

APPENDIX

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- 1). ORDER OF THE THIRD CIRCUIT COURT OF APPEALS (AUGUST 26, 2022)**
- 2). ORDER OF THE THIRD CIRCUIT COURT OF APPEALS DENYING PETITIONER'S SUR PETITION FOR REHEARING/REHEARING IN BANC DATED SEPTEMBER 23, 2022**
- 3). STANDARD JURY INSTRUCTIONS FOR THIRD DEGREE MURDER IN PENNSYLVANIA**
- 4). CASE HISTORY**
- 5). TRIAL TRANSCRIPTS DIPICTING JUDGE'S ERRONEOUS JURY CHARGE OF THIRD DEGREE MURDER**

DLD-188

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 22-1494

FRANCIS BOYD, Appellant

VS.

SUPERINTENDENT ROCKVIEW SCI, ET AL.

(E.D. Pa. Civ. No. 2-97-cv-07160)

Present: KRAUSE, MATEY and PHIPPS, Circuit Judges

Submitted is Appellant's notice of appeal, which may be construed as a request for a certificate of appealability under 28 U.S.C. § 2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing request for a certificate of appealability is denied. A certificate of appealability is required to appeal a District Court's order denying a Rule 60(b) motion. Bracey v. Superintendent Rockview SCI, 986 F.3d 274, 283 (3d Cir. 2021). In order to obtain a certificate of appealability from the denial of a Rule 60(b) motion, Boyd must show that jurists of reason would debate both the District Court's denial of his Rule 60(b) motion and the merits of his underlying habeas claim. Id. Boyd has not shown that jurists of 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. § 2502(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."); Werts v. Vaughn, 228 F.3d 178, 203 (3d Cir. 2000) (reasoning that "counsel cannot be deemed ineffective for failing to raise a meritless claim").

By the Court,

s/ Cheryl Ann Krause
Circuit Judge

Dated: August 26, 2022



A True Copy:

Patricia S. Dodzuweit

Patricia S. Dodzuweit, Clerk
Certified Order Issued in Lieu of Mandate

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1494

FRANCIS BOYD,

Appellant

v.

SUPERINTENDENT ROCKVIEW SCI;
THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA;
THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA

(D.C. Civ. No. 2-97-cv-07160)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, McKEE, AMBRO, JORDAN, HARDIMAN,
GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO,
BIBAS, PORTER, MATEY, and PHIPPS, Circuit Judges

The petition for rehearing filed by Appellant Francis Boyd in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Cheryl Ann Krause
Circuit Judge

Dated: September 23, 2022
ARR/clw/cc: Mr. Francis Boyd
Matthew Stiegler, Esq.

REMARKS OF FORMER CHIEF JUSTICE BENJAMIN R. JONES CONCERNING THE SUGGESTED STANDARD JURY INSTRUCTIONS (1977)

The genesis of the suggested standard jury instructions is directly attributable to the late Judge Frank L. Pinola of Luzerne County, who on a visit to the West Coast, became acquainted with the existence and use of standard jury instructions in trial work in California. Judge Pinola was enthusiastic about the success of the instructions in California, and particularly in their eliminating the necessity for new trials in many cases as a result of error in jury instruction.

As a consequence of Judge Pinola's presentation as to the effective use of instructions, he succeeded in interesting many members of our legal profession in Pennsylvania as to their possible use here. Eventually the late Chief Justice John C. Bell, Jr., with the advice and concurrence of the various Justices of the Supreme Court of Pennsylvania, announced the appointment of a Committee on Proposed Standard Jury Instructions on July 1, 1968. It should be noted that it has always been understood both by the Justices of the Supreme Court and the appointed members of the Committee, that the instructions as completed by the Committee were not to be considered as having been officially adopted by the Supreme Court.

