No. 22-5834

ORIGINAL

UNITED STATES SUPREME COURT

JOSE TORRES
PETITIONER

-V-

COMMONWEALTH OF MASSACHUSETTS
RESPONDANTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

PETITION CERTIORARI

Jose Torres
OCCC
1 Administration Rd
Bridgewater, MA 02324

QUESTIONS PRESENTED

1) WHETHER MR. TORRES WAS ENTITLED TO RELIEF OR IN THE ALTERNATIVE AN EVIDENTIARY HEARING, ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, WHERE THE COUNSEL FAILED TO OBJECT TO VITAL AND IMPORTANT JURY INSTRUCTIONS THAT WERE CRITICAL TO THE JURY'S DECISION TO FIND MR. TORRES GUILTY?

2) WHETHER THE COURT ERROR IN DENYING MR. TORRES' HABEAS CORPUS PETITION?

LIST OF PARTIES

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

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

RELATED CASES

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TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

RULES/STATUES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix #1 to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was 5-20-22.

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

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

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

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

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

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

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

I. JURISDICTION

The district court had jurisdiction over this habeas corpus petition because Mr. Torres alleged that he was in the custody of the Commonwealth of Massachusetts in violation of the United States Constitution. See 28 U.S.C. § 2241(c)(3). This appeal is taken from the final judgment entered on September 3, 2019, denying Mr. Torres" Writ of Habeas Corpus. Mr. Torres filed a notice of appeal which was granted on September 19, 2019. The First Circuit Court of Appeals denied Mr. Torres' appeal, without any written explanation on or about December 18, 2021. This Court has jurisdiction under 28 U.S.C. § 1253.

II. ISSUES PRESENTED FOR REVIEW

1) WHETHER MR. TORRES WAS ENTITLED TO RELIEF OR IN THE ALTERNATIVE AN EVIDENTIARY HEARING, ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, WHERE THE COUNSEL FAILED TO OBJECT TO VITAL AND IMPORTANT JURY INSTRUCTIONS THAT WERE CRITICAL TO THE JURY'S DECISION TO FIND MR. TORRES GUILTY?

2) WHETHER THE COURT ERROR IN DENYING MR. TORRES' HABEAS CORPUS PETITION?

III. STATEMENT OF THE CASE

A. EVIDENCE PRESENTED AT TRIAL

The murder victim, Melissa Santiago, had been Mr. Jose Torres' girlfriend. At about 11:15 a.m. on March 9 the victim's two eldest children appeared at the first floor neighbor's apartment. The oldest child said, "My Mommy and daddy [Mr. Torres] had a fight and he killed her. She's dead." He added that Mr. Torres had left. The next oldest, who was five years old at the time of the incident, testified at trial to the physical beating he saw Mr. Torres inflict on his mother. He Mr. Torres push her under a leg of the kitchen table, and then sit on the table, Mr. Torres then locked the children in their bedroom. The neighbor went upstairs and found the victim lying lifeless on the kitchen floor in a pool of blood. An electrical cord was pulled tight around her neck. The kitchen was in a state of disarray.

The blood was caused by the fact that the victim's throat had been cut. According to the medical examiner, the case of death was a combination of ligature strangulation and incision of the neck. DNA testing confirms that

blood spots found on Mr. Torres' sandals was the victim's blood, and a foot print in blood at the murder scene matched Mr. Torres's sandal size and tread pattern.

The prosecutor argued to the jury that Mr. Torres had killed the victim in an "impulsive," blind "rage" after an argument in which the victim had told Mr. Torres that she was calling another lover to come over and have sex with her because Mr. Torres could not satisfy her sexually. Evidence of what had led to the murder came from analysis of the crime scene and the victim's body, analysis of blood on Mr. Torres' sandal, the bloody footprint, the victim's children, and Mr. Torres himself.

