NO.

IN THE

SUPREME COURT OF THE UNITED STATES

ANIL NAYEE,

PETITIONER,

V.

THE ADMINISTRATOR OF THE NEW JERSEY STATE PRISON; THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

RESPONDENT(S).

MOTION FOR LEAVE TO PROCEED IN *FORMA PAUPERIS*

1. The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in *forma pauperis*.

2. Petitioner has previously been granted leave to proceed in forma pauperis in the following court(s); United States District Court for the District of New Jersey, and the United States Court of Appeals, Third Circuit.

3. Theodore Sliwinski, Esq. was appointed as a CJA counsel for the petitioner to prepare his appeal to the United States Court of Appeals, Third Circuit.

4. Counsel is filing this to enable the petitioner to file his Petition for Certiorari. I am going to file a motion for a 60 day extension.

5. Petitioner's counsel's certification or declaration in support of this motion is attached hereto.

THEODORE SLIWINSKI, ESQ.
ATTORNEY FOR PETITIONER

DATE: 12/30/2023

No.

IN THE

SUPREME COURT OF THE UNITED STATES

ANIL NAYEE,

PETITIONER,

v.

THE ADMINISTRATOR OF THE NEW JERSEY STATE PRISON; THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

RESPONDENTS.

CERTIFICATION OR DECLARATION IN SUPPORT OF MOTION TO PROCEED IN LEAVE IN *FORMA PAUPERIS*.

I, Theodore Sliwinski, Esq. hereby issue the following certification in support of the motion to proceed in forma pauperis;

1. I was assigned to represent the petitioner, Anil Nayee, with regard to his appeal in the United States Court of Appeals, Third Circuit.

2. On July 27, 2023, the Third Circuit, denied the petitioner's appeal. The petition filed for two Petitions

for a Rehearing En Banc. The first Petition for a Rehearing En Bank was denied on September 18, 2023. The second Petition for a Rehearing was denied on October 3, 2023.

3. I believe that the issues in the Petition for Certiorari raise some novel issues of law.

4. The petitioner is currently incarcerated at the NJ State Prison.

5. I was relieved as counsel by the Third Circuit. However, the petitioner contacted me on December 12, 2023, and he requested that I file a 60 day extension for him to file his own Petition for Certiorari.

6. Thus, I am complying with his request, and complying with my duties as counsel, and with my professional responsibilities.

7. I hereby certify that the above statements made by me are true, and that they are made under the penalties of perjury.

THEODORE SLIWINSKI, ESQ.
ATTORNEY FOR PETITIONER

DATE: 12/30/2023

No.

IN THE SUPREME COURT OF THE UNITED STATES

ANIL NAYEE,

PETITIONER,

V.

THE ADMINISTRATOR OF THE NEW JERSEY STATE PRISON; THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

RESPONDENTS.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FROM THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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45 River Road
East Brunswick, NJ 08816
Counsel for Petitioner
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QUESTIONS PRESENTED

Was the defendant denied due process and the effective assistance of counsel; 1) by appearing in a correctional uniform at trial; and 2) by his attorney's failure to request, and the trial court's failure to charge, a jury instruction on the lesser included offense of manslaughter.

PARTIES TO THE PROCEEDINGS

The petitioner is an inmate at the New Jersey State Prison, located in Trenton, NJ. The respondent is the Administrator of the New Jersey State Prison, the Attorney General, and the State of New Jersey.

TABLE OF CONTENTS

INDEX TO APPENDIX

VOLUME ONE

APPENDIX A - Judgment of the Third Circuit for the case of Anil Nayee v. Administrator New Jersey State Prison, Attorney General, New Jersey, No. 21-2022.

APPENDIX B - Opinion for the case for the Third Circuit for the case of Anil Nayee v. Administrator New Jersey State Prison, Attorney General, New Jersey, No. 21-2022.

APPENDIX C - Order dated 9/18/2023, denying the Petition for a Rehearing En Banc,

APPENDIX D - Order dated 10/3/2023, denying the Second Petition for a Rehearing En Banc.

APPENDIX E - Defendant's Volume Four of his Appendix as submitted to the Third Circuit Court of Appeals.

VOLUME TWO

APPENDIX F - Defendant's Volume Five of his Appendix as submitted to the Third Circuit Court of Appeals.

VOLUME THREE

APPENDIX G - Defendant's Volume Six of his Appendix as submitted to the Third Circuit Court of Appeals.

APPENDIX H - New Jersey Petition for Certification dated September 20, 2007.

APPENDIX I - Transcript of a PCR hearing before Judge Alan Rockoff in the Middlesex County Superior Court, dated January 19, 2012.

TABLE OF AUTHORITIES

CASES **PAGE(S)**

TABLE OF STATUTES

STATUTES **PAGE(S)**

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Anil Nayee, respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals, for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, was filed on July 27, 2023. (Exhibits A and B) A Petition for a Rehearing En Banc was denied on September 18, 2023. (Exhibit C) A second Petition for a Rehearing En Banc was denied on October 3, 2023. (Exhibit D)

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit ("Court of Appeals") was entered on July 27, 2023. (App. B) There were two Petitions for Rehearings En Banc filed. The first Petition for a Rehearing En Banc was denied on September 18, 2023. (Exhibit C) The second Petition for a Rehearing En Banc was denied on October 3, 2023. (Exhibit D) The jurisdiction of this court is invoked under 28 U.S.C. 1254(1). This petition is filed within 90 days of the judgment. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The defendant was denied due process and the ineffective assistance of counsel when he was forced to appear before the jury in prison garb. Trial counsel was ineffective because he failed to adequate research, investigate, and be cognizant of the law in his case.

The defendant was fundamentally denied his constitutionally protected right to effective assistance of counsel. This violated deprived him of his Sixth Amendment right to the effective assistance of counsel. The New Jersey State decision resulted in unreasonable determination of facts in light of the evidence presented in State court proceeding. Finally, the Third Circuit committed a reversible error when it evaluated defendant Nayee's ineffective assistance claims. (Exhibits A to D)

Trial counsel was also ineffective when his constitutional rights were violated when the trial court failed to instruct the jury on the lesser included offense of manslaughter. Defendant Nayee was deprived of the effective assistance of counsel when his attorney declined to request the lesser included offense instruction. There was an adequate rational basis in the evidence and record to support the issuance of this charge. Finally, the Third Circuit committed a reversible error when it erroneously evaluated defendant Nayee's ineffective assistance claims.

STATEMENT OF THE CASE

This is a Petition for Certiorari of a Third Circuit Court of Appeals decision issued on July 27, 2023. (Exhibits A and B) The Supreme Court review is necessary because the Third Circuit completely disregarded longstanding prior precedence. The defendant was denied due process and the ineffective assistance of counsel when he was forced to appear before the jury in prison garb. Trial counsel was also ineffective because he failed to object to the defendant appearing in prison garb at the trial. (413a to 416a) The defendant's family repeatedly offered to provide civilian clothes to the defendant at all stages of the case.

Defendant Nayee was fundamentally denied his constitutionally protected right to effective assistance of counsel. The New Jersey State decision resulted in unreasonable determination of facts in light of the evidence presented in State court proceeding. The Third Circuit committed a reversible error when it evaluated defendant's Nayee's ineffective assistance of counsel claims. Trial counsel was ineffective because he failed to adequately research, investigate, and to become fully cognizant of the law in his case.

Trial counsel was also ineffective when his constitutional rights were violated when the trial court failed to instruct the jury on the lesser included offense of manslaughter. Defendant Nayee was deprived of the effective assistance of counsel when

his attorney declined to request the lesser included offense instruction. There was certainly an adequate rational basis in the evidence and record to support the issuance of this charge.

