would mitigate the offense

75	8	to find the defendant guilty of the crime of
	23	must decide on
81	5	self defense again, that's all.
96	13	case the mitigating circumstances you may consider are the
97	2	restraint and which actually produced such a state of
	3	mind in the defendant.
	8	not cool off at the time. There must be a causal
	10	passion and the killing. The killing must follow
	13	mind induced by the provocation rather than a pre-existing
	14	intent to kill or injure the deceased. Mere words,
	15	no matter how insulting or abusive standing alone did not constitute
100	4	THE COURT: Self defense and lack of aggression

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COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

SUFFOLK COUNTY No. 2013-P-1594

COMMONWEALTH,
Appellee

v.

JONATHAN CARVALHO,
Appellant

ON APPEAL FROM A JUDGMENT OF THE
SUFFOLK SUPERIOR COURT

BRIEF AND RECORD APPENDIX OF THE DEFENDANT-APPELLANT

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II. It was prejudicial error for the trial judge not to instruct that Luis Rodriguez's aggressive approach towards Mr. Carvalho could qualify as heat of passion induced by reasonable provocation.

Prior to trial, defense counsel requested in writing that the trial judge instruct the jury that adequate provocation for heat of passion upon reasonable provocation can arise from the victim's aggressive and threatening approach even if the victim did not strike a blow. (RA:36). Instead, the trial judge gave the model instruction language on reasonable provocation in force at the time of trial stating:

> Mere words, no matter how insulting or abusive standing alone do not constitute reasonable provocation. **Physical contact, even 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. (T8:71-72, 97; RA:57).

See Model Jury Instructions on Homicide 28-29 (1999)(emphasis added).

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. (T8:80-81).

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After the trial judge re-instructed the jury on reasonable provocation using the same language, (T8:97; RA:57), defense counsel once again objected to the lack of an aggressive approach instruction. (T8:100).

The factual issue before the jury for determination was whether Luis Rodriguez's aggressive approach towards Mr. Carvalho with his fists raised in a fighting position was "reasonable provocation". At trial the prosecutor conceded that Luis Rodriguez approached Mr. Carvalho with his fists raised in a combative stance. (T7:162). However, there was no evidence that Luis Rodriguez made "physical contact" with Mr. Carvalho or landed "even a single blow". Under these facts, the jury would not understand the provocation instruction as given to include aggressive approach prior to blows being struck. The judge's refusal to give the requested instruction was prejudicial error.

Case law is clear that a manslaughter instruction on reasonable provocation is warranted even when no physical contact by the victim preceded the defendant's attack. See Commonwealth v. Morales, 70 Mass. App. Ct. 526, 532 (2007); Commonwealth v. Fortini, 68 Mass. App. Ct. 701, 706 (2007)(reasonable provocation instruction required when an "unexpected and aggressive approach"

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could have caused a reasonable person in the defendant's position to have felt an "immediate and intense threat"); Commonwealth v. Rodriguez, 58 Mass. App. Ct. 610, 611-614 (2003) (where defendant sought out confrontation, brought a weapon and used deadly force before any physical contact, reasonable provocation instruction was appropriate). A jury instruction that suggests or implies that physical contact is a requirement for reasonable provocation is error. See Commonwealth v. Morales, 70 Mass. App. Ct. at 532-533.

In Commonwealth v. Morales, prior to the incident the defendant had problems with a woman, the woman persistently got other men to confront the defendant, and feeling threatened the defendant purchased a knife. Id. at 527, 529. This woman then recruited the victim to confront the defendant. Id. at 527. During the incident, the victim and two other men all bigger than him confronted the defendant, putting the defendant in fear of his life. Id. at 530. The victim threw two punches at the defendant's face, but missed. Id. The defendant then lunged at the victim with a knife, stabbing him three times and killing him. Id.

The trial judge in Morales instructed the jury using the same model language used by the judge in this case. Id. at 530-531. The Morales jury returned with

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a question whether someone swinging and missing at another person would be reasonable provocation or whether there had to have been physical contact. Id. at 531. The jury here may have had the same question.

In response to the jury question, the Morales trial judge instructed that for reasonable provocation "there would need to be physical contact. Even a single blow would be enough, but words and verbal abuse, [] no matter how insulting or obscene, is not enough." Id. at 531. This Court held in Morales that this instruction was reversible error.[4] See id. at 532-533. This Court reasoned that "the definition of voluntary manslaughter does not contain any express requirement that the physical contact is necessary in order for the jury to consider reasonable provocation or sudden combat." Id. at 532.

