

No. _____

In The
Supreme Court of the United States

ANGEL MEDINA,

Petitioner;

V.

ADMINISTRATOR NEW JERSEY STATE PRISON, ET AL.,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Angel Medina #543089/190758C
New Jersey State Prison
P.O. Box 861
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QUESTIONS PRESENTED

I. Whether the Rule of Equity Created in Martinez v. Ryan and Trevin v. Thaler apply in State Postconviction Relief Proceedings so as to Prevent the Procedural Default of Claims of Ineffective Assistance of Trial Counsel.

II. Whether Petitioner was Denied the Effective Assistance of Postconviction Counsel.

III. Whether Petitioner was Denied the Effective Assistance of Trial Counsel.

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The United States District Court of New Jersey denied petitioner's petition for a writ of habeas corpus in an Order dated March 15, 2017.....Pa-1)

The United States District Court of New Jersey denied Petitioner's petition for a writ of habeas corpus in an Opinion dated March 15, 2017.....Pa-2)

The United States Court Of Appeals for the Third Circuit filed an order on December 18, 2017, denying petitioner's petition for a rehearing En Banc.....Pa-27)

JURISDICTION

The Third Circuit entered its order denying the Petitioner's notice of appeal and did not consider the petition for a Certificate of Appealability, which served as the court's judgment, on July 19, 2017. Thereafter, on August 28, 2017, the Third Circuit denied a timely petition for rehearing and rehearing en banc. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the Circuit Court's decision on a writ of certiorari.

CONSTITUTIONAL PROVISION INVOLVED

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner Angel Medina was indicted in Essex County under Indictmen No. 07-09-3165. He was charged with murder; unlawful possession of weapon; possession of a weapon for unlawful purpose.

The Petitioner was convicted of all counts. Thereafter on January 6, 2006, Petitioner was sentenced to an aggregate sentence of 40 years with a 35 years parole disqualifier.

In February 2016, Petitioner filed a petition for a writ of habeas corpus. This petition raised seventeen grounds: **GROUND ONE:** The Defendant was deprived His Constitutional Right to testify on His own Behalf, in Violation of His Fourteenth Amendment Right to Due Process of Law; **GROUND TWO:** Defendant was Denied His Fourteenth Amendment Right to Effective Assistance of Counsel on Appeal; **GROUND THREE:** The Defendant's Motion for Post-Conviction Relief Should Not be Barred by Procedural Consideration, this Violated Defendant's Fourteenth Amendment Right to Due Process of Law; **GROUND FOUR:** The Cumulative Effect of the Errors Complained of Rendered the Trial Unfair, Violating Petitioner's Constitutional Right to a Fair Trial; **GROUND FIVE:** The Trial Court Denied the Defendant His Constitutional Rights to Fair Trial by an Impartial Jury and His Due Process Right to Fair Trial by permitting a Witness to Testify in Prison Garb and Shackles During Trial, this Violated Petitioner's Right to Due Process, and Equal Protection of the Law as Guaranteed by the United States Constitution, and the Fourteenth Amendment; **GROUND SIX:** The Trial Court Denied the Defendant His Constitutional

Rights to a Fair Trial by an Impartial Jury and His Due Process Right to Fair Trial Because the Court Failed to Provide a Limited Instruction to the Jury, this Violated Petitioner's Right to Due Process, and Equal Protection of the Law as Guaranteed by the United States Constitution, and the Fourteenth Amendment; **GROUND SEVEN:** The Trial Court Denied the Defendant His Rights to a Fair Trial by an Impartial Jury and His Due Process Right to Fair Trial Because of Disjointed Trial Proceedings, this Violated Petitioner's Right to Due Process, and Equal Protection of the Law as Guaranteed by the United States Constitution, and the Fourteenth Amendment; **GROUND EIGHT:** Petitioner was Denied the Effective Assistance of Trial Counsel, this Violated Petitioner's Right to Due Process, and Equal Protection of the Law as Guaranteed by the United States Constitution, and the Fifth, Sixth and Fourteenth Amendment; **GROUND NINE:** An Evidentiary Hearing was Required on All Issues/Allegations Petitioner Presented to the Lower Court on His Post-Conviction Relief Petition, this Violated Petitioner's Right to Due Process, and Equal Protection of the Law as Guaranteed by the United States Constitution, and the Fifth, Sixth and Fourteenth Amendment; **GROUND TEN:** Petitioner PCR Counsel was Never Able to Thoroughly Investigate Petitioner's Case, Because Trial Counsel Lost Petitioner's Trial Files "Discovery," this Violated Petitioner's Right to Due Process, and Equal Protection of the Law as Guaranteed by the United States Constitution, and the Fifth, Sixth and Fourteenth Amendment; **GROUND ELEVEN:** The Sequential "Acquit First" Jury Instructions and those Contained on the