REASONS FOR GRANTING THE WRIT

POINT ONE

THE PETITION FOR CERTIORARI SHOULD RESOLVE THE QUESTION OF WHETHER A DEFENDANT IS UNCONSTITUTIONALLY COMPELLED TO WEAR PRISON CLOTHES, WHEREIN THE TRIAL COURT UNDULY RESTRICTS THE OPPORTUNITY TO OBTAIN CIVILIAN CLOTHING. THIS RAISES A CRITICALLY IMPORTANT ISSUE OF BOTH CRIMINAL AND CONSTITUTIONAL LAW.

A Petition for Certiorari review is absolutely necessary because the Third Circuit decision completely disregarded longstanding prior precedence. The defendant was denied due process and the ineffective assistance of counsel when he was forced to appear before the jury in prison garb. Trial counsel was also ineffective because he failed to object to the defendant appearing in prison garb at the trial. (413a to 416a) The defendant's family repeatedly offered to provide civilian clothes to the defendant at all stages of the case.

Additionally, the defendant was also denied due process when the trial court failed to instruct the jury on the lesser-included offense of manslaughter to the murder charge. The defendant also asserts that trial counsel was ineffective for arguing that there was no basis for the lesser included charge of manslaughter. There was more than adequate evidence in the record

to support a lesser included charge for voluntary manslaughter. The defendant is also entitled to federal habeas relief on this claim. (Exhibit G), (844a to 850a)

This case is a clear violation of the seminal case of Estelle v. Williams, 425 U.S. 501 (1976). In Estelle v. Williams, 425 U.S. 501 (1976), the Supreme Court considered "whether an accused who is compelled to wear identifiable prison clothing at his trial is denied due process or equal protection of the laws." Id. at 502. In the Estelle case, on the morning of trial, the defendant had asked an officer at the jail to allow him to wear civilian clothes, but his request was denied. Subsequently, at trial, neither the defendant nor his counsel made any objection to the identifiable prison attire worn by the defendant. The Supreme Court recognized that, consistent with the Fourteenth Amendment, a state cannot "compel an accused to stand trial before a jury while dressed in identifiable prison clothes." Id. at 512.

The trial of a defendant in prison garb has been recognized as an affront to the dignity of the proceedings and as jeopardizing a defendant's due process right to a fair trial; thus, the State may not compel a defendant to appear for trial before a jury in identifiable prison or jail clothing. The constant reminder of a defendant's condition implicit in prison attire may affect a juror's judgment and thereby endanger the presumption of innocence by creating an unacceptable risk that

the jury will impermissibly consider that circumstance in rendering its verdict. Estelle v. Williams, supra, 425 U.S. 501, 505.

The appearance of the defendant Nayee's prison uniform should not have been permitted to affect the jurors' decision making, which should have been on the hard evidence alone. Defendant Nayee had the right to appear in civilian clothing (instead of a prison or jail uniform) to avoid the risk that the jury's judgment will be tainted and the defendant's right to a presumption of innocence will be compromised. Trial counsel simply ignored the wishes of defendant Nayee to wear civilian clothes for the trial.

On page three of the Third Circuit opinion it alleges that nothing in the record "warrants a conclusion that Nayee was compelled to standing trial in jail garb." (Exhibit B) This ruling by the Third Circuit was inherently incorrect. In the record below, the defendant clearly explained that his family wanted to provide him with clothing for the trial. Trial counsel simply committed an inexcusable blunder by not permitting defendant Nayee to wear civilian clothes. Trial counsel's deficiencies certainly prejudiced him. A very strong defense could have been presented to argue that defendant was only guilty of a manslaughter charge. If defendant Nayee would have worn civilian clothing, then there is a strong chance that he would

have only have been convicted of manslaughter instead of murder. (Exhibit A)

On September 14, 2004, the defendant appeared before the Honorable Deborah Venezia with his trial attorneys, Michael Critchley, Esq. and Edmund DeNoia, Esq. During the trial, the prosecutor, raised the concern of the defendant's appearance in his jailhouse green. Defense counsel raised no objection(s) and he opined, "I'm not concerned about prejudice. He doesn't have any clothes. I have no objection." (Exhibit E, 415a)

Unexplainably, the trial court failed to explain the inherent prejudice of appearing in a prison garb, and she failed to personally questioned the defendant concerning his desire to relinquish his right to appear in civilian clothing. The defendant appeared before the jury in his jail "greens." (Resp. Ex. 5, 6-21 to 24; Resp. Ex. 6, 12-3 to 6, 44-4 to 6, 49-15 to 16). State witnesses identified the defendant in the courtroom as, "The man wearing greens." (Resp. Ex. 6, pg. 6-21 to 6-24, Resp. Ex 7, pg. 12-3 to 12-6, pg. 49-15 to 49-16) The defendant appeared before the jury in his jail clothes. Thus, the defendant's appearance clearly suggested to the jury that he was still dangerous and menacing. (1T 5-3 to 5-13); (4T 6-21 to 6-24);(5T 44-4 to 44-6); (5T 49-15 to 49-16).

Trial defense counsel was also ineffective because he failed to ensure that the defendant had civilian clothing during the

entire trial. Defense counsel stated that; "He doesn't have any clothes." (Resp. Ex. pg. 5-12 to 13). This is nonsense. If the defendant could afford two private attorneys during the course of the trial, then he could certainly afford some clothing. (Exhibit E), (415a)

There is no reason to believe that the defendant's family could not bring the defendant's clothes to court or to trial counsel's office. In this case, the defendant's family did in fact provide clothing (a black pants and blue shirt) to the staff at the Ann Klein Forensic Center (AKFC), for him to wear to the court. At the Ann Klein Forensic Center (AKFC), someone either lost his clothing or may have stolen it. The defendant had also gained weight since his arrest from taking psych medications. Therefore, the clothing his family provided no longer fit him.

It is clear from this record that defendant Nayee attempted to obtain the civilian clothing for this trial. Here, there was no excuse for counsel's failure to take any steps, including providing the defendant with civilian attire and requesting appropriate cautionary instructions, to ensure that the jurors did not reject the defendant's diminished-capacity defense because of concerns about his dangerousness. When the defendant Nayee appeared in court prior to trial, the State pointed out that he had no civilian clothing. Defense counsel did not even object to defendant Nayee's appearing before the jury in his jail

clothing, noting he "doesn't have any clothes" and that the jurors were to learn that Nayee was incarcerated. (Exhibit E) 415a); (1T 5-3 to 13)

The trial court failed to address defendant Nayee's personally to determine whether he wished to appear before the jurors in his jail clothes, failed to discuss Nayee's jail garb during the voir dire, and she failed to provide jurors with a cautionary instruction. Thus, defendant Nayee was forced appeared before the jury in his jail "greens." (4T 6-21 to 24; 5T 12-3 to 12-6, 44-4 to 44-6, 49-15 to 49-16).

There was no strategic reason for defense counsel to permit the defendant to appear before the jury in prison garb. Indeed, defense counsel expressed concern that, because the defendant was taking several anti-psychotic medication, his physical appearance prejudiced the jurors against him. (Resp. Ex. 5, 3-15 to 7-13)

Although the trial judge's interest in proceeding with the trial is understandable, the trial court should have afforded defendant Anil Nayee a further opportunity to procure civilian clothing, in light of the danger of denial of a fair trial when an accused is tried in prison garb. The question relating to a trial court's denial of a reasonable continuance to obtain civilian clothing, is significant in light of the devastating effect that a defendant's appearance in prison garb has on the

defendant's right to the presumption of innocence and to a fair trial.

In Estelle v. Williams, supra, 425 U.S. 501, the Supreme Court recognized that a defendant's appearance in prison clothes introduces an impermissible and prejudicial factor into a trial. The Estelle Court reaffirmed the principal that a defendant "should not be compelled to go to trial in prison or jail clothing because the possible impairment" of the presumption of innocence guaranteed as part of the defendant's due process right to a fair trial." Id. at 504.

