

No. 22-6319

**ORIGINAL**

IN THE  
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.  
FILED

OCT 20 2022

OFFICE OF THE CLERK

FRANCIS BOYD-PETITIONER

v.

SUPERINTENDENT OF ROCKVIEW-RESPONDENTS CV-97-7160

ON PETITION FOR WRIT OF CERTIORARI TO

COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FRANCIS BOYD

500 E. 4th Street

Chester, Pa. 19013

QUESTIONS PRESENTED

- 1). DID THE THIRD CIRCUIT COURT OF APPEALS MISCONSTRUE PETITIONER'S QUESTION CONCERNING HIS CLAIM(S) IN DENYING HIS PETITION FOR REHEARING/REHEARING IN BANC.
- 2). CAN A TRIAL JUDGE INSTRUCT A JURY DURING A JURY CHARGE, THAT THEY CANNOT FIND A DEFENDANT GUILTY OF A CERTAIN DEGREE OF MURDER EVEN THOUGH THE DEFENDANT WAS CHARGED WITH THAT DEGREE OF MURDER?
- 3). CAN A TRIAL JUDGE GIVE AN ERRONEOUS JURY CHARGE ON THIRD DEGREE MURDER THE SECOND TIME AROUND, AFTER GIVING THE CORRECT ONE DURING THE FIRST CHARGE, AFTER THE JURY ASKED FOR A RECHARGE ON FIRST, SECON AND THIRD DEGREE MURDER?
- 4). CAN A TRIAL JUDGE, IN CHARGING A JURY ON THE DEGREES OF MURDER, MIX THE ELEMENTS OF SECOND-DEGREE MURDER INTO THE CHARGE OF THIRD DEGREE MURDER?

**LIST OF PARTIES**

**Francis Boyd, Petitioner**

**Robert Meyers, Superintendent of Rockview**

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**CITATIONS OF THE OFFICIAL AND**  
**UNOFFICIAL REPORTS OF OPINIONS AND ORDERS**

**BOYD V. SUPERINTENDENT OF ROCKVIEW, C.A. NO. 22-1494 (E.D. Pa. CIV. 97-CV-07160)**

**8-26-22**

**SUR PETITION FOR REHEARING.....SEPTEMBER 23, 2022 C.A. NO. 22-1494**

**CONSTITUTIONAL PROVISIONS, TREATIES**

**18 Pa. section 2502 (b) (1974) (Amended 1978) (Relating to Second Degree Murder).**

### CONCISE STATEMENT OF THE CASE

Petitioner filed a Rule 60(b)(6) in the District Court saying that: 1). *His trial judge gave an erroneous charge to the jury concerning Third Degree Murder"; 2). His attorney was ineffective for allowing the charge; 3). Trial judge added elements of second-degree murder into his third degree murder charge to the jury; 4). Trial judge gave the jury a different charge of third degree murder the second time around after the jury asked for a recharge of first, second and third degree murder.* The District Judge denied petitioner's 60 (b)(6) petition. Petitioner filed a Certificate of Appelability with the Third Circuit Court of Appeals. The Third Circuit on August 26, 2022 in which petitioner received on September 2, 2022 denied petitioner's Certificate of appealability stating: "Boyd has not shown that jurists not reason would debate the merits of his underlying Habeas claims as the challenged instructions were a correct statement of the applicable law and counsel was not arguably ineffective for failing to object. See 18 Pa. C.S. Section 2505(b) (1974) (Amended 1978) ("a criminal homicide constitutes murder of the second degree when the death of the victim occurred while defendant was

engaged as a principal or an accomplice in the perpetration of a felony," Wertz v. Vaughn, 228 F. 3d 178, 203 (3d. Cir. 2000) (reasoning that "Counsel cannot be deemed ineffective for failing to raise a meritless claim"). Id.