Verdict Sheet Told the Jury, In Direct Violation of State v. Coyle, 119 N.J. 194 (1990), to Deliberate on Passion/Provocation Manslaughter only After Finding Defendant not Guilty of Murder, this Violated Petitioner's Right to Due Process, and Equal Protection of the Law as Guaranteed by the United States Constitution, and the Fourteenth Amendment; **GROUND TWELVE:** The Trial Judge Improperly Placed Upon Defendant the burden of Disproving the Reason for the Defendant's Alleged Flight, this Violated Petitioner's Right to Due Process, and Equal Protection of the Law as Guaranteed by the United States Constitution, and the Fourteenth Amendment; **GROUND THIRTEEN:** The Trial Judge Erred in Not Asking the Jurors if Further Deliberation would Help Resolve Their Deadlock, Resulting in a Unanimous Guilty Verdict, Which was Returned After they were sent to Deliberate Further, this Violated Petitioner's Right to Due Process, and Equal Protection of the Law as Guaranteed by the United States Constitution, and the Fifth, Sixth and Fourteenth Amendment; **GROUND FOURTEEN:** Petitioner's Petition for Post-Conviction Relief was Improperly Denied, Violating Petitioner's Right to Due Process, and Equal Protection of the Law as Guaranteed by the United States Constitution, and the Fourteenth Amendment; **GROUND FIFTEEN:** The PCR Court Applied an Improper Legal Standard, Violating Petitioner's Right to Due Process, and Equal Protection of the Law as Guaranteed by the United States Constitution, and the Fourteenth Amendment; **GROUND SIXTEEN:** Defense Counsel Rendered Ineffective Assistance of Counsel by Failing to protect Defendant's Rights on Appeal, this Violated Petitioner's Right to

Due Process, as Guaranteed by the United States Constitution, and the Fifth, Sixth and Fourteenth Amendment; **GROUND SEVENTEEN:** Cumulative Errors by Trial and Appellate Counsel Amounted to Ineffective Assistance of Counsel, this Violated Petitioner's Right to Due Process, as Guaranteed by the United States Constitution, and the Fifth, Sixth and Fourteenth Amendment.

On April 7, 2017, the district court denied the petition for a writ of habeas corpus. Medina v. Johnson, No. 17-1975 (SDW), slip opinion.

REASONS WHY CERTIORARI SHOULD BE GRANTED

Point I

Reasonable Jurists Could Disagree with the District Court's Ruling that The Trial Court did not Deny the Defendant His Constitutional Rights to a Fair Trial by an Impartial Jury and His Due Process Right to Fair Trial Because the Trial Court Failed to Provide a Limited Instruction to the Jury.

The necessity of a limiting instruction can not be denied in the face of case law which mandates that such an instruction be given. As such, counsel's deficiency in this regard is inexcusable, and can not be explained away, as there was nothing strategic about counsel's actions. See State v. G.V., 162 N.J. 252, 262 (2000), finding a limiting instruction that was given, insufficient, and noting that where the relevance of the evidence is very narrow, such relevance must be carefully explained by the trial court. The limiting instruction should be given even if it is not requested by the prejudiced party. See also, State v. Clausell, 121 N.J. 298, 323 (1990).