Shortly after the murder, Mr. Torres gave a lengthy interview to a Detective Munroe that was admitted into evidence. During the interview, Det. Munroe observed that Mr. Torres had "heavy duty scratches" on his face. Mr. Torres explained how those scratches came as follows:

Mr. Torres said that he sees a therapist for "impulsive and explosive black out rages" in the form of flashbacks because he was mentally abused by his uncle when he was younger. Mr. Torres explained that he is Bi-polar, suffers from anxiety, and depression, Mr. Torres also explains that he suffers from extreme memory loss. For these conditions Mr. Torres takes medication including Klonopin, Ambilify, Seroquel, Paroxetine, and Nabumetone, as well

as many other medications. Mr. Torres also explained that he smoked marijuana to help with joint and back pain.

The victim and Mr. Torres had been girlfriend and boyfriend, and had broken up about four years before. Recently they were getting back together. In fact, Mr. Torres said he was going to surprise her with an engagement and wedding rings when he returned from gathering his things in New Hampshire. Prior to the murder, Mr. Torres had been staying in the victim's apartment. The victim had become hi-polar and had a history of suicidal actions and thoughts. The victim frequently told Mr. Torres, "...my bi-polar is going to fucking get me going raging, that my medication won't work, I'm gonna hurt one of these kids." Mr. Torres knew the victim to be out of control because he observed her once almost throw her little daughter out of a window. The victim had not slept in two days before the murder. According to Mr. Torres, the victim and him when to another person's house to conduct a witchcraft ritual to dense the sprits out of the house and to dense the body. Mr. Torres said that the victim started to really "bugging out" threatened to kill herself and her children, and was acting as if someone else was out to get her. The next day the victim awoke a "different person". After playing with the kids all day, Mr. Torres, the victim and her kids watched a movie that night. The victim started taking double doses of Oxycodone, Percocet, and Klonopin and was also drinking alcohol. The victim all that day tried to have

people including Mr. Torres get her some cocaine, so that she could calm down. The victim kept on getting mad at Mr. Torres for not getter her cocaine during the previously mentioned movie.

According to Mr. Torres, he and the victim had a verbal argument that night about the victim wanting to have her ex—boyfriends and ex-girlfriends come over to the apartment to have sex with her. Mr. Torres claims that the victim was in a bi—polar manic stage. Mr. Torres then threatened to have his ex-girlfriend to come over and give him "a massage".

After the argument, Mr. Torres used to hug the victim to apologize to her, but that night when Mr. Torres when to hug the victim, the victim "flipped out" and "scratched the shit out of [Mr. Torres'] face." Mr. Torres stated that he then got mad, and informed her that why would she call other women for sex when Mr. Torres was right there. Mr. Torres claims that he had never been violent with the victim before and that he never laid a hand on her, (See court trail transcripts generally). During the charge conference, the Court found that a manslaughter was REQUIRED based on reasonable provocation/heat of passion. The Court said that "marital infidelity" issues had been raised by the evidence and the manslaughter instruction SHOULD be given. The Commonwealth concurred.

The instruction on manslaughter that the Court ultimately gave it the jury was not integrated with the murder instruction. Instead, manslaughter was presented to the jury as a stand alone instruction after the second degree murder Instruction. The jury was NOT informed that voluntary manslaughter in the appropriate verdict if the jury finds the elements of murder, except that the Commonwealth has not proved the ABSENCE of heat of passion upon reasonable provocation. The Court had first instructed on the murder, including malice, without mention of manslaughter or mitigation:

> The second element the Commonwealth must prove beyond a reasonable doubt is that the killing was committed with malice. Malice, as it applies to deliberately premeditated murder, means an intent to cause death. The Commonwealth must prove that Mr. Torres actually intended to cause death on Melissa Santiago. In evaluating whether the Commonwealth has proven beyond a reasonable doubt malice, meaning an intent to cause death, you may consider whether a dangerous weapon was used. As a general rule, you are permitted to infer that a person who intentionally used a dangerous weapon on another person is acting with malice. (See jury instructions)

After instructing on first degree murder, premeditation and extreme atrocity and cruelty, and second degree murder, the Court told the jury that to obtain a murder conviction, the Commonwealth must prove "the absence of the mitigating circumstances of heat of passion upon reasonable provocation." The Court also stated "If the Commonwealth has not proved. . . the absence of

heat of passion upon reasonable provocation, the Commonwealth has not proved malice."