The Supreme Court also noted "that the constant reminder of the accused's, condition implicit in such distinctive, identifiable attire may affect a juror's judgment. The defendant's clothing is so likely to be a continuing influence throughout the trial that, not unlike placing a jury in the custody of deputy sheriffs who are also witnesses for the prosecution, an unacceptable risk is presented of impermissible factors coming into play." Id. at 504-05.

Because "compelling an accused to wear jail clothing furthers no essential state policy," Id. at 505, and because appearance in prison garb is so inherently prejudicial, appellate courts must carefully examine instances where defendants wear prison clothing at trial. Id. at 504.

The Supreme Court has acknowledged the difficulty reviewing

courts have in determining the actual effect on a particular jury of viewing a defendant in prison garb:

> The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience. Id. at 504.

A defendant's right to be presumed innocent is eroded, and his rights to due process and a fair trial are also infringed, when jurors see him in a prison uniform. U.S. Const. Amend. V, VI, XIV; N.J. Const. Art. I, ¶¶ 1, 10; State v. Gertrude, 309 N.J. Super. 354, 358, 707 A. 2d 178 (App. Div. 1998); (prejudice inherent in appearing before jury in prison garb "is obvious").

The defense raised was for diminished capacity/insanity. Unfortunately, when defendant Nayee appeared before the jury in his jail clothes it suggested that he was still dangerous. Since trial counsel was aware that the jury might reject the diminished capacity for a dangerous inmate (Exhibit G, 851a to 925a);(11T 12-1 to 13-10), he was ineffective in failing to secure clothing for defendant Nayee. U.S. Const. Amend. VI; N.J. Const. Art. 1, ¶ 10. (Exhibit G),(857a)

In the present case, the trial court judge violated the legal requirement that she personally address defendant Nayee, and ask him if he would waive his right to appear before the jury

in civilian clothing. Therefore, there was no knowing and voluntary waiver of the right to appear before the jury, in civilian clothing(s) that is clearly required by New Jersey law.

The trial court judge also failed to address the topic of defendant Nayee's attire during the voir dire stage. (2T) Here, the trial court did not even issue any type of cautionary instruction. Here, the court's final instructions to the jury failed to mention the prison-garb issue entirely (11T 105-7 to 143-1), as did the court's instructions at the commencement of the trial. (3T 2-2 to 13-2) Therefore, the court's errors and omissions require a reversal. (Exhibit G), (903a to 922a)

Defense counsel also stated that the jurors would hear testimony that defendant Nayee was incarcerated, so counsel was "not concerned about that prejudice." (1T 5-10 to 10-12) It was necessary to safeguard a defendant's due process rights by taking steps such as a proper voir dire of the jurors, and also by providing jurors with cautionary instructions. Here, there was no excuse for trial counsel's failure to take any steps, including providing defendant Nayee with civilian attire, and by requesting appropriate cautionary instructions. These steps would have ensured that the jurors did not reject defendant Nayee's diminished-capacity defense because of concerns about his dangerousness.

It is one thing to learn that a defendant is incarcerated;

it is another to be constantly reminded by his attire that a defendant poses a risk of safety to others. Because the defendant Nayee had two attorneys, and because the judge acknowledged that the voir dire process revealed that Mr. Critchley, Esq. was a high-profile defense attorney (2T 68-2 to 68-5), the jurors likely concluded that defendant Nayee was not represented by the public defender's office. And if defendant Nayee could afford counsel, then he likely could afford a reasonable bail. Defendant Nayee's failure to post bail may well have been interpreted by the jurors as indicating that the bail was very high, because the court believed that defendant Nayee posed a danger to others. The jurors concerns about defendant Nayee's dangerousness may have caused them to reject the diminished capacity defense.

There was no strategic reason for defense counsel to want defendant Nayee to appear before the jury in prison garb. Indeed, defense counsel expressed concern that, because Nayee was taking several anti-psychotic medications, his physical appearance might prejudice the jurors against him. (4T 3-15 to 7-13) Indeed, defense counsel likened the situation to one in which jurors see a defendant in shackles. (4T 4-17 to 5-1); (Exhibit E), (414a to 416a)

Defense counsel was required to be familiar with the relevant legal principles. Yet counsel's failure to take any

action to protect defendant Nayee from the strong possibility that he would be prejudiced by the jurors' concerns about his incarceration suggests that he was unfamiliar with cases such as State v. Artwell, 177 N.J. 526, 832 A. 2d 295 (2003), State v. Gertrude, supra, 309 N.J. Super. 354, 707 A. 2d 178, and State v. Carrion-Collazo, 221 N.J. Super 103, 534 A. 2d 21 (App. Div. 1987). A lawyer's violation of the duty to apply relevant legal principles constitutes deficient performance.

Trial counsel's failure to request civilian clothing for his client, or to request remedial measures such as a cautionary instruction(s), created strong risk that the jurors verdict would be based on extraneous concern, such as the defendant's dangerousness. Thus, his case was prejudiced. For these reasons, trial counsel was ineffective under the Strickland standard.

Under Strickland, to establish prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 466 U.S. at 694. Nonetheless, "where the deficiencies in counsel's performance are severe and cannot be characterized as the product of strategic judgment, ineffectiveness may be clear." Ultimately, "the relevant question is not whether counsel's choices were strategic, but whether they were reasonable." United States v. Gray, 878 F. 2d 702, 711 (3d

Cir. 1989). Any objective standard of reasonableness requires counsel to understand facts and testimony and adapt to them, even at the expense of purportedly clever theories.

The question relating to a trial court's denial of a reasonable continuance to obtain civilian clothing is significant in light of the devastating effect that a defendant's appearance in prison garb has on the defendant's right to the presumption of innocence and to a fair trial. Federal appellate courts have not applied a uniform standard in determining the reasonableness of an opportunity afforded by a trial court, to a defendant to obtain civilian clothing before the defendant can be compelled to wear prison garb in front of the jury.

Therefore, this Court should the Petition for Certiorari to decide this important question of criminal and constitutional law and to correct the erroneous decision of this Panel in this case. A petition for federal habeas corpus relief may challenge the fact that a defendant was wearing jail-issued clothing when tried. See, Estelle v Williams, supra, 425 U.S. 501; Felts v. Estelle, 875 F. 2d 785 (9th Cir 1989).

POINT TWO

THE PANEL SHOULD HAVE OVERTURNED THE APPELLANT'S DENIAL OF HIS PETITION FOR HABEAS CORPUS BECAUSE HIS CONSTITUTIONAL RIGHTS WERE DENIED, WHEN HE WAS FORCED TO STAND TRIAL BEFORE THE JURY IN PRISON GARB.

The defendant also re-asserts he was denied due process, and trial counsel was ineffective when he was forced to stand trial in prejudicial prison garb. The defendant also alleges his legal counsel was ineffective in permitting him to appear in prison garb at trial. (See ECF 20 at 54); (77a to 100a)

Counsel's failure to object to defendant appearing in prison garb at trial fell below an objective standard of reasonableness, for the following reasons. If such an objection would have been made, then the outcome of the proceeding would have been different to a reasonable probability. The major issue at trial was whether the defendant had the requisite state of mind to be convicted.

Here, there is no doubt that trial counsel failed to object to the violation of the defendant's constitutional right. This substantial constitutional violation was a blatant surrender of one of defendant's Nayee's fundamental constitutional rights. This major trial error could have been easily been prevented, only if trial counsel made a pretrial motion to allow defendant Nayee to appear before the jury in civilian clothing and be free of restraints.

Defendant Nayee also satisfied the prejudice prong of the Strickland standard. There is a reasonable probability that, but for trial counsel's unprofessional errors, the result of the

proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984). Here, there is reasonable probability that the outcome of the trial would have been different.

The Third Circuit opinion also departs from established Third Circuit case law. (Exhibit B) An illustrative case is Gaito v. Brierly, 485 F. 2d 86 (3d Cir. 1973). Here, defendant Gaito appealed from an order of the United States District Court for the Western District of Pennsylvania denying, after an evidentiary hearing, his petition for a writ of habeas corpus. Defendant Gaito's sole contention was that two required appearances before a jury in his prison clothes, deprived him of his Fourteenth Amendment right to due process of law.