The instruction should also "explain precisely the permitted and prohibited purposes of the evidence, with sufficient reference to the factual context of the case to enable the jury to comprehend and appreciate the fine distinction to which it is required to adhere." State v. Marrero, 148 N.J. 469 (1997).

"So critical is the need for accuracy that erroneous instructions on material points are presumed to be reversible State v. Martin, 119 N.J. 2, 15, 573 A.2d 1359 (1990); see State v. Weeks, 107 N.J. at 410, 526 A.2d 1077; State v. Grunow, 102 N.J. 133, 148, 506 A.2d 708 (1986). We have recently reiterated

the point that '[c]lear and correct jury charges are essential for a fair trial.' State v. Cook, 300 N.J. Super 476, 488, 693 A.2d 483 (App. Div. 1996) (quoting State v. Brown, 138 N.J. 481, 522, 651 A.2d 19 (1994)). The Supreme Court has said that incorrect instructions of law 'are poor candidates for rehabilitation under the harmless error theory.' State v. Weeks, 107 N.J. at 410, 526 A.2d 1077 (citing State v. Warren, 104 N.J. 571, 518 A.2d 218 (1986)). Also see State v. Harrington, 310 N.J. Super 272, 277 (1998).

"Accurate and understandable jury instruction in criminal cases are essential to a defendant's right to a fair trial. State v. Concepcion, 111 N.J. 373, 379, 545 A.2d 119 (1988). Consequently, a trial court's failure to charge a jury on an element of an offense is presumed to be prejudicial error, even in the absence of a request by defense counsel. State v. Federico 103 N.J. 169, 176, 510 A.2d 1147 (1986). So paramount is the duty to insure a fair trial that a jury must deliberate in accordance with correct instruction even when such instructions are not requested by counsel. State v. Grunow, 102 N.J. 133, 148, 506 A.2d 708 (1986); see also State v. Rhett, 127 N.J. 3, 601 A.2d 1359 (1990).

In the present case, the Petitioner was denied his due process and equal protection rights to a fair trial because of the improper jury instructions, specifically due to one of the State's witnesses Ferming Wilson, were allowed to testify before the jury in prison garb and shackles and trial court failed to give or provide a limiting instruction relating thereto.

The Petitioner also argued that the trial court abused its discretion by not advising the defense or the State of the court's upcoming vacation, which caused the defense to suffer a manifest wrong and deprived the Petitioner a fair trial by an impartial jury. See Rock v. Arkansas, 483 U.S. 44 (1937); see also Ferguson v. Georgia, 365 U.S. 570 (1961).

The Petitioner also argued that the trial court improperly lessened the burden the State's burden by giving the jury the following faulty flight charge:

There has been some testimony in this case from which you may infer that the defendant fled shortly after the alleged commission of the crime. The defense has suggested the following explanation: that a shot or shots was fired and that he left the scene with Yusef Battle. If you find the defendant's explanation credible, you should not draw any inference of a defendant's consciousness of guilt from the defendant's departure. If after consideration of all of the evidence you find that the defendant fearing that an accusation or arrest would be made against him on the charge or charges involved in this indictment connection with all other evidence in the case as indication or proof of a consciousness of guilt. It is for you as judges of the facts to decide whether or not evidence of flight shows a consciousness of guilt, and the weight to be given such evidence in light of all of the other evidence in the case.

Such an instruction shifts the burden from the State to the defense and as such, a reasonable jurists could disagree with the District Court's decisions regarding the jury instructions that was given in the Petitioner's case. Therefore, the District Court's decision should be reversed.

Point II

Reasonable Jurists Could Disagree with the District Court's Ruling that The Trial Judge did not Err in Not Asking the Jurors if Further Deliberation would Help Resolve Their Deadlock.