Here unlike Morales, the trial judge did not expressly state that physical contact was required for reasonable provocation. But the instruction read as a whole conveyed to the jury that such a requirement existed. The instruction told the jury that physical contact may be enough but words weren't enough. (T8:71-72, 97). The instruction told the jury to consider only

[4]On retrial, Morales was convicted not of second-degree murder but only of manslaughter. Commonwealth v. Morales, 464 Mass. 302, 303 (2013).

"whether **the contact** is sufficient". (T8:71, 97). Despite defense counsel's adamant request, "aggressive approach" was wholly excluded from the instructions. By focusing on "physical contact" and "contact", and by not directly addressing the trial evidence of a clear physical threat to Mr. Carvalho with no contact by Luis Rodriguez, the instruction when read as a whole gave the jury the message that the contactless physical threat from the advancing Luis Rodriguez was not enough for reasonable provocation. This was error here, just as surely as it was error in Morales to explicitly instruct the jury this way.

The Court will review the failure to give a reasonable provocation instruction on aggressive approach for prejudicial error. An error is non-prejudicial only if this Court is sure that the error did not influence the jury or had only "very slight effect." Commonwealth v. Flebotte, 417 Mass. at 353. The trial judge's failure to instruct the jury that Luiz Rodriguez's aggressive approach towards Mr. Carvalho could be reasonable provocation influenced the jury against a manslaughter verdict. The evidence of manslaughter was strong, but the instructions could have caused the jury to improperly evaluate the trial evidence of reasonable provocation. A reasonable

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person in Mr. Carvalho's position, believing that Luis Rodriguez had been recruited to "hit" him, (T3:164), and being in an agitated state of fear and anxiety, would have been provoked by Luis Rodriguez advancing upon him with fists raised. In this situation, Luis Rodriguez did not have to land a blow before Mr. Carvalho was adequately provoked. But the jury did not know that. For that reason alone the jury may have rejected a manslaughter verdict. The reasonable provocation instruction prejudiced Mr. Carvalho.

Defense counsel's proposed instruction would have cured the probability that the instruction as given caused the jury to think that Luis Rodriguez had to hit Mr. Carvalho before reasonable provocation existed. The trial judge should have given defense counsel's requested instruction. In light of the trial judge's refusal and for all of the reasons set forth above, Mr. Carvalho's state and federal constitutional rights to due process and a fair trial have been violated. See e.g., Estelle v. McGuire, 502 U.S. 62, 72 (1991); Cupp v. Naughten, 414 U.S. 141, 147 (1973).

III. The trial judge erred by instructing the jury that sudden combat needed to be "unplanned".

The first time that the trial judge instructed the jury on sudden combat, she stated that:

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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK COUNTY No. FAR-24804

COMMONWEALTH,
Appellee

v.

JONATHAN CARVALHO,
Appellant

ON APPEAL FROM A JUDGMENT OF THE
SUFFOLK SUPERIOR COURT

DEFENDANT'S APPLICATION FOR FURTHER APPELLATE REVIEW

Claudia Leis Bolgen
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to consider the adequacy of Mr. Carvalho's attempts to retreat. See id. at 399. The trial judge's failure to instruct on self-defense and excessive force in self-defense when the defense requested the instructions and sufficient evidence supported them violated Mr. Carvalho's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See California v. Trombetta, 467 U.S. 479, 485 (1984); Taylor v. Withrow, 288 F.3d 846, 851-853 (6th Cir.2002).

III. This Court should modify the model reasonable provocation instruction to deal with "aggressive approach".

The factual issue before the jury for determination was whether Luis Rodriguez's aggressive approach towards Mr. Carvalho with his fists raised in a fighting position was "reasonable provocation". The instruction told the jury that physical contact may be enough but words weren't enough. (T8:71-72, 97) The instruction told the jury to consider only "whether **the contact** is sufficient". (T8:71, 97) Yet, case law is clear that a manslaughter instruction on reasonable provocation is warranted even when no physical contact by the victim preceded the defendant's attack. See Commonwealth v. Morales, 70 Mass. App. Ct. 526, 532 (2007). This Court should find the Appeals Court made a gross error in approving the instruction given here

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under these facts and should modify the Model Jury Instructions on Homicide to eliminate the probability that another jury interprets the current instruction to mean that physical contact is required. The instruction as given violated Mr. Carvalho's rights under Fourteenth Amendment to the United States Constitution to due process and a fair trial. See e.g., Estelle v. McGuire, 502 U.S. 62, 72 (1991); Cupp v. Naughten, 414 U.S. 141, 147 (1973).