At his second trial, it was undisputed that defendant Gaito was transported from the State Correctional Institution at Pittsburgh to the jury selection in his prison garb. This prison garb consisted of matching brown denim shirt and pants, work shoes, and a heavy dark brown corduroy coat. According to the affidavit of a prison official, it was standard policy to take men to court in prison garb unless the court order specified that they were being sent for trial, in which event a suit would normally be furnished. Since defendant's Gaito's court order "only stated that he was to be brought to court," he was not provided with a suit. Consequently, while the jury was being

chosen, the appellant sat in the courtroom in his prison clothes. No objection to this procedure was made on that day by either appellant or his court-appointed attorney.

The next morning, according to defendant Gaito's testimony at the evidentiary hearing, his sister brought his civilian clothes to the prison. However, a prison guard refused to permit him to return to his prison cell to put them on. Then, while he was waiting for his trial to start, the appellant alleges that another prisoner told him about a recent decision from the Eastern District of Pennsylvania, which purportedly held that it was prejudicial error to try a man in his prison clothes.

Based on this information, defendant Gaito himself asked the trial judge to declare a mistrial so that a new jury could be picked. This motion was denied, and appellant's trial began with him dressed in his prison garb in full view of the jury. Several witnesses testified during the morning, and at the lunch recess that Gaito obtained his civilian clothes which he wore for the rest of the trial. He was again found guilty and, after exhausting his state remedies, he filed the present habeas corpus petition.

The order of the District Court denying the writ of habeas corpus was reversed. The case was then remanded to the District Court to issue a writ of habeas corpus, unless the Commonwealth

of Pennsylvania grants defendant Gaito a new trial, within a reasonable period of time to be prescribed by the District Court.

The Third Circuit simply ignored the case of Gaito v. Brierly. In the Gaito case, the lawyer did not object to his client wearing prison clothing either. However, the case was reversed. The Third Circuit simply focused their decision on the lack of prejudice. This rationale overlooked established legal precedence, and the realities of being tried for serious crimes. A jury is much more likely to convict a defendant on serious charges if he is tried while wearing prison clothes.

POINT THREE

THE THIRD CIRCUIT INCORRECTLY OVERLOOKED THE APPELLANT'S INHERENT PREJUDICE OF BEING FORCED TO WEAR PRISON GARB.

The jury's knowledge of appellant Nayee's custodial status, based on his appearance in jail clothes, was impermissible and was inherently prejudicial. Inherent prejudice occurs whenever there is "'an unacceptable risk ..... of impermissible factors coming into play'" in the jury's decision. Holbrook v. Flynn, 475 U.S. 560, 570 (1986). As the reviewing court, this Court must "examine ..... first, whether there was an 'impermissible factor that came into play' and second, whether it posed an unacceptable risk.'" Woods v. Dugger, 923 F. 2d 1454 (11th Cir. 1991), cert. denied, 502 U.S. 953 (1991).

It is well-established that an accused's custodial status is an impermissible factor for the jury to consider in rendering a verdict. The Supreme Court has explained that "prison clothes are an unmistakable indication of the need to separate a defendant from the community at large, and therefore likely to be interpreted as a sign that he is particularly dangerous or culpable." Holbrook v. Flynn, supra, 475 U.S. at 569. The Court concluded that an accused's appearance before the jury at trial in jail clothing is "inherently prejudicial." Id. at 568. See, United States v. DeCoster, 624 F. 2d 196 (D.C. Cir. 1976); (recognizing that trying an accused "in prison attire was inherently prejudicial" and that "actual harm need not be shown"); Hernandez v. Beto, 443 F. 2d 634 (5th Cir. 1971), cert. denied, 404 U.S. 879 (1971); (it is inherently prejudicial for an accused to be tried in prison garb); Brooks v. Texas, 381 F. 2d 619, 624 (5th Cir. 1967); ("inherently unfair to try a defendant for crime while garbed in his jail uniform").

POINT FOUR

THE PETITION FOR CERTIORARI MUST BE GRANTED BASED ON THE GROUNDS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

In present matter, it is submitted the Third Circuit's decision relating to Nayee's two ineffective assistance of counsel claims were governed by the Sixth Amendment of the United States Constitution and "clearly established" by Strickland v.

Washington, supra, 466 U.S. 668, and Williams v. Taylor, 529 U.S. 362 (2000), and it conflicts with other circuits. Richards v. Quarterman, 566 F.3d 553 (5th Cir. 2009)); Crace Herzog, 798 F.3d 840, 849 (9th Cir. 2015); Morris v. California, 966 F.2d 448, 454-55 (9th Cir. 1991);(finding counsel's performance to be deficient because "he had not done his homework" in researching the relevant law.) Breakiron v. Horn, 642 F. 3d 126 (3d Cir. 2011).

In this case, the State courts' decision resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding when the court failed to acknowledge trial counsel's opening statement, testimonies of experts, prosecutor comments, and New Jersey Supreme Court Justice Virginia Long's findings. §2254(d)(2). (Exhibit H)

Also, State courts' decision was contrary to "clearly established" Federal law, U.S. Const., 6th Amend., as determined by the Supreme Court of the United States in Strickland when trial counsel failed to properly research, investigate, and know the point of law and cases pertaining to his own defenses, namely, N.J.S.A. 2C:4-2 and cases relevant to defense. Due to his misunderstanding of the law, he erred and rejected a lesser included offense which would have gave the jury another option, a middle ground. Because of the error, Nayee was prejudiced. He

received a higher sentence under murder, rather than lower sentence under manslaughter, undermining different outcome §2254(d)(1).

Nayee was charged with murder, which requires him to have acted purposely and knowingly. N.J.S.A. 2C:11-3a(1),(2). Nayee did not deny killing Mendez. At the trial, counsel raised two defenses of insanity and diminished capacity, and presented argument and evidence to support the theories. In consideration of these defense counsel in his opening said the following to illustrate his theories.

EVIDENCE IN SUPPORT OF RATIONAL BASIS

1. Trial Counsel's Opening Statement

"We asked you would you have any prejudice or any bias or any notions against mental illness, against psychiatry or against psychiatrist." (Petitioner's Appendix; Vol. 4. 454a, 21-24) "[W]hat you're going to hear from the evidence that there's two components and an event you have to consider. You have to consider the act and you have to consider the mind because the act by itself does not constitute a crime. You're going to hear before someone could be found guilty of a crime you not only consider the act but consider the state of mind." (455a),(Exhibit E)

[T]he State is charging with the act and with the mind. Purposeful or knowing, they're words that have specific legal meaning and significant ..." and your honor will instruct you because you're going to find out through the evidence that people sometimes commit an act because of an evil mind and sometimes people commit an act because of sick mind. (455a to 456a) (Exhibit E)

"You are going to hear that Anil Nayee is suffering, has suffered from sick mind and as result of that sickness he was unable to act purposefully and knowingly then you come to the conclusion that the state and the evidence will show he will not have proven beyond a reasonable doubt the element of the offense, the

act and the mind. You're going to hear, ladies and gentlemen, that Anil Nayee is suffering from severe mental illness. Whether you use the word crazy, whether you use the word mental illness, I doubt at the end of this case after hearing all the evidence you're going to have doubt that he's suffering from a disease of the mind and the disease of the mind you'll hear impact on the testimony as relate to the defense here. (456a), (Exhibit E)

"When we selected you as jurors we discussed insanity and we discussed mental disease or defect. You're going to hear testimony that relates to both of those what is referred to as diminish capacity and insanity, two separate mental considerations that you as jurors are going to have to consider and we will produce evidence that relates to both of these. I'll give you summery right now and I'll give you a more detailed opening as I go along."