Petitioner filed a **PETITION FOR REHEARING & REHEARING EN BANC** on September 6, 2022 explaining to the Court that they *misconstrued* his claims and that petitioner, in his 60(b)(6) petition did not challenge **18 Pa. C.S. Section 2502(b)(1974) (relating to second-degree murder)**. See Claim #1 of 60 (b) (6) petition. (**PETITIONER'S TRIAL JUDGE INFERRED TO HIS JURY THAT THEY COULDN'T FIND HIM GUILTY OF THIRD DEGREE MURDER DESPITE PETITIONER BEING CHARGED WITH THIRD DEGREE MURDER ON THE BILL OF INDICTMENT, IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND HIS SIXTH AMENDMENT RIGHT TO AN EFFECTIVE ATTORNEY**). And claim #2: (**PETITIONER'S ATTORNEY FAILED TO CHALLENGE THIS FAULTY JURY CHARGE OF THIRD DEGREE MURDER, AND HE FAILED TO FILE PETITIONER'S DIRECT APPEAL TO THE PENNSYLVANIA SUPREME COURT WHICH CAUSED THE CLAIM TO BE WAIVED IN STATE COURT AND PROCEDURALLY BARRED IN FEDERAL COURT, IN VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL**". Petitioner agrees with Section 2505(b), however, that

was not his challenge in his 60(b)(6) petition. His challenge was the claims above.

Petitioner challenged the fact that the trial judge, in charging the jury on Third

Degree Murder the second time around (after the jury broke for deliberations

and asked for a re-charge on (*First, Second, and Third degree murder*), gave a

totally different third degree murder charge and even added elements of "second-

*degree murder*" within his faulty third degree murder charge to the jury. The

second charge that he gave violated petitioner's Due Process Rights to the U.S.

and Pennsylvania Constitutions which resulted in a miscarriage of justice. The

Judge is forbidden by law to include elements of one degree of murder into the

charge of another degree of murder if its not an element of that charge. The

District Attorney has to prove each element of each charge. *In re Winship*, 397

U.S. 358, 363-64. 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970). Petitioner included

transcripts of the respective charge to the jury to prove his claims. This Court in

(*Bollenbach v. United States*), 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350 (1946) held:

"[t]he influence of the trial judge on the jury is necessarily and properly of great

weight,... and jurors are ever watchful of the words that fall from him.

Particularly in a criminal trial, the judge's last word is apt to be the decisive word."

*Archambault*, 290 A.2d at 75 (quoting *Bollenbach*, 326 U.S. at 612).

Petitioner was charged by the District Attorney with First, Second, and Third Degree Murder along with Voluntary Manslaughter. See N.O.T. at 932 attached. In Pennsylvania, a jury is allowed to find a defendant guilty of anyone of the above charges in the Bill of Indictment. In other words, they can find a defendant who was charged with murder and robbery, guilty of "*first degree murder and robbery*". They can also find a defendant guilty of "*second degree murder*", and they can find a defendant guilty of "*third degree murder and robbery*". Each degree of murder comes with different "*elements*". As petitioner stated above, the Judge cannot, by Pennsylvania and Federal law, include elements of one degree of murder into the jury charge of another degree of murder if its not an element of that charge. See *In re Winship*, 397 U.S. 358, 363-64, 90 S.Ct. 1068, 25 L.Ed 2d 368 (1970). During his initial charge to the jury on third degree murder, the judge gave the correct charge and did not add elements of second degree murder within his charge. See N.O.T. at 956 & 967 attached. The jury, after deliberating for a couple of days, came back and requested that the judge recharge them on *first, second, and third degree murder*. Indicating that they were considering finding petitioner guilty of third degree murder. The judge, in his second charge gave a different (*his own*) charge for third degree murder and even added "elements of second degree murder" within his third degree murder.