There were only six days of actual testimony. Yet, the jury had considerable difficulty in reaching a verdict. They were sent to deliberate on October 19, 2005. They continued to deliberate on October 20, 21 and 25th. Various readbacks requests and questions were presented to the judge. On October 25th, the jurors indicated they were deadlocked. The note they sent to the judge stated that, "[a]fter four days of deliberations this jury cannot arrive at a unanimous decision, and all 12 jurors believe that further deliberations will not yield a different result." The judge instructed them to return the next day, stating that, "[t]omorrow morning, I'm going to have you come back, I will give you some supplemental instructions, and I'll ask you to go back, and try once again tomorrow to see if you can reach a unanimous verdict." There was no discussion as to whether further deliberations would break this deadlock. The next day, on October 26, he gave the following instruction:

Ladies and gentlemen, as I said to you yesterday, I'm going to ask you to go back into the jury room this morning. The evidence will be brought in a few moments, and to see with further discussion you might be able to reach a unanimous verdict on any or all of these charges.

So, let me give you this instruction before I send you back there.

The verdicts in this case must represent the considered judgment of each juror. In

order to return a verdict it is necessary that each juror agree thereto. Your verdict, as I told you, must be unanimous. It is your duty, however, as jurors to consult with one another, and to deliberate with a view towards reaching an agreement if you can do so without violence to your own individual judgment. Each of you must decide the case for yourself. But do so only after an impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations do not hesitate to reexamine your own views and change your opinion if convinced that that opinion is erroneous, but do not surrender your honest conviction as to weight or effect of evidence solely because of the opinion of fellow jurors, or for the mere purpose of returning a verdict. As I told you, you are not partisans in this case, you are judges, you are judges of the facts. Your sole interest is to ascertain [sic] the truth from the evidence in this case.

Now, that may assist you or guide you in considering your respective positions or it may not. But I'm going to ask you to go back into the jury room and see if you can reach a unanimous agreement. If you can, fine. If you can't, then please notify us after you have endeavored to do so.

Several hours later, after a further request for a re-charge on murder and its lesser offenses, a guilty verdict was returned on all counts. While the judge's charge to the jury was adequate, his failure to even inquire whether such a charge was wanted or would be useful was error.

Since the New Jersey Supreme Court's holding in State v. Czachor, 82 N.J. 392 (1980), there has been much concern about possible coercion of dissenting jurors into joining the majority opinion. Courts were instructed to repeat the language given at the end of the charge concerning the jurors' duty not to do

"violence to individual judgment." Id. at 405, n.4. The charge given by Judge McCormack followed this part of Czachor and reiterated the need to reexamine views held and the like. However, the failure to even ask whether continued deliberations would be fruitful had as much a potential coercive effect on this jury as would failure to give the "violence to individual judgment" language in his recharging.

The error made in this case was not what the judge told the jurors, but whether they should have been told anything at all, once they indicated they were deadlocked. Generally, "[t]he appropriate course when a juror indicates that the jury is deadlocked is to inquire of the jury whether further deliberation will likely result in a verdict." State v. Figueroa, 190 N.J. 219, 240 (2007), quoting State v. Valenzuela, 136 N.J. 458, 469 (1994). In fact, the ABA Standards indicates that "if the jury has reported a definite deadlock after a reasonable period of deliberations, it would be improper to give or repeat the instruction." Figueroa, 190 N.J. at 235. See also State v. Vergilio, 261 N.J. Super 648, 655 (App. Div. 1993) (if a jury states it cannot come to a unanimous verdict, the judge should ask whether further deliberations will be helpful).

Several factors should be considered by the trial judge before he or she sends the jury back for further deliberations, such as length of the trial, complexity and the duration of deliberations. Figueroa, 190 N.J. at 239-40.

In the Petitioner's case, the jury was in deliberations for approximately five days. At various times, almost the entire

trial was read back. Each part pf the charge was repeated. The jury certainly had time to evaluate the elements of the crimes and the testimony of each witness. They were unequivocal in telling the judge they were deadlocked. Yet the judge did not even broach the possibility that a mistrial should have been declared. He did not ask the jurors if further deliberations would be helpful. He merely sent them back to deliberate, albeit with judicially sanctioned instructions, indicating, not so subtly, that they were not done and a verdict was expected.

It is critical that jurors be permitted "to deliberate objectively, freely, and with an untrammelled mind." Czachor, 82 N.J. at 402. In the case at bar, this process was affected by the judge's sending them back to deliberate despite the fact that they indicated a deadlock. The judge's refusal to accept this decision, without even questioning whether further deliberations would help resolve the deadlock, had the capacity to tilt the jury towards a conviction, bringing an unjust result.