"On diminished capacity you will hear testimony from psychiatrists that as a result of the disease of the mind that he suffers he was able to act with purposeful mind as the word is used in law or a knowing mind as that word is used in law you'll also hear that it's the state' burden to prove beyond reasonable double that he doesn't have a mental disease or defect and that the mental disease or defect will not affect the capacity to exercise the mental state. When you hear the psychiatrist talk about that component." (457a, 7-18),(Exhibit E)

Aside from this diminish capacity you'll also hear testimony on the defense of insanity, basically whether as a result of the disease of that mind so mentally sick that you are not able to distinguish right or wrong. (457a to 458a), (Exhibit E)

And you're going to hear psychiatrists. These psychiatrists that you are going to hear about are not psychiatrists that were hired by Mr. Nayee. These are not psychiatrists that were retained by Mr. Nayee. These are psychiatrists will come in and express the opinion that Mr. Nayee is suffering from a mental disorder and they are psychiatrists who are employed by the State of New Jersey. (458a 8-17),(Exhibit E)

He then presented numerous psychiatrists.

2. THE EXPERT(S) MEDICAL TESTIMONIES

Dr. Zomoradi testified, "From my experience and certainty from what the literature says depression doesn't start one day,

it starts gradually, most commonly. And so my assumption when I saw the patient on October 16th is that on October 11th, he wasn't well. That something was going on." (Exhibit F),(641a) She concluded, "My opinion is that he was mentally ill definitely for days, probably weeks prior to days that I saw him." (Exhibit F),(643a)

Dr. Salib testified that Anil Nayee was a patient at the Ann Klein Center for an almost a year, which is more than usual. (Exhibit F), (645a) He concluded, "In condition, for example, like Mr. Nayee, he had major depression with psychotic features ..." (Exhibit F), (651a) He testified that this depressive disorder lasts approximately for about two weeks.

Dr. Jantilal Patel, who was a board certified in psychiatry and neurology, also testified at the trial. Dr. Patel diagnosed Nayee as suffering from a major depressive disorder with psychotic features. Dr. Patel testified that Nayee exhibited symptoms of hallucinations and paranoia. (Exhibit F), (676a to 680a)

Dr. Robert Latimer, a board certified forensic psychiatrist testified on Nayee's behalf. (Exhibit F), (684a) Dr. Latimer concluded that within a reasonable certainty, that on October 11, 2001, Nayee was suffering from a major depression with psychotic features -- a severe mental illness. Nayee devolved into abnormal thinking, abnormal perception, and abnormal behavior. With a

severe major depressive disorder, a person loses control over reality and pain is so sever that he wants to die. Such a person is vulnerable and weak. And this is clinical picture that we all have seen. Not only me, but his treating physicians and practically everybody who came into contact with him." (Exhibit F), (711a)

Dr. Latimer concluded that the command hallucination interfered with Nayee's ability to act knowingly and purposely. Nayee's mental disease interfered with his capacity to understand or appreciate the nature, circumstances and consequences of his acts. He was deprived of consciousness of his acts. Nayee acted impulse created by a psychotic, delusional, and hallucinatory illness. He lacked the capacity to know that what he was doing was wrong because his actions were compelled by imaginary voices. He also testified that Nayee was acting under throws of a psychotic episode and as result of that he was unable to understand the nature, the circumstances surrounding it and consequences of act. (Exhibit F), (716a to 718a)

Dr. Howard Gilman, a forensic psychiatrist, testified that on October 11, 2001, Nayee was suffering from a Major Depressive Disorder classified in DSM-IV as Axis I. 9 (Exhibit G), (828a to 829a)

3. THE PROSECUTOR'S STATEMENT

The Prosecutor also presumed the possibility that Nayee may have been able to resist the command hallucination when asked Dr.

Latimer about whether there was an irresistible impulse to kill Mendez. (178a and 718a), (Exhibit F) The notion that Nayee may have been able to resist the command hallucination; but failed to do so, clearly demonstrated that Nayee acted recklessly.

4. JUSTICE VIRGINIA LONG OF NEW JERSEY SUPREME COURT's FINDINGS.

On September 20, 2007, Honorable Virginia A. Long granted Nayee's Petition for Certification to the New Jersey Supreme Court. She limited the issues on the Petition of Certification solely "to the issue of the trial court's refusal to consider the record before it regarding defendant's mental illness." as mitigating factor for sentencing purposes. State v. Nataluk, 316 N.J. Super. 336, 720 A. 2d 401, (1998). (101a to 102a), (Exhibit H)

On June 14, 2006, Nayee raised his ineffective assistance of counsel claims on direct appeal therefore under AEDPA Strickland was clearly established law, then. (84a) See, State v. Quixal, supra, 431 N.J. Super. 502, 513, 70 A. 3d 749; (If however, the issue of ineffective assistance of counsel can be determined on the trial record alone, it is appropriately raised and disposed of either on a new trial motion or on direct appeal); Rules Governing the Courts of New Jersey (2018 Edition Pressler & Verniero) at page 1218.

During the PCR hearing on January 19, 2023, the Honorable Alan Rockoff, J.S.C. addressed Nayee's ineffective assistance of counsel claim respect to counsel's rejecting lesser included

offense as follows:

> It's speaking about another issue concerning the failure to request a charge for lesser included offense for aggravated manslaughter as oppose to charge given, the charge of murder. It said that, as the failure to request a charge on lesser included offense of aggravated manslaughter, the defendant's charge of ineffective assistance of counsel on this point, is not matter that can be resolved on the record on direct appeal. It is more appropriately addressed if at all, on a petition for Post Conviction Relief at 24.
>
> So the ... that same reasoning would apply to this jury taint issue. That it is a collateral issue, concerning effective assistance of counsel and not a direct appealable issue. And therefore, the action of the Appellate Division, or the action of the Appellate counsel in this case in not raising that issue -on direct appeal, is not sufficient to overcome the Strickland rule, the Strickland test of deficiency as well as prejudice -- not having been found in this case. Okay, that's full record Thank you." at 38-42. (Exhibit I)

Based on the record, Nayee contends that in evaluating Nayee's ineffective assistance of counsel claim(s) the panel misapplied Strickland, rational basis test, N.J.S.A. 2C:4-2 and relevant case law.

In this case, the court asked counsel whether it should instruct the jury regarding lesser-included manslaughter offenses. Defense counsel declined the charge, and the court chose not instruct the jurors on manslaughter. The court and the counsel said that there was no basis for such charge. But on this record the court had an obligation to provide the manslaughter charges *sua sponte* regardless of whether defense counsel wanted it, see State v. Rivera, 205 N.J. 472, 16 A. 3d 352 (N.J. 2011),

and the absence of that charge violated Nayee's rights to a fair jury trial and due process. See, United States v. Creamer, 555 F. 2d 612, 616 (7th Cir. 1977); (defendant is entitled to have a jury instruction on any defenses which has "some foundation. "even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility.")

The Fifth Circuit has opined, however, that:

> If the trial judge evaluates or screens the evidence supporting a proposed defense, ... and upon such evaluation declines to charge on that defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect ... the trial judge directs a verdict on that issue against the defendant. Strauss v. United States, 376 F. 2d 416 (5th Cir. 1967). Since the result is trial by the judge, rather than trial by a jury, both Sixth Amendment and Due Process rights may be at issue. Zemina v. Solem, 573 F. 2d 1027 (8th Cir. 1978), affirming and adopting Zemina v. Solem , 438 F. Supp. 455 (S.D. 1977).

Here, rational basis existed in the trial record to warrant lesser included offense. Thus, the State court decision resulted in an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. §2254(d)(2).

A. TRIAL COUNSEL FAILED TO RESEARCH, INVESTIGATE, AND BECOME FULLY COGNIZANT WITH THE RELEVANT LAW FOR THE CASE.

The defense of diminish capacity pursuant to N.J.S.A. 2C:4-2 and relevant case law also supported lesser included offense. However, trial counsel's misunderstanding of the law led counsel to reject lesser included offense.

