22-5834

No. 19-8227

UNITED STATES SUPREME COURT

JOSE TORRES
PETITIONER

-V-

COMMONWEALTH OF MASSACHUSETTS
RESPONDANTS

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

PETITION FOR REHEARING

Jose Torres
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PETITION FOR REHEARING

Pursuant to this Court's Rule 44.2, Petitioner Jose Torres, *pro se*, petition for a rehearing of the Court's order denying certiorari in this case. The petitioner requests that the Court takes in mind the arguments stated below for the reason for the rehearing on the singular issue that Mr. Torres had ineffective Assistance of Counsel. The Petitioner request that the Court grants the petition, vacate the judgment and remand it back to

GROUNDS FOR REHEARING

I. THE COURT SHOULD HOLD THE PETITION AND GRANT THE REHEARING BECAUSE MR. TORRES' COUNSEL WAS INEFFECTIVE AND CAUSED A LOWER BURDEN OF PROOF FOR THE PROSECUTION

A. Argument

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 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 puilty 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.

This issue that is at hand is an issue that has never been addressed in either this court or any of the lower courts. This issue would be an issue that has never been addressed or ruled upon, and would upend the Due Process Clause in Massachusetts. By keep this law in place, defendants like Mr. Torres, would lose Due Process protections that the United States Constitution has enshrined.

In Torres' case the Supreme Judicial Court (SJC) was silent as to its reasoning on this issue, and only bought up information that was not relevant to Torres' arguement. 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.

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).

"(T)here 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)(l)(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

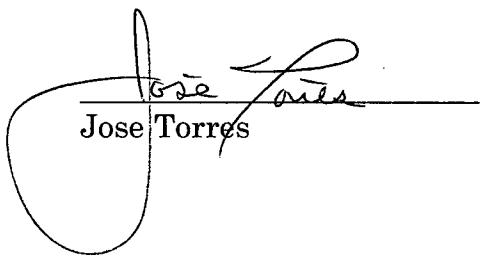
by the trial judge, a verdict of heat of passion manslaughter should have been a viable option for the jury. Here, the fact that — due in part from counsel's failure to object — the jury was not clearly and fully instructed on the murder - manslaughter relationship, it is not possible to have confidence 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 ALLOW this REHAERING for the reasons set forth in the above brief.

CERTIFICATE OF GOOD FAITH & LIMITED TO GROUNDS OF INTERVENING CIRCUMSTANSES OF SUBSTANTANTIAL OR CONTROLLING EFFECT

I, Jose Torres, pro se, certify that this document is sent to this Honorable Court in **Good Faith** and for not for any type of delay. Mr. Torres is claiming that the brief is being sent due to circumstances of substantial or controlling effect that the First Circuit has had, and has had different rulings going both ways both for and against the Petitioners. Mr. Torres is certifying that the ambiguity in the rulings and the law.



Jose Torres