The district court offered no analysis to support its ultimate conclusion that petitioner had failed to demonstrate that the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. The district court simply noted the Petitioner did not support his claim with case law. Medina v. Johnson, supra, at 16. But the district court failed to offer any analysis of its own on the merits of petitioner's claim and failed to offer its reasons for concluding that the state court had rejected petitioner's claim.

Point III

Reasonable Jurists Could Disagree with the District Court's Ruling that The Trial Court did not Deny the Defendant His Constitutional Rights to Fair Trial by an Impartial Jury and His Due Process Right to Fair Trial by permitting a Witness to Testify in Prison Garb and Shackles During Trial.

The Petitioner asserts that one of the State's witnesses, Fermin Wilson, testified before the jury in prison garb and shackles. There was also an extra officer in the courtroom during his testimony.

A fair trial entitles a criminal defendant to have his or her guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on the grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. See Taylor v. Kentucky, 436 U.S. 478 (1978).

In fact, our Supreme Court has held that defense witnesses can no longer appear at trial in prison garb because the practice advances no essential state interest. State v. Artwell, 77 N.J. 526, 530 (2003). More recently, in State v. Russell, the Appellate Division applied the holding in Artwell to a scenario in which a prosecution witness, an alleged co-conspirator with the accused, had testified in prison garb, along with handcuffs and shackles. The Court noted that similar guilt-by-association concerns were implicated from that prosecution witness' appearances. Thus, the Court required that in any future trial of the matter, the State's witness should not appear in prison garb.

Ibid.

The Petitioner also contends that trial counsel was ineffective for not objecting to such restraints and prison grab and it is further submitted that in order to effectively guarantee the defendant his constitutional right Court should have taken all necessary precautions to ensure that the Petitioner was not subjected to undue prejudice or possible bias because of Mr. Wilson's restraints and/or prison grab and the trial court's failure to do so resulted in the Petitioner being deprived his constitutional rights to a fair trial by an impartial jury and due process.

As such, reasonable jurists could disagree with the district court's decision.

Point IV

Reasonable Jurists Could Disagree with the District Court's Ruling that Petitioner's was deprived His Constitutional Right to testify on His own Behalf.

It is a well recognized principle of law that a defendant have a right to testify on his own behalf. Rock v. Arkansas, 483 U.S. 44 (1987). The Supreme Court in Ferguson v. Georgia, 365 U.S. 570 (1961) announced "permitting a defendant to testify advance both the 'detection of guilt' and 'protection of innocence'." Id.

The right to testify on one's own behalf at a criminal trial is found in multiple provisions of the constitution. It is a right that is "essential to the due process of law in a fair adversary process. Faretta v. California, 422 U.S. 806 (1975).

As the Rock v. Arkansas Court stated:

the necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony. A person's right[s] . . . include, as a minimum, a right to examine witnesses against him, to offer testimony, and to be represented by counsel." Rock v. Arkansas, supra at 52, quoting In Re Oliver, 333 U.S. 257, 273 (1948).

In the Petitioner's case, he maintained that from the very outset, his trial attorney did not keep him apprised of the status of his case while it was pending and he constantly felt like he was being kept in the dark.

The Petitioner also asserts that his trial counsel did not adequately go over the discovery with him or any other materials necessary to prepare for his case in a meaningful way, despite the Petitioner's specific requests to review the Grand Jury transcript and trial counsel did not provide him with a copy thereof.

Trial counsel also did not discuss with the Petitioner the State's witnesses or what evidence would be brought out on direct examination during the State's case, nor did counsel even explain how these witnesses could properly be cross-examined and in what ways counsel could shed doubt on their testimony or otherwise be discredited.

Moreover, trial counsel never discussed with the Petitioner that he might been elicited during the trial should he have chosen to take the witness stand on his own behalf. Although, the Petitioner maintains his innocence of the charges in this case, and he asserts that he did not testify on his own behalf because of trial counsel's failure to go over the discovery with him, coupled with trial counsel's lack of preparation of his case.