The defense of diminished capacity, in accord. N.J.S.A. 2C:4-2, states in pertinent part:

> "Evidence that the defendant suffers from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is element of the offense. In the absence of such evidence, ... which would negate a state of mind which is element of the offense."

In State v. Galloway, 133 N.J. 631, 647, 628 A. 2d 735 (1993), the purpose of the N.J.S.A. 2C:4-2 defense, and the scope of defense explained that "all mental deficiencies, including conditions that cause a loss of emotional control may satisfy the diminish capacity defense if the record shows that experts in the psychologist field believe that kind of mental deficiency can effect a person's cognitive faculties, and the record contains evidence that the claimed deficiency did affect the defendant's capacity to form the mental state necessary for the commission of the crime. State v. Harris, 141 N.J. 525, 555, 662 A. 2d 333 (1995)). Here, multiple experts diagnosed that Nayee suffering from major depressive disorder with psychotic features.

Dr. Latimer testified that Nayee heard the command hallucinations after he walked Mendez to car, and acted upon it (714a), but Nayee had allowed himself to become capable of killing Mendez as a result of his reckless actions before he heard the command hallucination. The prosecutor also presumed the possibility that Nayee may have been able to resist the command hallucination when he asked Latimer about whether there was an

irresistible impulse to kill Mendez. (718a) The notion that Nayee may have been able to resist the command hallucination, but Failed to do so, demonstrated the possibility of that Nayee acted recklessly.

In State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987), State v. Washington, 223 N.J. Super. 367, 538 A. 2d 1256 (App. Div. 1988), and State v. Junita, 224 N.J. Super. 711, 541 A.2d 284 (1988), the Courts found that manslaughter should be charged as a lesser-included offense of murder, and in none of those cases did expert or other witness apparently express an opinion that the defendant acted recklessly or was capable of acting recklessly, and each of those cases was somewhat similar to Nayee's. Therefore, counsel's ignorance of the law was evident that expert had to express an opinion that Nayee acted recklessly.

In the present case, as in Ramseur, Junita, Washington, Serrano, and there was evidence that the defendant killed the decedent during a psychotic episode during which, according to defense experts, he was unable to act knowingly or purposefully. (Exhibit F), (716a-718a) Just as aggravated and reckless manslaughter were applicable lesser-included offenses in those cases, because Nayee's inability to act knowingly did not necessary preclude the possibility that he acted recklessly, they were applicable here. (Exhibit F), (716a to 718a)

In Ayestas v. Davis, 933 F. 3d 384 (5th Cir. 2019), the

defendant had made a strong showing that trial counsel was deficient "It is unquestioned that under the prevailing professional norm at the time of [Ayestas'] trial, counsel had an obligation to conduct a thorough investigation of [his background." Porter v. McCollun, 558 U.S. 30, 39, 130 S. Ct. 447, 175 L. Ed. 2d 398(2009). With even minimal investigation by trial counsel, at least one may well have, as this Court held that evidence of mental illness and substance abuse is relevant to assessing moral culpability. See, Rompilla v. Beard, 545 U.S. 374 (2005). Failure to thoroughly research, investigate, and know the laws such as N.J.S.A. 2C:4-2, N.J.S.A. 2C:1-8(e) rational basis and cases cited herein attest counsel's ignorance and misunderstanding of the law. Under New Jersey law, Nayee was entitled to manslaughter charge if counsel had requested one because the charge was supported by the evidence. N.J.S.A. 2C:1-8(e) Breakiron v. Horn, supra, 642 F. 3d 136; 2011 U.S. App. LEXIS 7885 (3rd Cir. 2011) Here, it was an error on part of the trial counsel when he rejected the lesser included offense since it was consistent with the defense(s) Richards v. Quarterman, supra, 566 F.3d 553, 569-70.

The Supreme Court has repeatedly noted that where an attorney demonstrated ignorance of law, his or her performance falls below "the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); see also Hinton v. Alabama, 571 U.S.

263, 274, 134 S. Ct. 1081, 188 L. Ed. 2d (2014); ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is quintessential example of unreasonable performance under Strickland.").

Where it comes to advising on jury instructions, defense counsel's performance will consider deficient when his or her "error with jury instruction were not strategic decision to forgo one defense in favor of another." but instead "the result of misunderstanding of law." United States v. Span, 75 F. 3d 1383, 1390 (9th Cir. 1996); White v. Ryan, 895 F. 3d 641, 666 (9th Cir. 2018); ("A decision [by counsel] based on a misunderstanding of law is not sound trial strategy."). Where a trial attorney makes such a decision based on a misunderstanding of the law, rather than a strategic calculation-that decision "receives no deference." Crace v. Herzog, 798 F. 3d 840, 852 (9th Cir. 2015). United States v. Alferahin, 433 F. 3d 1148, 1161 (9th Cir. 2006); (finding deficient performance where attorney "did not intent strategically to forgo the materiality instruction" but instead "had no idea that such an instruction was available to his client as 13 matter of right"). Clearly, counsel's advise, based on his misapprehension of law, was deficient under the first prong of Strickland. See, Ruiz v. Spearman, 2020 US Dist. LEXIS 143009 (N.D. Cal. 2020); see also Everett v. Beard, 290 F. 3d 500, 513-14 (3rd Cir. 2002); (wherein counsel was ineffective for

failing to object to jury instruction due to lack of knowledge of applicable law.)

Here, counsel's misunderstanding of the law due to his failure to thoroughly research, investigate, and know the point of law fundamental to his defense "fell below objective standard of reasonableness. Strickland. Nayee was also prejudiced by counsel's error and his deficient performance. He received a 50 year term, with a 85% stip, oppose to 10 to 30 years if he was found guilty of manslaughter. Had the counsel requested a lesser-included offense, there was a likelihood of a different outcome based on the evidence. Lafler v. Cooper, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398, (2012).

In New Jersey, to be convicted of manslaughter, defendant must have acted recklessly. N.J.S.A. 2C:11-4a and b(1). N.J.S.A. 2C:11-3. states: a. Except as provided in N.J.S.A. 2C:11-4, criminal homicide constitutes murder when (1) The actor purposely causes death or ..... or (2) The actor knowingly causes death or ... death. Under the New Jersey law, serious bodily injury (SBI) murder involves a higher degree of culpability than does aggravated manslaughter. To be guilty of SBI murder, the defendant must have knowingly or purposely inflicted serious bodily injury ....

To be found guilty of aggravated manslaughter under N.J.S.A. 2C:11-4(a) of manslaughter under N.J.S.A. 2C:11-4b(1), a person acts "recklessly" found to have acted recklessly within the

intend of N.J.S.A. 2C:11-4a and 4b(1) when he "consciously disregard a substantial and unjustifiable risk" that the death will result from his conduct. Also see N.J.S.A. 2C:2-2.

Under, N.J.S.A. 2C:11-3b a murder, the statue provides three sentences: (1) 30 years without parole, (2) a specific term of years between 30 years and life imprisonment, with 30 years required to be served before the person is eligible for parole; and (3) life imprisonment without parole. In contrast, under, 2C:11-4 manslaughter, a defendant may be sentenced presentment of between 10 and 30 years. State v. Clark, 255 N.J. Super. 14, 604 A. 2d 609 (App. Div. 1992) In Lafler v. Cooper, supra, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398, the Supreme Court held the inmate suffered prejudice based on the likelihood that outcome would have been different, since the inmates sought relief based on a failure to meet a legal standard rather that application of an incorrect legal principle.

In the Lafler case, [t]he prosecution offered to dismiss two of the charges and to recommend a 51-85 month sentence. At trial, he was convicted on all counts and received a mandatory minimum 185-to-360-sentence. Finding that the state appellate court had unreasonably applied the constitutional effective assistance standard laid out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. 2d 674, and Hill v. Lockhart, supra, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203.