Next the Court instructed on the elements of manslaughter:

> And now my instructions, ladies and gentlemen, as to voluntary manslaughter. Voluntary manslaughter includes the intentional, unlawful killing of the deceased by Mr. Torres.
>
> To prove this crime, the Commonwealth must prove beyond a reasonable doubt, each of the following two elements beyond a reasonable doubt. One; that Mr. Torres intentionally inflicted an injury or injuries likely to cause death upon the deceases that caused her death, and two, that Mr. Torres acted unlawfully. I've previously given you the instructions concerning, or the definition of an unlawful killing. If the Commonwealth proves each of these two elements beyond a reasonable doubt then you should return a verdict of voluntary manslaughter. If the Commonwealth fails to prove each of these elements beyond a reasonable doubt, you must not convict Mr. Torres of manslaughter.

At the end, the Court told the jury to choose the highest offense proved:

> If the evidence convinces, you beyond a reasonable doubt that Mr. Torres is guilty of a serious criminal offense, you, the jury have the duty to find Mr. Torres guilty of the most serious offense that the Commonwealth has proved beyond a reasonable doubt.

Before any mention of manslaughter or mitigation, the Court told the jury that if the elements of... murder are proved, the jury "should find Mr. Torres guilty" of murder in the first degree based on premeditation, in the first degree based on extreme atrocity and cruelty, and second degree. In

contrast to the Court's instructions concerning murder (except as part of the final, stand alone manslaughter instruction that was based on finding intentional infliction and unlawful killing rater than absence of malice), the Court never identified any circumstance where the jury "SHOULD FIND" Mr. Torres guilty of manslaughter.

Trial counsel for Mr. Torres failed to object to these incorrect instructions.

B. REVIEW BY STATE COURT

There was no objection to the manslaughter instruction in the trail. In the Supreme Judicial Court, Mr. Torres claimed that the manslaughter instruction violated Due Process because, taken as a whole, the instruction diluted the burden of proof on the murder by (a) failing to inform the jury that manslaughter was murder absent of heat of passion/reasonable provocation and by focusing on voluntary manslaughter as if it were a separate offense; and (b) his counsel was constitutionally ineffective for not objecting. In making these claims Mr. Torres cited the following: Mullaney v. Wilbur, 421 U.S. 684 (1975); Commonwealth v. Satterfield, 373 Mass. 109, 115 (1977)(citing Commonwealth v. Saferian, 366 Mass. 89, 96 (1974)).

In its opinion, the Supreme Judicial Court found that "the judge's instruction was the model instruction" and that, in its estimation, "the jury understood that the verdict of guilty of first degree required proof beyond a reasonable doubt of the absence of reasonable provocation and... heat of passion." Commonwealth v. Torres, 469 Mass. 389, 409 (2014). That is the Court found there was no error in the instruction.

C. HABEAS PETITION

In Mr. Torres' habeas petition, Mr. Torres makes the same claims that he made in the ruling made to the Supreme Judicial Court. The District Court once again denied his motion, and denied his petition. Mr. Torres is seeking to address this issue with this Honorable Court.

D. APPELLATE REVIEW

Mr. Torres appealed this case to the First Circuit Court. Briefs were completed by both parties to this case, and the First Circuit Court denied Mr. Torres' appeal without any written decision as to the denial of the appeal. This appeal was denied on or about December 18, 2021

REASONS FOR GRANTING THE PETITION

The Petitioner seeks this Honorable Court to review this brief in accordance with Supreme Court Rule 10 (c) as this case presents an important question of unsettled Federal and State Law.