Since the appointment of the Committee, the Supreme Court has received regular reports of the progress of its work. As the drafts of various jury instructions have been distributed over the past few years to trial judges throughout Pennsylvania for study, criticism, suggestions and possible use, we have received many appreciative responses concerning completed suggested jury instructions, as well as on the comments and research notes accompanying the instructions.

We are certain that the results of the Committee's efforts will prove to be of inestimable value not only to trial judges, but to trial practitioners as well, in their research and preparation for trial work. Further, we believe that the suggested standard jury instructions should make the trial process more effective by increasing accuracy in the jury instructions and thereby eliminating the necessity for new trials resulting from error in instructions.

The Pennsylvania Bar is greatly indebted to the Committee and the reporters for the Committee work for their long and diligent efforts in bringing to a completion the proposed standard jury instructions project. For my part, they all have my deep personal gratitude for this outstanding contribution of the profession to our efforts to constantly improve the trial process and the administration of justice so that our legal system can better serve the general public.

**BENJAMIN R. JONES
Former Chief Justice
Pennsylvania Supreme Court**

February 22, 1977
Philadelphia, Pennsylvania

15.2502C (Crim)

THIRD-DEGREE MURDER

1. Third-degree murder is any killing with malice [that is not first- or second-degree murder]. The defendant has been charged with third-degree murder. To find the defendant guilty of this offense, you must find that the following three elements have been proven beyond a reasonable doubt:

First, that [name of victim] is dead;

Second, that the defendant killed [him] [her]; and

Third, that the defendant did so with malice.

[2. The word "malice" as I am using it has a special legal meaning. It does not mean simply hatred, spite, or ill-will.

Malice is a shorthand way of referring to particular mental states that the law regards as being bad enough to make a killing murder.]

[First Alternative]

3. For murder of the third degree, a killing is with malice if the perpetrator's actions show his or her wanton and willful disregard of an unjustified and extremely high risk that his or her conduct would result in death or serious bodily injury to another. In this form of malice, the Commonwealth need not prove that the perpetrator specifically intended to kill another. The Commonwealth must prove, however, that the perpetrator took action while consciously, that is, knowingly, disregarding the most serious risk he or she was creating, and that, by his or her disregard of that risk, the perpetrator demonstrated his or her extreme indifference to the value of human life.

[Second Alternative]

3. For murder of the third degree, a killing is with malice if the perpetrator acts with [a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty indicating an unjustified disregard for the probability of death or great bodily harm and an extreme indifference to the value of human life] [a conscious disregard of an unjustified and extremely high risk that his or her actions might cause death or serious bodily harm].

[On the other hand, a killing is without malice if the perpetrator acts [with a lawful justification or excuse] [or] [under circumstances that reduce the killing to voluntary manslaughter].]

Boyd, 1990 Pa. Super. LEXIS 1053 (Apr. 20, 1990) Habeas corpus proceeding at Boyd v. Myers, 1998 U.S. Dist. LEXIS 20253 (E.D. Pa., Dec. 21, 1998) Post-conviction proceeding at, Decision reached on appeal by Commonwealth v. Boyd, 823 A.2d 1022, 2003 Pa. Super. LEXIS 1384 (Pa. Super. Ct., Mar. 27, 2003) Post-conviction proceeding at, Decision reached on appeal by Commonwealth v. Boyd, 897 A.2d 514, 2006 Pa. Super. LEXIS 701 (Pa. Super. Ct., Feb. 24, 2006) Writ of habeas corpus dismissed, Certificate of appealability denied Boyd v. Klem, 2007 U.S. Dist. LEXIS 67649 (E.D. Pa., Sept. 13, 2007) Post-conviction proceeding at, Decision reached on appeal by Commonwealth v. Boyd, 15 A.3d 543, 2010 Pa. Super. LEXIS 5664 (Pa. Super. Ct., Oct. 27, 2010) Post-conviction proceeding at, Writ granted by, in part, Request granted Boyd v. Court of Common Pleas, 164 A.3d 461, 2016 Pa. LEXIS 2812 (Pa., Dec. 16, 2016) Post-conviction relief dismissed at Commonwealth v. Boyd, 2018 Pa. Super. Unpub. LEXIS 1804 (May 31, 2018) Post-conviction relief denied at, Writ of habeas corpus dismissed Commonwealth v. Boyd, 2018 Pa. Super. Unpub. LEXIS 2736 (July 30, 2018)