The Petitioner's also contends that his right to testify on his own behalf was infringed upon by the time constraints imposed by the trial court in the following exchanges:

The Court: All right. You let's get Mr. Medina out. All right. On the record. [Trial counsel], as I said we're under difficult time constraints. So, I'm going to ask you to call your next witness. I understand that you have been told and you indicated to me before

I come back on the record Detective Chirico was on his way.

Prosecutor: I can confirm that, Judge.

The Court: Well, I'm glad you can, but I can't wait, and in his estimate of ten minutes is off by 15 or 20 minutes, or he gets an emergency call, you now, keep this jury sitting here. Unless I can hear very succinctly why there's a reason of law as why the defendant if he's going to testify should not go on the stand next, then I'm going to tell you call your next witness and get this jury out.

Trial Counsel: Judge, because the information I seek to elicit from my client if he testified may be able to come from Detective Chirico which would then nullify the necessity of me calling my client.

The Court: What is your proffer?

Trial Counsel: My proffer is that at the time of Mr. Medina's arrest he's arrested by Detective Chirico and others, and with him at that time is Miss Levina Early who testified to was the person that was with my client at the Ritz Motel.

The Court: There hasn't been testimony he was at Ritz Hotel with this woman. It's testimony in the past because of relationship he's alleged to have had with her, that Mr. Battle suspected that's why he wanted to go there.

Trial Counsel: Exactly, Judge.

The Court: How does that testimony have to go before Mr. Medina's testimony?

Trial Counsel: Judge, because of the - you have to say habitual sequence of things. I don't know what may come out with Detective Chirico wither favorably to me or adversely to me from his testimony which could effect whether my client testifies. Then, seriously, Judge, since we're only asking for a short delay to bring Detective Chirico in, if - I note that the case we've had number of delays legitimate reasons. I submit this is

one of those reasons as well. I have to wait and be prepared to present a defense case not knowing when the State's case will end of the Detective Chirico had been instructed by me to be here 1:30, so I was surprised when I walked outside and he wasn't there.

The Court: He's under subpoena by you.

Trial Counsel: Verbal subpoena you heard yesterday when he acknowledged coming - being ordered to come back. When I spoke with him he said he's on his way. I understand [the Assistant Prosecutor] he spoke -

The Court: Not here in five minutes, I'm bringing the jury out, and ask you to call your next witness, whether Mr. Medina or someone else. Five minutes.

Thereafter, the Trial Court was advised that Mr. Medina would not be testifying on his own behalf. At that time, the trial court informed the Petitioner that as far as the Judge was concerned, that was a "**final decision**" even though the defense case had not been concluded.

The Rock decision synthesizes recognized the constitutionally-protected right to testify. See e.g., Nix v. Whiteside, 475 U.S. 157, 164, 16 S.Ct 988, 993 89 L.Ed.2d 123, 133 (1986) ("although this Court has never explicitly held that a criminal defendant has a due process right to testify . . . the right has long been assumed."); Jones v. Barnes, 463 U.S. 745, 751, 13 S.Ct 3308, 3312, 77 L.Ed.2d (1983) (the "ultimate authority to make certain fundamental decisions . . . (including) whether to testify" rests with the defendant); Harris v. New York, 401 U.S. 222, 225, 91 S.Ct 643, 645, 28 L.Ed.2d 1, 4 (1971).

("Every criminal defendant is privileged to testify in his own defense or refuse to do so").

Therefore, the Petitioner contends that there was a reasonable probability that the outcome of his trial would have been different and as such, a reasonable jurists could disagree with the district court's decision.