This Court's review of the district court's ruling should be *de novo.* Walters v. Maass, 45 F.3d 1355, 1357 (9th Cir. 1995). There are two applicable standards of review. See Gardner v. Ponte, 817 F2,d 183, 187 n.2 (1st Cir,) (Failure to object to jury instructions requires Strickland two—part analysis), cert. denied, 484 U.S. 863 (1987). On the issue of whether there was an error in the instruction, this court "must assess the prejudicial impact of constitutional error in a state—court criminal trial under the 'substantial and injurious effect' standard set forth in Brecht v. Abrahamson, 507 U.S. 619 (1993) whether or not the state appellate court recognized the error and reviewed it for harmless error under the "harmless beyond a reasonable doubt" standard set forth in Chapman v. California, 386 U.S. 18 (1967). Fry v. Pliler, 551 U.S. 112, 121 (2007). As the Brecht standard is even more deferential to the state court, there is no need to analyze the alleged error under the AEDP. Connolly v. Roden, 72 F.3d 505, 506-07 (1st Cir. 2004).

Because the Supreme Judicial Court did not address the ineffective assistance as to the failure to object to the jury instructions, the review of that issue

IV. ARGUEMENTS

A. STANDARD OF REVIEW

This Court's review of the district court's ruling should be *de novo.* Walters v. Maass, 45 F.3d 1355, 1357 (9th Cir. 1995). There are two applicable standards of review. See Gardner v. Ponte, 817 F2,d 183, 187 n.2 (1st Cir,) (Failure to object to jury instructions requires Strickland two—part analysis), cert. denied, 484 U.S. 863 (1987). On the issue of whether there was an error in the instruction, this court "must assess the prejudicial impact of constitutional error in a state—court criminal trial under the 'substantial and injurious effect' standard set forth in Brecht v. Abrahamson, 507 U.S. 619 (1993) whether or not the state appellate court recognized the error and reviewed it for harmless error under the "harmless beyond a reasonable doubt" standard set forth in Chapman v. California, 386 U.S. 18 (1967). Fry v. Pliler, 551 U.S. 112, 121 (2007). As the Brecht standard is even more deferential to the state court, there is no need to analyze the alleged error under the AEDP. Connolly v. Roden, 72 F.3d 505, 506-07 (1st Cir. 2004).

Because the Supreme Judicial Court did not address the ineffective assistance as to the failure to object to the jury instructions, the review of

that issue in the District Court should have been a de novo review. Lynch v. Ficco, 438 F.3d 35, 48 (1st Cir. 2006)

B. MR. TORRES DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

In United States ex rel. Barnard v. Lane, 819 F.2d 789 (7th Cir. 1987) it states that counsel's failure to request jury instruction on lesser included offenses in murder prosecution was ineffective assistance. Manslaughter, in Massachusetts, exists as an independent offense, separate from murder. But in the context of a murder case, where there is evidence of reasonable provocation and heat of passion, voluntary manslaughter is a lesser included offense which occurs when the jury finds the element of murder but the Commonwealth fails to prove that the killing took place in the absence of heat of passion upon reasonable provocation. Accordingly, in murder cases where there is evidence of reasonable passion/heat of passion, the connection between murder and manslaughter requires elucidation to a jury. Commonwealth v. Walczak, 634 Mass. 808, 839 (2012). "Where the evidence raises the possibility that the defendant may have acted on reasonable provocation, the Commonwealth must prove, and the jury must find, beyond a reasonable doubt in order to convict the defendant of murder that the

defendant did not act on reasonable provocation." Commonwealth v. Lapage, 435 Mass. 480, 484, 759 N.E.2d 300, 304 (2001).