the jury was petitioner's statement that he accidentally discharged his defective weapon striking the decedent. There were no eye witnessess to the shooting. This evidence came by way of the prosecution's case in chief. The jury received no evidence at trial that the murder was an intentional killing, and believed petitioner's statement that the homicide was unintentional. Obviously, the District Attorney also thought that this could be a third degree murder case also because he added it (lesser charge) to the Bill of Indictment. See *N.O.T. at 932*. Even Pennsylvania Courts feel the same way about second-degree murder. See *Commonwealth v. Jessie James Griffin*, 310, Super. 39; 456 A.2d 171; 1983 Pa. Super. Lexis 2483, "(*Murder of the second or third degree occurs where the killing of the victim is the unintentional result of a criminal act.*)" Considering the evidence that the jury heard pointed them towards a possible third degree conviction, the Judge's erroneous charge was fatal to petitioner. In Brooks v. Gilmore, above, the court said: "*To test the constitutionality of the instruction given here requires consideration of how a reasonable juror would analize the hypothetical decision presented in the court's charge.*" *Id.* at 8. In the case at bar, the judge, in his erroneous unconstitutional charge took third degree murder off the table when he added the second-degree elements to it.

The fatal charge came during its recharge of third degree murder when the jury asked for a recharge on first, second and third degree murder. As soon as he gave his

recharge on second-degree murder, which petitioner had no problem with, he then gave a "different" charge on third degree murder "MURDER OF THE THIRD DEGREE INCLUDES ALL UNLAWFUL KILLING WITH MALICE, BUT WITH NO INTENTION TO KILL OR CAN REASONABLY AND FULLY BE INFERRED". "MOREOVER, IF THE CRIMINAL HOMICIDE WHICH WOULD OTHERWISE BE MURDER OF THE THIRD DEGREE OCCURRED DURING THE ACTUAL COMMISSION, THE ATTEMPT TO COMMIT OR FLIGHT AFTER THE COMMISSION OF A ROBBERY, IT IS MURDER OF THE SECOND DEGREE AND NOT MURDER OF THE THIRD DEGREE." When the Judge got to the MOREOVER part of the charge, he violated petitioner's due process rights and prejudiced him. Those words are "not", and have never been a part of a Third Degree Murder charge to a jury in Pennsylvania's history. He had just gave another second-degree murder charge to the jury), only to add these same (second-degree murder) elements to his third degree murder charge to the jury. That is the specific language that petitioner is challenging: "When a habeas petitioner claims the jury instruction was unconstitutional, "we have an Independent duty to ascertain how a reasonable jury would have interpreted the instruction at issue." (*Smith v. Horn*), 120 F.3d 400, 413 (3d. Cir. 1997) (citing *Francis*, 471, U.S. at 315-16). "We exercise this duty by focus[ing] Initially on the specific language challenged." *Francis*, 471, U.S. at 315. "and then considering the "allegedly constitutionally infirm language...In the context of the

charge as a whole "to determine whether there is a reasonable likelihood the jury applied the instructions in a manner violative of the accused's due process rights. Smith, 120 F.3d at 411. The Third Circuit in its September 2, 2022 denial of petitioner's Certificate of Appellability construed petitioner's claim(s) to be that he was challenging applicable law 18 Pa. C.S. Section 2505(b) (1974) (Amended 1978). Petitioner was not challenging this law at all. As stated above, he challenged the mixture of second-degree murder elements into the third degree murder charge to the jury. He basically told the jury that they couldn't find petitioner guilty of third degree murder, despite petitioner being charged with third degree murder. Surley, contrary to what the Third Circuit said in their decision, there is a reasonable likelihood that reasonable jurors would debate the merits of his underlying claims. There is no doubt that In re Winship was totally violated.

The instruction contained ambiguity and inconsistency and confused the jury enough not to even consider a third degree murder conviction. In Tison v. Houtzdale, 976 F.3d 382, the court held: "If the instruction contains "some 'ambiguity' Inconsistency, or deficiency", such that it creates a "reasonable likelihood" the jury misapplied the law and relieved the government of its burden of proving each element beyond a reasonable doubt, the resulting criminal conviction violates the defendant's Constitutional Right to Due Process". (Bennett v. Superintendent Graterford), SCI, 886,