Point V

Reasonable Jurists Could Disagree with the District Court's Ruling that The Trial Court's Sequential "Acquit First" Jury Instructions and those Contained on the Verdict Sheet Told the Jury, In Direct Violation of State v. Coyle, 119 N.J. 194 (1990), to Deliberate on Passion/Provocation Manslaughter only After Finding Defendant not Guilty of Murder, this Violated Petitioner's Right to Due Process, and Equal Protection of the Law as Guaranteed by the United States Constitution, and the Fourteenth Amendment

In the Petitioner's case, the State and the Defense agreed that passion/provocation manslaughter should have been given to the jury as an option. The judge, at the charge conference, noted:

As to the substantive charges, it's been requested, and I don't believe there was an objection to my charging as to Count 1, Murder, passion/provocation and aggravated manslaughter - passion/prov and aggravated manslaughter as lesser included offenses. Any objection to that from the state?

The State: No, your Honor.

The Court: Any objection from the defense?

The Defense: No.

The judge continued, indicating how he would structure the charge. He indicated he would tell the jurors to consider the murder charge first. If they were to acquit of murder, they should consider passion/provocation manslaughter. If they acquit of that form of manslaughter, they would move on to aggravated manslaughter. The defense objected to the structured nature of the charge. The judge agreed by stating that he would tell them

this order was a "guide" and they're not bound by it." Defense counsel explained:

Defense counsel: It's - I don't want it to be that - they may decide to consider passion/provocation first. Is there going to be instruction you may take these in any order you wish?

The Court: I will tell them this is to give them to assist them, I don't tell they [sic] must follow it. A you know the model charge certainly doesn't direct them to do it in that order. The way it's structured it would be very, very odd for a jury to not go in that order because of the way the law is presented to them.

Defense counsel: So long as they're not bound by that order.

The actual charge, referring to Count One read as follows:

That count is based on a statute that indicates in pertinent part as follows: A person is guilty of murder if, one he caused the victim's death or serious bodily injury that then resulted in death. And two, that the defendant did so purposely or knowingly; and three, that the defendant did not act in the heat of passion resulting from a reasonable provocation. If you find beyond a reasonable doubt that the defendant purposely or knowingly caused Mutah Coleman's death, or serious bodily injury that then resulted in death, and that he did not act in the heat of passion resulting from reasonable provocation, Angel Medina would be guilty of murder. If, however, you find that Angel Medina purposely or knowingly caused the death, or serious bodily injury that then resulted in death, and that he did act in the heat of passion resulting from reasonable provocation, the Angel Medina would be guilty of passion/provocation manslaughter, no distinction. In order for you to the [sic] find the defendant guilty of murder, the State is required to prove each of the following elements beyond a reasonable doubt. That Angel Medina caused Mutah Coleman's

death and that Angel Medina did so purposely or knowingly, and that Angel Medina did not act in the heat of passion resulting from a reasonable provocation.

After defining the elements of passion/provocation manslaughter, the judge turned to aggravated manslaughter by telling the jury that "there is another offense that I will define for you that falls under this same homicide umbrella." He then defined the elements of aggravated manslaughter.

The above-quoted language comports with the Model Jury Charge on murder and the two manslaughters. The problem is that the judge then undercut this language by giving an "acquittal first" sequential charge at the end of the instructions and in the verdict sheet. At the very end of the charge, the judge instructed the jury:

I'll go over this verdict sheet with you now. It sets up the title of the case and so forth.

Begins with Count 1. Murder of Mutah Coleman purposely or knowingly. Not guilty or guilty. It says if you find the defendant guilty of murder, then you move on to Count 2.¹ If you find the defendant not guilty of murder, then you will consider passion/provocation manslaughter as I have defined that. Make a determination, not guilty or guilty.

If you find the defendant guilty of the passion/provocation manslaughter, then you move on to Count 2. If you found the defendant not guilty of murder, and not guilty of passion/provocation then you will consider aggravated manslaughter. Not guilty or guilty.

¹ Count 2 is the charge of possession of a weapon without a permit.

These words ended the instructions which the judge gave to the jurors and mirrored the verdict sheet which they took with them and read during deliberation. Because the sequential nature of the instructions and the verdict sheet directly violated the decision in State v. Coyle, 119 N.J. 194, 223-224 (1990), thereby precluding or inhibiting proper consideration of passion/provocation manslaughter as a lesser-included offense, the defendant's Fourteenth Amendment due-process and fair-trial rights and his corresponding state-constitutional rights were violated.