Massachusetts substantive law on the relationship of murder and voluntary manslaughter is not ambiguous: "Voluntary manslaughter in this context is a crime that would otherwise be murder if 'a killing arises' from a sudden transport of passion or heat of passion upon a reasonable provocation or upon sudden combat." Commonwealth v. Whitman, 430 Mass. 746, 750-51, 722 N.E.2d 1284, 1288-89 (2000).

In states like Massachusetts, because manslaughter is a lesser included offense to murder, the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of heat of passion on sudden provocation when the issue is properly presented. Mullaney v. Wilbur, 421 U.S. 684, 696 (1975)(the presence or absence of the heat of passion on sudden provocation has been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide). At the heart of Due process analysis is that defendant did not act out of heat of passion based on reasonable provocation.

In reviewing the ineffective assistance / manslaughter instruction issue the Supreme Judicial Court stated:

> Finally, the judge's instruction on manslaughter was the model instruction. ... Taken as a whole, we think the jury understands that a verdict of guilty of murder in the first degree required proof beyond a reasonable doubt of the absence of reasonable provocation and... heat of passion.

See Commonwealth v. Torres, 469 Mass. at 409

Notwithstanding the Supreme Judicial Court assertion, the model instruction contained an important paragraph that was entirely missing from the judge's instruction in this case. This is the missing paragraph:

> In summary then, in order to prove murder, the Commonwealth is required to prove beyond a reasonable doubt that the defendant committed an unlawful killing with malice. If after your consideration of all the evidence you find the Commonwealth has proved beyond a reasonable doubt the elements of murder, except that the Commonwealth has not proved beyond a reasonable doubt the absence of (heat of passion upon reasonable provocation/ heat of passion induced by sudden combat), **THEN** you **MUST** not find the defendant guilty of murder and you would be justified in finding the defendant guilty of voluntary manslaughter.

See Massachusetts Superior Court Criminal Practice Jury Instructions, Volume I., Frances A. McIntyre, §s 2.4.2, 2-33, 2-34 (1999 ed,,1st Supplement 2003, MCLE) (emphasis added)

The above model instruction, in keeping with the Massachusetts substantive law, shows that the jury must be informed that the offense of murder becomes the lesser offense of voluntary manslaughter where heat of passion based on reasonable provocation is not proved. It should be noted that in the 2013 Massachusetts model jury instruction, it indicates the utmost importance of informing the jury **at the outset** that voluntary manslaughter is the appropriate verdict.

Without the above mentioned paragraph from the model jury instructions, the jury was improperly led to focus on murder rather then the intent of voluntary manslaughter's law to focus on the manslaughter. This is because the instructions began with murder instruction which included a definition of malice that did not mention either manslaughter or mitigation; the instructions ended with an instruction on manslaughter as a stand alone offense; and this was followed by an instruction to choose the highest offense that was proved.

The federal courts may not overturn convictions resulting from state prosecutions merely because instructions given to juries are "undesirable, erroneous, or even universally condemned." Cupp v. Naughten, 414 U.S. 141, 146 (1973). Instead, courts must determine whether "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due

process." Id. at 147. We are to judge the challenged in the context of the instruction as a whole, not "in artificial isolation." Id. Therefore, it is not enough that portions of the instructions may be correct. The instruction must be understood by a lay person. Falconer v. Lane, 905 F.2d 1129, 1136-37 (7th Cir. 1990).

However in this case, because the essential model jury instruction was missing, a reasonable juror was likely to vote for murder, by first rejecting a verdict of manslaughter because the government had proven the elements of manslaughter, and then concluded that a verdict of murder was appropriate because all the elements of murder including malice, was proven, and the murder was in fact the highest most serious charge. In this case, where the defendant appeared to have erupted into a sudden rage and manslaughter appeared to be a just and correct verdict, serious and injurious prejudice to defendant resulted from (a) the omission of the only part of the model instruction that clearly explained the relationship between murder, malice and manslaughter, and (b) the subsequent failure of his attorney to object, which objection would have likely led the judge to add the missing paragraph. Ineffective assistance of counsel constitutes cause for failure to object. Murray v. Carrier, 477 U.S. 478 (1986). Here, the deficiency in the judge's instruction was apparent by comparison with the model instructions. Had defense counsel objected it is likely that the Court would have given the

missing paragraph before completing her charge. Had that occurred, it is likely the jury would have returned a manslaughter verdict because the jurors would have understood the link between murder and manslaughter and concluded that the facts at trial did not indicate an absence of heat of passion on reasonable provocation.