IV. The Appeals Court unreasonably failed to correct the trial judge's erroneous use of the word "unplanned" in the sudden combat instruction.

In order to correctly evaluate whether this particular case involved sudden combat, the jury had to decide not whether the **meeting** was unplanned but whether the **combat at the planned meeting** was sudden/unplanned. The trial judge's first instruction on sudden combat was in the conjunctive - both "unplanned combat" and "sudden assault" were required. (T8:73-74) Once the jury found the meeting was planned the instruction as given could have swayed the jury to not consider the issue of sudden combat any further. The second instruction had these two phrases in the disjunctive, but the jury could still have understood the instruction to mean that if the meeting was planned, nothing that happened during it would have

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476 Mass. 1107
(This disposition is referenced
in the North Eastern Reporter.)
Supreme Judicial Court of Massachusetts.

Commonwealth
v.
Jonathan Carvalho

December 22, 2016

Synopsis
Appeal From: 90 Mass.App.Ct. 1110, 60 N.E.3d 1198.

Opinion

DENIED.

All Citations

476 Mass. 1107, 65 N.E.3d 662 (Table)

End of Document

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138 S.Ct. 110
Supreme Court of the United States

Jonathan CARVALHO, petitioner,
v.
MASSACHUSETTS.

No. 16–9309.
|
Oct. 2, 2017.

Synopsis

Case below, [redacted] 60 N.E.3d 1198.

Opinion

Petition for writ of certiorari to the Appeals Court of Massachusetts denied.

All Citations

138 S.Ct. 110 (Mem), 199 L.Ed.2d 69, 86 USLW 3151

End of Document

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PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District: Massachusetts
Name (under which you were convicted): Jonathan Carvalho	Docket or Case No.: TBD
Place of Confinement: MCI Shirley Medium	Prisoner No.: W99799
Petitioner (include the name under which you were convicted): Jonathan Carvalho	Respondent (authorized person having custody of petitioner): v. Steven Kenneway
The Attorney General of the State of Massachusetts	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

Suffolk Superior
ThFee Pemberton Sq.
Boston, MA 02108

(b) Criminal docket or case number (if you know): SUCR2010-10961

2. (a) Date of the judgment of conviction (if you know):

(b) Date of sentencing: 12/20/11

3. Length of sentence: Life with PArole Eligibility 15 years

4. In this case, were you convicted on more than one count or of more than one crime? ☐ Yes ☐ No

5. Identify all crimes of which you were convicted and sentenced in this case:

Murder in the Second Degree

6. (a) What was your plea? (Check one)

☒ (1) Not guilty ☐ (3) Nolo contendere (no contest)

☐ (2) Guilty ☐ (4) Insanity plea

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(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?

(c) If you went to trial, what kind of trial did you have? (Check one)

☒ Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☐ Yes ☒ No

8. Did you appeal from the judgment of conviction?

☒ Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court: Massachusetts Appeals Court

(b) Docket or case number (if you know):

(c) Result: Judgment Affirmed

(d) Date of result (if you know): Oct. 14, 2016

(e) Citation to the case (if you know): Commonwealth v. Carvalho, 90 Mass. App. Ct. 1110

(f) Grounds raised:

(1) The trial judge committed numerous errors in jury instructions;
(2) the prosecutor improperly appealed to juror sympathy during opening & closing statements;
(3) the motion to suppress should have been allowed;
(4) the judge should have required a reason for one of the State's peremptory challenges of a potential juror.

(g) Did you seek further review by a higher state court? ☒ Yes ☐ No

If yes, answer the following:

(1) Name of court: Supreme Judicial Court of Massachusetts

(2) Docket or case number (if you know):

(3) Result: denied

(4) Date of result (if you know):

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(5) Citation to the case (if you know): Commonwealth v. Carvalho, 476 Mass. 1107 (2016)

(6) Grounds raised: Same as those on Appeal

(h) Did you file a petition for certiorari in the United States Supreme Court? XX Yes ☐ No

If yes, answer the following:

(1) Docket or case number (if you know):

(2) Result: Denied

(3) Date of result (if you know): Oct. 2, 2017

(4) Citation to the case (if you know): Carvalho v. Massachusetts, 2017 US LEXIS 5962