Murder and passion/provocation manslaughter are so closely related to one another that the latter is defined as "a homicide which would otherwise be murder under section 2C:11-3 but [which] is committed in the heat of passion resulting from a reasonable provocation." N.J.S.A. 2C:11-4b(2). Thus, a single factor -- the absence of heat of passion and provocation -- distinguishes the two crimes. The mens rea for the those crimes is the same -- purposeful or knowing. "[T]he mental states for those two offenses [are] interrelated; they shade [] from one into the other." State v. Cooper, 151 N.J. 326, 369 (1997). In contrast, for example, the difference between murder on one hand and aggravated and reckless manslaughter on the other is a matter of an absolute difference in the mens rea requirement of those crimes, murder requiring a purposeful or knowing state of mind while both reckless and aggravated manslaughter require reckless states of mind. N.J.S.A. 2C:11-3; 2C:11-4.

In Coyle, it states: while "acquit first" instructions are acceptable when telling a jury to proceed sequentially through murder, then aggravated manslaughter, then reckless manslaughter, see also Cooper, 151 N.J. at 366-370 (same), the same is not true when passion/provocation manslaughter is at issue. A jury cannot possibly "acquit first" of murder before even considering passion/provocation manslaughter because the absence of passion/provocation is effectively an element of murder in such a case. State v. Grunow, 102 N.J. 133, 145 (1986). Sequential consideration of murder, then passion/provocation manslaughter is, thus, a non sequitur. For a jury truly to follow such an instruction would effectively preclude proper consideration of passion/provocation manslaughter.

As stated in State v. Martin, 119 N.J. 2, 15 (1990) (jury instructions are a "road map" to guide the jury in its critical deliberations on the guilt of the defendant.) The prejudice from an error in the verdict sheet's presentation of the offense of murder and passion/provocation manslaughter has been recognized. In State v. Reed, 249 N.J. Super 41, 49-50 (App. Div. 1991), aff'd o.g. 133 N.J. 237 (1993), the Appellate Division concluded that the oral instructions correctly described the State's burden of proof on murder and passion/provocation manslaughter. However, instead of providing an opportunity for a verdict on passion/provocation manslaughter, the form merely directed the jurors to consider aggravated manslaughter and manslaughter if they acquitted the defendant of murder. Id. at 50. "The effect of this erroneous form of the verdict sheet was to prevent the jury

from considering whether the defendant was guilty of passion/provocation manslaughter if they found that, but for his having acted in the heat of passion as the result of reasonable provocation, he would have been guilty of purposeful or knowing murder." Id. In the Petitioner's case, the passion/provocation manslaughter was included on the verdict sheet, but it would have been next to impossible for the jury to reach the issue given the "acquittal first" instructions of the judge.

Here, a properly-instructed jury, having heard the evidence could have at least had a reasonable doubt regarding whether or not the Petitioner responded (albeit too extremely) to provocation by the eventual victim in the midst of a heated argument, and returned a verdict for passion/provocation manslaughter, not murder. According to Ferming Wilson, Mutah Coleman began the argument with the Petitioner. In fact, Coleman had been arguing with several people and had been acting "rowdy." In addition, to be legally drunk. The departure of both men from the restaurant could certainly have been seen as a continuation of the argument and an expected escalation into violence, an invitation to mutual combat. State v. Mauricio, 117 N.J. 402 (1990); State v. Crisantos, 102 N.J. 265, 274 (1986).

Therefore, the error in the Petitioner's case is clearly contrary to established State Law and is a violation of his due process and right to a fair trial and as such, a reasonable jurists could disagree with the District Court's decisions regarding the verdict sheet and the instructions that was given

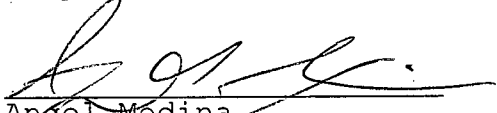
in the Petitioner's case. Therefore, the District Court's decision should be reversed.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Third Circuit Court of Appeals.

Respectfully submitted,

Dated: March 15, 2018


Angel Medina