Editorial Information: Subsequent History

Post-conviction relief dismissed at, Writ of habeas corpus denied Com. v. Boyd, 401 Pa. Super. 638, 577 A.2d 647, 1990 Pa. Super. LEXIS 1053 (Apr. 20, 1990) Habeas corpus proceeding at Boyd v. Myers, 1998 U.S. Dist. LEXIS 20253 (E.D. Pa., Dec. 21, 1998) Post-conviction proceeding at, Decision reached on appeal by Commonwealth v. Boyd, 823 A.2d 1022, 2003 Pa. Super. LEXIS 1384 (Pa. Super. Ct., Mar. 27, 2003) Post-conviction proceeding at, Decision reached on appeal by Commonwealth v. Boyd, 897 A.2d 514, 2006 Pa. Super. LEXIS 701 (Pa. Super. Ct., Feb. 24, 2006) Writ of habeas corpus dismissed, Certificate of appealability denied Boyd v. Klem, 2007 U.S. Dist. LEXIS 67649 (E.D. Pa., Sept. 13, 2007) Post-conviction proceeding at, Decision reached on appeal by Commonwealth v. Boyd, 15 A.3d 543, 2010 Pa. Super. LEXIS 5664 (Pa. Super. Ct., Oct. 27, 2010) Post-conviction proceeding at, Writ granted by, in part, Request granted Boyd v. Court of Common Pleas, 164 A.3d 461, 2016 Pa. LEXIS 2812 (Pa., Dec. 16, 2016) Post-conviction relief dismissed at Commonwealth v. Boyd, 2018 Pa. Super. Unpub. LEXIS 1804 (May 31, 2018) Post-conviction relief denied at, Writ of habeas corpus dismissed Commonwealth v. Boyd, 2018 Pa. Super. Unpub. LEXIS 2736 (July 30, 2018)

OF WHICH CAN BE CHANGED, SUCH AS PERSONAL PROPERTY, NAMELY, CASH, RINGS, WATCHES AND ITEMS OF THAT NATURE.

IN THIS CASE, THE COMMONWEALTH ALLEGES THAT CURRENCY, UNITED STATES CURRENCY, WAS TAKEN IN THE THEFT.

IF, AFTER CONSIDERING ALL OF THE EVIDENCE, YOU FIND THAT THE COMMONWEALTH HAS ESTABLISHED BEYOND A REASONABLE DOUBT ALL OF THE ELEMENTS WHICH I HAVE STATED, YOU MUST FIND THE DEFENDANT GUILTY OF ROBBERY IN WHICH HE THREATENED SERIOUS BODILY INJURY. OTHERWISE, YOU MUST FIND THE DEFENDANT NOT GUILTY OF ROBBERY.

UNDER BILL OF INFORMATION 597, JUNE TERM 1976, THE DEFENDANT IS CHARGED WITH MURDER. AS I HAVE TOLD YOU BEFORE, YOU HAVE THE POWER TO RETURN ONE OF FIVE POSSIBLE AND PROPER ALLOWABLE AND AVAILABLE VERDICTS IN YOUR DELIBERATIONS PERTAINING TO THIS BILL OF INDICTMENT CHARGING MURDER. THAT IS: (1) GUILTY OF MURDER IN THE FIRST DEGREE; (2) GUILTY OF MURDER IN THE SECOND DEGREE; (3) GUILTY OF MURDER IN THE THIRD DEGREE; (4) GUILTY OF THE CHARGE OF VOLUNTARY MANSLAUGHTER; AND (5) NOT GUILTY.