C. DID THE COURT ERROR IN DENYING MR. TORRES' HABEAS CORPUS PETITION

The Court states that Petitioner's ineffective assistance claim was adjudicated on the merits in the SJC because "... [T]he Harrington presumption is not rebutted." Mr. Torres disagrees. The Harrington presumption that the state court resolved the federal issue on its merits applies except when "there is reason to think some other explanation for the state court's decision is more likely." Harrington v. Richter, 562 U.S. 86, 99, 131 S. Ct. 770, 784-85 (2011).

There are two reasons to think that the SJC's decision was not based on consideration of the federal claims in the context of Petitioner's actual case, but instead was based on consideration of a hypothetical case in which the jury had been provided with the central model instruction which explains

the murder – manslaughter relationship (and which was missing in Petitioner's instructions).

First, this is not a case where the SJC was silent as to its reasoning. Compare, Murphy v. O'Brien, 15-CV-11130-IT, 2017 WE 2982332, 2017 Dist. Lexis 107542 (2017)(where petitioner did not show that his claim in state court was denied for some other reason, and the Harrington presumption was not overcome). In Torres' case, the SJC explained its reasoning in unequivocal (albeit incorrect) terms, as follows:

> **[T]he judges' instruction on manslaughter was the model instruction.** Counsel's failure to object to the instruction was not ineffective assistance of counsel. See Commonwealth v. Tassinari, 466 Mass. 340, 356-357, 995 N.E.2d 42 (2013) (manslaughter charge nearly verbatim to model instruction no error).

Commonwealth v. Torres, 469 Mass. 398, 409, 14 N.E.3d 253, 263 (2014)(emphasis added.)

The SJC's unqualified characterization of the instruction as the model instruction in Torres is different from cases where the SJC determines that the instructions differed from the model instructions, but that overall the instruction were still proper. Compare, Commonwealth v. Vargas, 475 Mass. 338, 339, 57 N.E.3d 920, 926 (2016)(where the SJC reviewed a manslaughter charge which it said "varied in minor, though not insignificant, ways from the

model instruction, but decided that in view of all the instructions, there was not a substantial likelihood of a miscarriage of justice.)

Secondly, the SJC supported its position with the following citation: "See Commonwealth v. Tassinari, 466 Mass. 340, 356-357, 995 N.E.2d 42(2013) (manslaughter charge nearly verbatim to model instruction no error".) The SJC's cite to Tassinari is telling because, unlike the Torres instructions, the Tassinari instructions included the critical portion of the model instruction which was not included in Torres,

Accordingly, here "there is reason to think some other explanation for the state court's decision is more likely," Harrington v. Richter, supra. (referring to an explanation other than the state court having decided the federal issue). Where, as in this case, there is reason to think that the SJC did not decide the actual federal issue presented, the habeas court should review the merits of Petitioner's federal claim de novo. Johnston v. Mitchell, 871 F3d 52, 59-60 (1st Cir. 2017) (deciding the federal claim failed on the merits).

The Court notes: "the manslaughter instructions only omitted a portion of the model instruction while otherwise including the majority of the instruction." The Court then concludes: "As such, the premise for petitioner's

argument that the SJC incorrectly recognized the actual model instruction as the model instruction is not entirely convincing." The Court also states: "Overall, Petitioner failed to rebut the presumption that the SJC adjudicated the merits of the ineffectiveness on failure to object. Petitioner disagrees with the Court's conclusions for the reasons cited in the preceding paragraphs.