Defendant Nayee here has clearly demonstrated evidence

supporting the charge. However, the trial court and trial counsel erroneously concluded that there was no rational basis. Importantly, due to misunderstanding, trial counsel was ineffective because he uprooted his own defenses when he rejected the lesser included offense. For the reasons stated herein, the State court's decision, with respect to Nayee's two ineffective assistance claims, resulted in a decision that was contrary to Federal law. U.S. Const., 6th Amend. and "clearly established" in Strickland, 28 U.S.C. §2254(d)(1), and the State court's decision was based on an unreasonable determination of the evidence presented in the State court proceeding. 28 U.S.C. §2254(d)(2).

It is submitted that the Petition for Certiorari must be granted because this case involves a question of exceptional importance- whether (1) Nayee was fundamentally denied his constitutionally protected right to effective assistance of counsel?; (2) the State decision resulted in unreasonable determination of facts in light of the evidence presented in State court proceeding; and (3) did the panel erred in evaluating Nayee's ineffective assistance claims? Fed. R. App. P. 35(a)?

For the foregoing reasons, defendant Nayee prays this Court grant his application for a Petition for Certiorari.

CONCLUSION

For the foregoing reasons, the defendant submits that he has clearly established the grounds in his Petition for Certiorari. His constitutional rights were deprived, and the Third Circuit ignored well establish legal precedence.

/s/ Theodore Sliwinski, Esq. **Date: 12/30/2023**

By: THEODORE SLIWINSKI, ESQ.
ATTORNEY FOR PETITIONER

Date: 12/30/2023

CERTIFICATE OF COMPLIANCE

I hereby certify that I am the attorney for the appellant Anil Nayee, and that I am filing the attached brief for the appellant, and (1) This brief complies with the word limits of Rule 32(a)(7)(B) and (C). I use the program Word Perfect Version 20 and the word count of this document is 8291.

(2) This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared using a Word Perfect 20 world-processing systems and it is in a proportionally-spaced typeface, namely Courier New, that it is at least 12 points;

(3) The text of the electronic PDF brief is identical to the text of the paper copies of the brief; and

(4) The electronic PDF brief has been automatically scanned upon creation and upon e-mail transmission by a virus detection program, namely Windows Defender; and

(5) The hard copies of the brief and appendix will be shortly mailed to the Clerk of the Supreme Court after the Petition for Certiorari is electronically filed.

/S/ Theodore Sliwinski, Esq.

By: THEODORE SLIWINSKI, ESQ.
ATTORNEY FOR PETITIONER

DATE: 12/30/2022

CERTIFICATE OF SERVICE

1. I hereby certify that service of the foregoing Petition for Certiorari and the appendix was made, by first-class mail, prepaid upon;

Nancy Hullet, Esq.
Middlesex County Prosecutor
25 Kirpatrick Street
3rd Floor
New Brunswick, NJ 08901

2. I herein certify that these statements made by me are true, and are made under the penalties of perjury.

/S/ Theodore Sliwinski, Esq.

By: THEODORE SLIWINSKI, ESQ.
ATTORNEY FOR PETITIONER

DATE: 12/30/2023

No.

IN THE SUPREME COURT OF THE UNITED STATES

ANIL NAYEE,

PETITIONER,

V.

THE ADMINISTRATOR OF THE NEW JERSEY STATE PRISON; THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

RESPONDENTS.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FROM THE THIRD CIRCUIT

APPENDIX FOR PETITION FOR A WRIT OF CERTIORARI

VOLUME ONE

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INDEX TO APPENDIX

VOLUME ONE

VOLUME TWO

VOLUME THREE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2022

ANIL NAYEE,
Appellant

v.

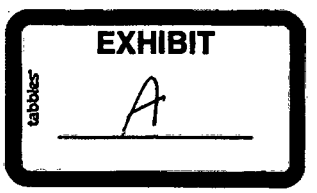
ADMINISTRATOR NEW JERSEY STATE PRISON;
ATTORNEY GENERAL NEW JERSEY

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 3-15-cv-01288)
District Judge: Honorable Peter G. Sheridan

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
March 31, 2023

Before: MATEY, FREEMAN, and FUENTES, *Circuit Judges*.

JUDGMENT



This cause came to be considered on appeal from the United States District Court for the District of New Jersey and was submitted under Third Circuit L.A.R. 34.1(a) on March 31, 2023. On consideration whereof, it is now hereby **ORDERED** and **ADJUDGED** by this Court that the order of the District Court entered April 23, 2021, is hereby **AFFIRMED**. Costs will not be taxed.

All of the above in accordance with the Opinion of this Court.

ATTEST:

s/Patricia S. Dodszuweit
Clerk

DATED: July 27, 2023

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
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July 27, 2023

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RE: Anil Nayee v. Administrator New Jersey State, et al
Case Number: 21-2022
District Court Case Number: 3-15-cv-01288

ENTRY OF JUDGMENT

Today, **July 27, 2023** the Court entered its judgment in the above-captioned matter pursuant to Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

A party who is entitled to costs pursuant to Fed.R.App.P. 39 must file an itemized and verified bill of costs within 14 days from the entry of judgment. The bill of costs must be submitted on the proper form which is available on the court's website.

A mandate will be issued at the appropriate time in accordance with the Fed. R. App. P. 41.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,

Patricia S. Dodszuweit, Clerk

By: Stephanie
Case Manager
Direct Dial 267-299-4926

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2022

ANIL NAYEE,
Appellant

v.

ADMINISTRATOR NEW JERSEY STATE PRISON;
ATTORNEY GENERAL NEW JERSEY

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 3-15-cv-01288)
District Judge: Honorable Peter G. Sheridan

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
March 31, 2023

Before: MATEY, FREEMAN, and FUENTES, *Circuit Judges*.

(Filed July 27, 2023)

OPINION*

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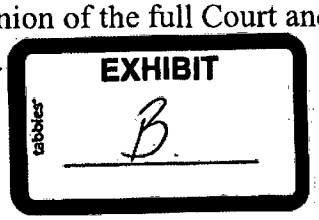
* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.



MATEY, *Circuit Judge.*

Nayee killed his ex-girlfriend in 2001. Following his arrest, Nayee was involuntarily committed to a mental health facility for psychiatric care. He was diagnosed with major depressive disorder and prescribed antidepressant and antipsychotic medications. At trial, Nayee presented expert testimony to support his defense that mental defects prevented him from forming the requisite intent for murder. The jury disagreed and convicted Nayee on all charges, including murder, resulting in a 50-year sentence.

After unsuccessfully appealing his conviction, Nayee petitioned for a writ of habeas corpus. The District Court denied the petition but issued a certificate of appealability on two issues: whether Nayee was denied due process and effective assistance of counsel 1) by appearing in a correctional uniform at trial, and 2) by his attorney's failure to request, and the trial court's failure to charge, a jury instruction on the lesser included offense of manslaughter. Finding no error, we will affirm.[1]

I.

Because the District Court denied Nayee's habeas petition without an evidentiary hearing, we exercise plenary review over its decision. *Adamson v. Cathel*, 633 F.3d 248, 254 (3d Cir. 2011). A state prisoner is entitled to habeas relief only if he is held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). But relief is unavailable when a petitioner's claims were previously decided on the merits in state court proceedings, unless adjudication of the claim resulted

[1] The District Court had jurisdiction under 28 U.S.C. § 2254(a). We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(a).

in a decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d).

A. Attire

Nayee argues he was denied a fair trial because he appeared before the jury wearing a prison uniform. Not so. While a defendant cannot be compelled "to stand trial before a jury while dressed in identifiable prison clothes, the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." *Estelle v. Williams*, 425 U.S. 501, 512–13 (1976).