F.3d 268, 285 (3d. Cir. 2018) (citing) (*Waddington v. Sarausad*), 555 U.S. 179, 190-91, 129 S.Ct. 823, 172 L.Ed. 2d 532 (2009) (internal citations omitted). "There is no question that, under clearly established federal Law, an instruction that contains both proper and improper charges can violate a petitioner's rights." (*Francis v. Franklin*), 471 U.S. 307, 315, 105 S.Ct. 1965, 85 L.Ed 2d 344 (1985) ("where a jury charge includes both proper and improper content, "the potentially offending words must be considered in the context as a whole". (*Whitney v. Horn*), 280 F.3d 240, 256 (3d. Cir. 2002) ("though an instruction may in one place "correctly explain[] the law," it may in another contain a "constitutional flaw" that requires reversal"); (*United States v. Gordon*), 290, F.3d 539 (3d. Cir. 2002) (similar). That constitutional flaw happened in the case at bar.

Without the judge's constitutional error, there is a good chance that petitioner would have been found guilty of third degree murder, which is a lesser charge of murder than second-degree and the sentence carried only a 10-to 20 year term at the time of the constitutional violation. The central issue here is when the judge added the MOREOVER part in the second half of his third degree murder re-charge to the jury, he crossed the constitutional line. The charge was constitutional up until then. (*Compare his first (initial) third degree charge with the second one*). In the case at bar, there is no doubt that "*there was a reasonable likelihood that the jury applied the instruction in a way that relieved the state of its burden of proving every element of*

the crime beyond a reasonable doubt". *Sarausad*, 555 U.S. at 190-91 (quoting *(Middleton v. McNeil)*, 541, U.S. 433, 437, 124 S.Ct. 1830, 158 L.Ed 2d 701, (2004) (per curiam); *(Estelle v. McGuire)*, 502, U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed 2d 385 (1991) (quoting *(Boyde v. California)*, 494, U.S. 370, 380, 110 S.Ct 1190, 108 L.Ed 2d 316 (1990))). "In making this determination, the jury instruction 'may not be judged as in artificial isolation, 'but must be considered in the context of the instructions as a whole and the trial record" Id. at 191 (quoting) *Estelle*, 502, U.S. at 72 (quoting) *(Cupp v. Naughten)*, 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed 2d 368 (1973)). Bennett, supra at 14. In the case at bar, there is no doubt that petitioner's jury applied the erroneous, unconstitutional charge incorrectly. "As a reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Franklin*, 471, U.S. at 322. "As such, there is a reasonable likelihood that the jury applied the instructions incorrectly in violation of the right to due process." Id. at 325.

Petitioner asked for a Rehearing/Rehearing In Banc, requesting that the full Court decide his claim(s). However, the original panel thought that petitioner was challenging **18 Pa. 2502(b) (Relating to second-degree murder)**. As a result of this mistake, the panel conveyed the wrong question to the rest of the judges in Petitioner's **Sur Petition For Rehearing**. Petitioner asks this Honorable Court to intervene and hear petitioner's claims on the merits.

By:

Francis Boyd  
Francis Boyd, Petitioner  
Pro-Se

Dated: October 3, 2022

**REASON FOR GRANTING THE WRIT**

Petitioner presented documented evidence to both the District Court and the Court of Appeals pertaining to his claim. His trial judge blatantly inferred to his jury that they could not find him guilty of the lesser charge of third-degree murder, although petitioner was charged with it in the Bill of Indictment. The documented evidence also prove that trial judge mixed elements of one degree of murder into the elements of another degree of murder thereby violating petitioner's right to the United States and Pennsylvania Constitutions Due Process Clause. And that petitioner's trial counsel was ineffective for not objecting to this blatant error that proved to be fatal for petitioner, nor did his Initial collateral-review attorney challenge trial attorney's failure to do so. The documented evidence on its face proves petitioner's claim(s) beyond a shadow of a doubt, and the District Court failed or refused to answer the question.

The Court of Appeals misconstrued petitioner's question pertaining to his claim that the Judge gave an erroneous jury charge and mixed the elements of two different degrees of murder.