To the same degree "there is reason to think" that the SJC assumed that the missing portions of the model instruction were included in Torres' trial, there is likewise "reason to think" that the SJC did not address Torres' actual ineffective assistance. That is, the SJC's explanation for ruling that counsel was not ineffective for failing to object to the instructions was that the instruction was the model instruction. The SJC's ruling on ineffectiveness was based wholly on the erroneous impression that there was nothing to object to.

The Court states: "... habeas relief does not extend to errors of state law, and the fact that an instruction is allegedly incorrect under state law, such as a deviation from a model instruction used in state court is not a basis for habeas relief.' Estelle v. McGuire, 502 U.S. at 67, 71-72."

In Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475 (1991), the Court is referring to state evidentiary rules. Id. at 71-72. The limitation suggested

here by Estelle is not apposite to habeas review in the instant case where the model instructions defines an element of the offense and was approved by the state court.

The Court reviewed certain instructions given by the trial judge and then concludes: (a) the trial judge correctly distinguished murder from manslaughter on the basis that to prove murder the Commonwealth must prove beyond a reasonable doubt the absence of mitigating circumstances of heat of passion based on reasonable provocation, and (b) on the basis of those instructions, a reasonable juror would understand that if the Commonwealth had not proved the absence of heat of passion, the Commonwealth had not proved malice, and if the Commonwealth had not proved malice, it had not proved murder.

Petitioner disagrees with the Court's conclusions. He does agree that a juror instructed to approach the instructions like a math problem could probably piece together the various principles and figure out the correct answer. But Petitioner does not agree that the instructions were adequate for the reasonable juror to figure out the answer in the context of deliberating on this case. The judge's very first instruction on the murder - manslaughter relationship was itself highly problematic, arguably erroneous, and definitely

confusing. After instructing on first and second degree murder, the judge told the jury:

> [T]he 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 Mr. Torres acted with malice."

Whether "it" [the killing] occurred under mitigating circumstances" is not a proper inquiry for the jury, How could the jury know? The jury's proper role here is not to determine whether there were mitigating circumstances but to determine whether or not the Commonwealth proved the absence of mitigating circumstances. And what does the judge mean by suggesting that the historical facts of the case are such that the Commonwealth "cannot prove beyond a reasonable doubt that Mr. Torres acted with malice"? If the judge had believed the evidence showed that the facts prevented the Commonwealth from proving that Mr. Torres acted with malice, the judge should have directed a verdict for the defendant on so much of the indictment that charged him with murder. For the judge to suggest that it is the jury's role to decide whether or not the historical facts of the case might prevent the Commonwealth from being able to prove the absence of mitigation is confusing at best. How can the jury know the actual historical facts? Because the issue is presented to the jury as a question of historical fact (rather than a question of whether Commonwealth met its burden of proof), there is a

danger that a reasonable juror would understand that instruction to dilute the Commonwealth's burden of proof.

The Court cites the above very problematic instruction quoted above as one that supposedly fulfilled the "malice - no malice fork in the road" required by Commonwealth v. Boucher, 403 Mass. 659, 663, 532 N.E. 2d 37, 39 (1989). For reasons stated, Petitioner strongly disagrees. The full set of instructions on murder and manslaughter are set out. Petitioner submits that a review supports his claim.

The Court states that there is "'no clearly established right to an instruction on a lesser included offense in a noncapital offense.' Exilhomrne v. Spencer, Civil Action No. 08-10552-DPW, 2-11 WL3759219, at 11 &n. 9 (D. Mass. Aug. 24, 2011)." The Report cites Paulding v. Allen, 393 F.2d 280, 283 (1st Cir. 2005) for the same proposition.