Nayee's attorney made "no objection" to his client's jail attire during trial, App. 415, despite being "fully conscious" of the attire issue, *Estelle*, 425 U.S. at 510. Indeed, the assistant prosecutor asked about Nayee's clothing during trial proceedings. App. 415 ("Judge, just one issue. . . . [Nayee's attorney] has no objection to [Nayee] showing up [in prison garb]. I don't know what the Court's position is, however."). But Nayee's attorney said his client had no civilian clothing available.[2] And even if he did, Nayee's counsel explained he had no concerns, given that facts adduced at trial would reveal Nayee was incarcerated. Nothing in the record "warrants a conclusion that [Nayee] was

[2] On appeal, Nayee claims that, while his family was willing to provide civilian clothing for trial, "he was not made aware of his rights" to wear such clothing. Reply Br. 8. But that fact fails to prove the "compulsion necessary to establish a constitutional violation." *Estelle*, 425 U.S. at 513.

compelled to stand trial in jail garb," and the District Court properly denied his due process claim.[3] *Estelle*, 425 U.S. at 512.

Nor can Nayee succeed on his ineffective assistance claim. To do so, Nayee must show that 1) his counsel's performance was deficient, such that it "fell below an objective standard of reasonableness," and 2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). We presume that an attorney's performance "falls within the wide range of reasonable professional assistance." *Id.* at 689. And we demand "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Nayee claims his attorney was ineffective for allowing Nayee to appear in prison garb during trial, for failing to ensure he had civilian clothing available, and for failing to request other remedial measures, such as cautionary jury instructions.[4] But even if

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[3] "Nor can the trial judge be faulted for not asking" Nayee "whether he was deliberately going to trial in jail clothes." *Estelle*, 425 U.S. at 512. Though New Jersey courts have held that "criminal defendants appearing for a jury trial in prison garb should be personally questioned by the trial judge concerning their desire to relinquish the right to appear in civilian clothing," they have not held that personal questioning is a constitutional requirement. *State v. Carrion-Collazo*, 534 A.2d 21, 26 (N.J. Super. Ct. App. Div. 1987); *State v. Gertrude*, 707 A.2d 178, 179 (N.J. Super. Ct. App. Div. 1998) (describing *Carrion-Collazo* as establishing "protective procedures to be followed" in future cases). And "[i]nsofar as [Nayee] simply challenge[s]" the application of New Jersey caselaw, he "allege[s] no deprivation of federal rights and may not obtain habeas relief." *Engle v. Isaac*, 456 U.S. 107, 119 (1982).

[4] The District Court found this claim unexhausted but denied it on the merits as not colorable. 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."); *Carpenter v. Vaughn*, 296 F.3d 138, 146 (3d Cir. 2002) (stating that federal courts can "deny an unexhausted claim on the merits if

counsel's performance was deficient, Nayee has not shown that the deficiency prejudiced him. *See Harrington v. Richter*, 562 U.S. 86, 112 (2011) ("The likelihood of a different result must be substantial, not just conceivable." (citation omitted)). The trial judge properly instructed the jury on the presumption of innocence. And Nayee himself conceded that he killed the victim, leaving his state of mind as the critical issue during trial. So no reasonable probability existed that Nayee "would not have been convicted . . . had he appeared in civilian clothes." *Hill v. Mitchell*, 400 F.3d 308, 320–21 (6th Cir. 2005) (rejecting ineffective assistance claim by defendant wearing prison garb when "jury learned from the outset" of trial that defendant had confessed to killing victim).[5]

B. Jury Instruction

Additionally, Nayee claims his constitutional rights were violated when the trial court failed to instruct the jury on the lesser included offense of manslaughter. But he points to no "clearly established Federal law, as determined by the Supreme Court," requiring such an instruction in this case. 28 U.S.C. § 2254(d)(1); *see McMullan v. Booker*, 761 F.3d 662, 667 (6th Cir. 2014) (stating the Supreme Court "has never held that the Due Process Clause requires instructing the jury on a lesser included offense in a

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it is perfectly clear that the applicant does not raise even a colorable federal claim" (citation and quotation marks omitted)).

[5] Nayee also challenges the trial judge's failure to issue cautionary jury instructions regarding the prison garb and to specifically address the attire issue during voir dire. But no authority supports the argument that the omissions amounted to a "violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

non-capital case" (citation omitted)). *See also Beck v. Alabama*, 447 U.S. 625, 638 & n.14 (1980) ("We need not and do not decide whether the Due Process Clause would require the giving of such instructions in a noncapital case."). So Nayee has demonstrated no entitlement to habeas relief on this claim.

Nor was Nayee deprived of effective assistance when his attorney declined to request the lesser included offense instruction.[6] Both counsel and the trial judge agreed "there [wa]s no rational basis in the evidence" presented for a manslaughter charge, App. 32, because the evidence failed to show Nayee "acted in a reckless manner," App. 37. Indeed, Nayee's attorney said a manslaughter charge and its requisite elements would not square with "the defense's theory" of the case. App. 31. So counsel and the trial judge both concluded there was insufficient "evidence in the record from which" a jury could have found a lesser degree of homicide. *McKernan v. Superintendent Smithfield SCI*, 849 F.3d 557, 567 (3d Cir. 2017). In other words, Nayee cannot demonstrate he was prejudiced by counsel's decision, as there was no "reasonable probability that the jury would have convicted [Nayee] of [manslaughter] only and not of [murder] if counsel had requested the [manslaughter] instruction." *Breakiron v. Horn*, 642 F.3d 126, 138 (3d Cir. 2011). Nayee has not shown "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

[6] As with Nayee's ineffective assistance claim regarding his trial attire, the District Court found this claim unexhausted but denied it on the merits as not colorable.

II.

For these reasons, we will affirm the judgment of the District Court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2022

ANIL NAYEE,
Appellant

V.

ADMINISTRATOR NEW JERSEY STATE PRISON;
ATTORNEY GENERAL NEW JERSEY

On Appeal from the United States District Court
for the District of New Jersey
(No. 3-15-cv-01288)
District Judge: Honorable Peter G. Sheridan

SUR PETITION FOR REHEARING

BEFORE: CHAGARES, *Chief Judge*, and JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, FUENTES*, *Circuit Judges*

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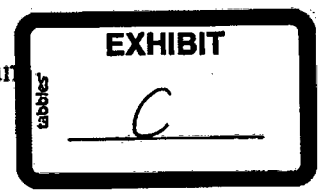
* Judge Fuentes' vote is limited to par



The petition for rehearing filed by appellant Anil Nayee in the above-captioned matter has been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the Court in regular active service. No judge who concurred in the decision asked for rehearing, and a majority of the circuit judges of the Court in regular active service who are not disqualified did not vote for rehearing by the Court en banc. It is now hereby **ORDERED** that the petition is **DENIED**.

BY THE COURT

s/ Paul B. Matey
Circuit Judge

Dated: September 18, 2023
Sb/cc: All Counsel of Record

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 21-2022

ANIL NAYEE,
Appellant

v.

ADMINISTRATOR NEW JERSEY STATE PRISON;
ATTORNEY GENERAL NEW JERSEY

(D.C. No. 3-15-cv-01288)

Present: MATEY, Circuit Judge

1. Motion by Appellant Anil Nayee to File Supplemental Pro Se Petition in Support for Rehearing and/or En Banc Rehearing

2. Motion by Appellant Anil Nayee to File Second Petition for a Rehearing En Banc Out of Time

Respectfully,
Clerk/sb

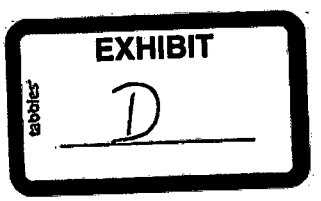
ORDER

The foregoing motion is **DENIED**.

By the Court,

s/ Paul B. Matey
Circuit Judge

Dated: October 3, 2023
Sb/cc: All Counsel of Record
Anil Nayee



Additional material from this filing is available in the Clerk's Office.