THUS, YOU SEE, MEMBERS OF THE JURY, THAT YOUR DUTIES ARE NUMEROUS. NOT ONLY ARE YOU TO DETERMINE

(AT 3:50 P.M. THE DEFENDANT ENTERED THE COURTROOM AND WAS SEATED WITH DEFENSE COUNSEL AND THE DISTRICT ATTORNEY WAS ALSO PRESENT.)

(AT 3:55 P.M. THE JURY WAS PRESENT IN THE COURTROOM.)

THE COURT: WILL THE FOREMAN PLEASE RISE?

(WHEREUPON JUROR NO. 8, HAROLD A. WALLACE, STANDS AS THE JURY FOREMAN.)

THE COURT: DID YOU HAVE A QUESTION?

FOREMAN: YES, SIR. WE WOULD LIKE TO HAVE THE LEGAL DEFINITION OF FIRST DEGREE AND SECOND DEGREE AND THIRD DEGREE.

THE COURT: FIRST, SECOND AND THIRD DEGREE?

FOREMAN: YES, SIR.

THE COURT: WELL, LET ME SEE IF I CAN GO OVER IT AGAIN A LITTLE SLOWER. PERHAPS YOU CAN UNDERSTAND WHAT IT IS.

WHAT IS MURDER OF THE FIRST DEGREE?
THE ACT OF ASSEMBLY OR STATUTE UNDER WHICH THE DEFENDANT IS BEING TRIED, EXPRESSLY DEFINES

KILLING IN THIS CASE WAS DONE IN THE COURSE OF THE ROBBERY, THEN IT WOULD BE MURDER OF THE SECOND DEGREE BECAUSE IT IS A FELONY MURDER. THEN, YOUR JOB WOULD BE TO DETERMINE BEYOND THAT WHETHER IT HAS BEEN PROVEN BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS THE PERSON COMMITTING THE KILLING, AND THAT HIS ACT WAS THE CAUSE OF DEATH, OR THAT THE DEATH WOULD NOT HAVE OCCURRED BUT FOR THE DEFENDANT'S ACT, OR THAT HE WAS AN ACCOMPLICE OF THE ACTUAL PERPETRATORS OF KILLING WHICH RESULTED IN THE DEATH OF WILLIAM BOYD.

MURDER OF THE THIRD DEGREE. ALL MURDER WHICH IS NOT MURDER OF THE FIRST DEGREE OR MURDER OF THE SECOND DEGREE SHALL BE MURDER OF THE THIRD DEGREE. SECTION 2502(c) OF THE CRIMES CODE PROVIDES VERBATIM, OR WORD FOR WORD, AS FOLLOWS:

• • • - MURDER OF THE THIRD DEGREE. ALL OTHER KINDS OF MURDER SHALL BE MURDER OF THE THIRD DEGREE.

MURDER OF THE THIRD DEGREE IS THE UNLAWFUL KILLING OF A HUMAN BEING

WITH MALICE, BUT WITH AN INTENTION MERELY TO INFILCT GRIEVOUS BODILY HARM, TO WOUND, TO MAIM, FRIGHTEN, OR TO CAUSE SERIOUS BODILY INJURY TO HIS VICTIM AND NOT TO TAKE HUMAN LIFE; AND YET, AS A RESULT OF THE INFILCTION OF THE INJURY, DEATH RESULTS."

THIRD DEGREE MURDER INCLUDES ANY UNLAWFUL KILLING OF A HUMAN BEING WITH MALICE, BUT WHERE NO INTENTION TO KILL EXISTS OR CAN REASONABLY AND FULLY BE INFERRED. THUS, IF THERE IS AN UNLAWFUL KILLING WHERE THERE IS WICKEDNESS OF DISPOSITION, HARDNESS OF HEART, CRUELTY, RECKLESSNESS OF CONSEQUENCES, AND A MIND REGARDLESS OF SOCIAL DUTY, BUT IF NO INTENTION TO KILL CAN BE INFERRED OR COLLECTED FROM THE FACTS, THEN THE VERDICT SHOULD BE GUILTY OF MURDER IN THE THIRD DEGREE.