However, both those cases concern Petitioners' claims that they were entitled to an instruction, and the state court disagreed. In Torres' case, the issue is not whether a lesser included instruction was warranted. It was warranted, according to both the trial judge and the Commonwealth. The issue in the instant case is whether Petitioner received the instruction which his case warranted. Petitioner claims he did to not receive it. On appeal to

the SJC, Petitioner claims he raised the issue and the SJC failed to address it because the SJC misunderstood what instructions were actually given. Since the SJC failed to address the issue, Petitioner's claim is now ripe for *de novo* habeas review.

The Court concludes that Petitioner's ineffective assistance claim fails on *de novo* review because (among other reasons) even if trial counsel had objected to the instructions, "there is no reasonable probability that the result would have been different." The Court reaches this conclusion by noting the following: a) cause of death was strangulation after which incision incurred, "thus evidencing extreme atrocity and cruelty." b) "Petitioner's description of the victim's statement that purportedly provided the basis for provocation did not indicate they took place during any physical struggle ..., thus allowing the jury to infer that ... petitioner would have "cooled off by the time of the killing."

Petitioner disagrees with the Court's conclusion, and he suggests that the facts cited by the Court do not support its conclusion.

(a) Despite "extreme atrocity and cruelty" evidence, a verdict of murder would be improper unless the Commonwealth had proved beyond a reasonable doubt that killing was not the result of heat of passion/ reasonable

provocation. That is, whether there was "extreme atrocity and cruelty" evidence is irrelevant to whether the malice inherent in the manner of the killing was legally neutralized by the Commonwealth's failure to prove the absence of heat of passion.

(b) It may be, as the Court states that the jury could have inferred that petitioner would have cooled off by the time of the killing. But the trial judge evidently determined that the "cooling off' inference was not so strong as to justify relieving the Commonwealth's burden of proof on the issue, See, 28 U.S.C. §2254 (e)(1)(a determination of a factual issue made by a State court shall be presumed to be correct).

Given the strong scientific evidence placing petitioner at the scene, a manslaughter verdict was Petitioner's best realistic outcome. The same facts that support a finding of "extreme atrocity and cruelty" also tend to indicate a crime of passion, and increasing thereby increasing the Commonwealth's burden to show the killing was not in the heat of passion.

On *de novo* review, under Strickland v. Washington, 466 U.S. 668 (1984), the issue of prejudice in Petitioner's case comes down to whether had counsel objected to the instructions and had the full model instruction been given, "there is a reasonable probability that ... the result of the proceeding

would have been different." A reasonable probability is defined by the Cowl as "a probability sufficient to undermine confidence in the outcome." at 496.

The issue at stake could hardly be more fundamental to the outcome. According to Mullaney v. Wilbur, 421 U.s. 684, 649-96,95 S. Ct. 1881 (1975):

> ...the presence or absence of the heat of passion on sudden provocation - has been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide. And, the clear trend has been toward requiring the prosecution to bear the ultimate burden of proving this fact.

Id. At 69

Had counsel objected to the omission of a key portion of the model instruction, it is likely the objection would have resulted in the key portion being given. Compare, Yeboah-Sefah v. Ficco, 556 F.3d 53, 80 (1st Cir. 2009)(where objection to evidence was not likely to have been allowed.)

To show prejudice from failure to object, Petitioner does need to show that a better outcome would have been likely. In keeping with findings made by the trial judge, a verdict of heat of passion manslaughter should have been a viable option for the jury. Here, the fact that — due in part from counsel's failure to object — the jury was not clearly and fully instructed on the murder - manslaughter relationship, it is not possible to have confidence that the jury

reached the verdict of murder rather than manslaughter only because it found the Commonwealth had proved beyond a reasonable doubt that the killing was not the result of heat of passion.

V. CONCLUSION

In conclusion, Mr. Torres is requesting that a hearing be set up for oral arguments. Mr. Torres seeks for this Honorable Court to vacate the sentence and REMAND this back to the lower Court with instruction to either enter a manslaughter conviction, or any other relief that this Court deems appropriate.