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? ☐ Yes ☒ No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No

(7) Result:

(8) Date of result (if you know):

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(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No

(7) Result:

(8) Date of result (if you know):

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

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(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No

(7) Result:

(8) Date of result (if you know):

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: ☐ Yes ☐ No

(2) Second petition: ☐ Yes ☐ No

(3) Third petition: ☐ Yes ☐ No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: The trial judge committed numerous errors in the jury instructions.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

1. It was error to deny petitioner's request for a self-defense instruction resulting in the violation of due process.
2. It was error to deny petitioner's request for a reasonable provocation instruction which made clear the victim need not strike a blow, resulting in a violation of due process.
3. The charge as given misinformed the jury that unplanned conduct could not occur at a meeting that was planned, resulting in a violation of due process.

(b) If you did not exhaust your state remedies on Ground One, explain why:

It was exhausted.

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(c) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue? ☒ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☒ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

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(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One:

GROUND TWO: The prosecutor improperly played on the jury's sympathy and emotion during her opening and closing, violating due process and the right to a fair trial.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The prosecutor repeatedly referred to the fact that the victim was an expectant father, improperly appealing to the emotions and sympathies of the jury.

(b) If you did not exhaust your state remedies on Ground Two, explain why:

It was exhausted.

(c) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue? ☒ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☒ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

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Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two

GROUND THREE: The motion to suppress should have been allowed based on the Miranda violation.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Statements made by petitioner during transport from Georgia to Massachusetts were made prior to police advising him of his Miranda rights when they arrived in Massachusetts and should have been suppressed. Denial based on decision that though the petitioner was in custody, statements were not result of interrogation.

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(b) If you did not exhaust your state remedies on Ground Three, explain why?

It was exhausted.

(c) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue? XXX Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes XX No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

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(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(c) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

GROUND FOUR: The judge should have required a reason for one of the State's peremptory challenges of a potential juror under Batson v. Kentucky.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The Commonwealth exercised 6 peremptory challenges, including Juror #3 who was Hispanic (the defendant was Hispanic). The judge sua sponte inquired if there were any other Hispanics still on the jury, but did not ask the prosecutor for an explanation for the impropriety.

(b) If you did not exhaust your state remedies on Ground Four, explain why:

It was exhausted

(c) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue? XX ☐ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

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Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four:

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13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? ☐ Yes ☐ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? ☐ Yes ☐ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? ☐ Yes ☐ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

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16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing:

(b) At arraignment and plea:

(c) At trial:

(d) At sentencing:

(e) On appeal:

(f) In any post-conviction proceeding:

(g) On appeal from any ruling against you in a post-conviction proceeding:

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? ☐ Yes ☒ No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☐ Yes ☐ No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

My Petition for writ of certiorari in the United States Supreme Court was denied on October 2, 2017, allowing me until October 2, 2018 for this filing.

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* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

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(Rev. 12/04)

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief:

Grant the Writ, and order a new trial within 180 days, or to be released.

or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on 9/1/18 (month, date, year).

Executed (signed) on 9/1/18 (date).

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

IN FORMA PAUPERIS DECLARATION

[insert appropriate court]

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 18-12018-NMG

JONATHAN CARVALHO,
Petitioner

v.

STEVEN KENNEWAY,
Respondent

NOTICE OF APPEAL

Now comes the petitioner in the above-entitled case and appeals pursuant to Fed. R. App. P. 3 and 4. Pursuant to Fed. R. App. P. 3(c), the petitioner states the following:

(1) PARTY TAKING APPEAL: Petitioner Jonathan Carvalho

(2) JUDGMENT, ORDER OR PART THEROF APPEALED: the District Court's (Gorton, J.) memorandum and order dated November 10, 2020 and entered November 12, 2020, and its Order of Dismissal dated November 12, 2020.

(3) COURT TO WHICH APPEAL IS TAKEN: United States Court of Appeals for the First Circuit.

Respectfully submitted,
JONATHAN CARVALHO
By his attorney,

/s/ Claudia Leis Bolgen
Claudia Leis Bolgen
BBO #556866
Bolgen & Bolgen
110 Winn Street, Suite 204
Woburn, MA 01801
Tel: (781) 938-5819

Dated: December 9, 2020

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UNITED STATES CONSTITUTION
FOURTEENTH AMENDMENT
(Relevant Parts)

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 2254(a)

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim --

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.