MALICE IN MURDER OF THE THIRD DEGREE IS THE MALICIOUS DESIGN TO DO HARM BUT NOT TO KILL. THIRD DEGREE MURDER IS THEREFORE THE

UNLAWFUL TAKING OF A HUMAN LIFE WITH MALICE AFORETHOUGHT, WITH NO SPECIFIC INTENTION TO KILL, BUT WITH AN INTENTION TO INFILCT GRIEVOUS BODILY HARM AND NOT TO TAKE HUMAN LIFE. YET, AS A RESULT OF THE INJURY INFILCTED, DEATH RESULTED.

NOW, LET ME SEE IF I CAN GIVE YOU A SUMMARY OF WHAT I HAVE SAID SO FAR. LET ME BRIEFLY SUMMARIZE THE LAW PERTAINING TO MURDER.

MURDER OF THE FIRST DEGREE IS AN UNLAWFUL, WILFUL, DELIBERATE AND PREMEDITATED KILLING WITH MALICE. IT IS ACCCOMPANIED BY A SPECIFIC INTENT TO KILL. THE PRINCIPAL QUESTION TO BE ANSWERED IS WHETHER OR NOT THE KILLER HAD THE WILFUL, DELIBERATE AND PREMEDITATED SPECIFIC INTENT TO KILL AT THE TIME OF THE KILLING. FURTHER, IF ALL OF THE ELEMENTS OF THE FIRST DEGREE ARE PROVED BEYOND A REASONABLE DOUBT, SUCH A CRIMINAL HOMICIDE IS STILL MURDER OF THE FIRST DEGREE, EVEN IF OCCURRING DURING THE ACTUAL COMMISSION, THE ATTEMPT TO COMMIT OR FLIGHT AFTER THE COMMISSION OF A FELONY, SUCH AS ROBBERY, AND THEREFORE, IT WOULD BE MURDER OF THE FIRST DEGREE AND NOT MURDER OF THE SECOND DEGREE.

MURDER OF THE SECOND DEGREE IS WHERE THE DEATH OCCURRED WHILE THE DEFENDANT WAS ENGAGED AS THE ACTUAL PERPETRATOR OR AN ACCOMPLICE DURING THE COMMISSION OF OR AN ATTEMPT TO COMMIT THE CRIME OF ROBBERY.

MURDER OF THE THIRD DEGREE INCLUDES ALL UNLAWFUL KILLING WITH MALICE, BUT WITH NO INTENTION TO KILL EXISTS 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.

NOW, I TAKE IT THAT ANSWERS YOUR QUESTION. PLEASE GO BACK AND DELIBERATE.

MR. HAMILTON: MAY I SEE YOUR HONOR AT SIDE BAR?

THE COURT: YES, SURE.

(THE FOLLOWING COLLOQUY OCCURRED AT SIDE BAR:)

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

FRANCIS BOYD	:	CIVIL ACTION
	:	
v.	:	
	:	
SUPERINTENDENT ROBERT MYERS, <i>et al.</i>	:	NO. 97-7160

ORDER

AND NOW, this 3rd day of March, 2022, upon consideration of Petitioner's Motion for Leave to File 60(b)(6) Petition, it is hereby **ORDERED** that:

1. Petitioner's motion (Document 78) is **DENIED**.¹
2. Petitioner's motion to proceed *in forma pauperis* (Document 77) is **DISMISSED** as moot.

BY THE COURT:

Berle M. Schiller, J.

¹ See Order dated December 27, 2018 (Document 71) denying similar prior filings, a copy of which is being sent to pro se petitioner with this Order.