

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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GEORGE LEONCE St. HELEN,

Petitioner,

02 Civ. 10248 (CLB)

- against -

Memorandum and Order

DANIEL SENKOWSKI, Superintendent,
Clinton Correctional Facility,

Respondent.

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Brieant, J.

By his *Pro Se* Petition received in the Office of the Pro Se Clerk of this Court on November 18, 2002 and docketed December 26, 2002, Mr. George Leonce St. Helen, a New York State prisoner, seeks a writ pursuant to 28 U.S.C. § 2254 to vacate his conviction. On reviewing the record in the case this Court appointed counsel for the Petitioner.

Following a jury trial before Judge Angiolillo and a jury in Westchester County Court, Petitioner was convicted of the crimes of Murder in the Second Degree (depraved indifference murder), Penal Law § 125.25(2) and criminal possession of a firearm in the second degree in violation of Penal Law § 265.03.

Petitioner was sentenced on July 23, 1998 to indeterminate concurrent terms of imprisonment of twenty years to life for the crime of murder in the second degree and six to twelve years on the gun charge. His conviction was unanimously affirmed by the New York Supreme Court Appellate Division, Second Judicial Department on April 29, 2002. Leave to

Appeal to the New York Court of Appeals was denied on August 22, 2002 (98 N.Y. 2d 713).

The Petition is timely. Set forth below are the findings of fact and conclusions of law of this Court, based solely on the official record.

As ground 1, the Petitioner alleges as follows:

The verdict was against the weight of the evidence and the counts Petitioner was convicted of should have been dismissed. Petitioner should have been convicted of the lesser count of manslaughter in the Second Degree, the proof and evidence in this case give rise (sic) to the fact that the shooting was accidental in nature. Through a series of case law interpretations, the New York Court of Appeals has “‘erased’ the distinction between the two crimes and removed the *mens rea* from the distinction”.

As ground 2, the Petitioner also alleges that:

The Prosecutor’s misconduct deprived the Petitioner of his right to a fair trial.

As ground 3, the Petitioner alleges that:

His statements and that the gun in evidence should have been suppressed.

Grounds 2 and 3 need not detain us. They were rejected by the state court on factual findings which were neither contrary to nor involved an unreasonable application of clearly established federal law.

The facts of the case are expressed succinctly in the Decision and Order of the Appellate Division:

The Defendant pointed a gun loaded with two bullets at the victim. He pulled the trigger twice, and the gun discharged. The victim later died of complications from the resulting injuries. The Defendant claimed that while he knew the gun was loaded, he believed that there were no bullets in its first two chambers. He claimed that he was only playing a game with the victim and that the shooting was an accident.

As the reader has probably already concluded, this case comes to this Court is the wake of *Jones v. Keane*, 02 Civ. 1804 (S.D.N.Y. 2002) *reversed* 329 F.3d 290 (2d Cir. 2003), and presents essentially the same issues.

Discussion

Exhaustion of State Remedies

The standard for Exhaustion which a state habeas petitioner must meet is fairly to present the federal claim in state court. *Strogov v. Attorney General of New York*, 191 F.3d 188, 191 (2d Cir. 1999). The standard is explicated in *Daye v. Attorney General of New York*, 696 F.2d 186, 191 (2d Cir. 1982 *en banc*). In *Daye*, our Court of Appeals held that a defendant may “fairly present the substance of a federal constitutional claim to the state court without citing book and verse on the Federal Constitution” (citations omitted). The Court also held that the requirement is satisfied “if the legal basis of the claim made in state court was a substantial equivalent of that of the habeas claim”, explaining further that “this means in essence that in state court, the nature of presentation of the claim must have been likely to alert the court of the claim’s federal nature.” *Daye* also holds that, where a claim rests on a factual matrix that is well within the mainstream of due process adjudication, the state courts must be considered to have been fairly alerted to its

Constitutional nature.

See also footnote 5 in *Daye* citing authority that briefs filed by the state in opposition may alert the court to the federal nature of the claim. In this case, just as in *Tweedy v. Smith*, 614 F.2d 325, 332 (2d Cir. 1979), the District Attorney, in his responding brief to the Appellate Division, alerted the court. The constitutional point in this case, of course, is whether the conflation by the New York Court of Appeals of any statutory distinction between reckless manslaughter and depraved indifference murder violates the rights of the accused to due process and equal protection. The People's brief in the Appellate Division in St. Helen's case at page 27 noted that Appellant's claim was "not a true weight [of the evidence] claim, since Defendant quickly abandons this pretense and unabashedly asks this court to disregard the [New York] Court of Appeals holding in *People v. Roe*, 74 N.Y. 2d 20, and embrace the view held by the dissent in that case 'that a wholly unintended accidental discharging of a weapon is not depraved mind murder' as a matter of law". Clearly the Petitioner asked the Appellate Division to reestablish the demarcation and reinstate the rule that wholly unintended accidental discharging of a weapon is not depraved mind murder (Petitioner's Appellate Brief at 10).

Our Court of Appeals has held, in *Ramirez v. Attorney General of New York*, 280 F.3d 87, 95 (2d Cir. 2001) that it is sufficient to assert the claim in terms so as to call to mind the specific constitutional right. This Court agrees with Petitioner that the totality of the presentation of the Appellate Division brief in this case was sufficient to "call to mind, for any reasonably competent jurist, both the vagueness and equal protection concerns underlying this Court's decision in *Jones*

v. Keane and the dissenting opinions in the New York Court of Appeals in *People v. Sanchez*, 98 N.Y.2d 373 decided after *Jones v. Keane*. See, e.g. *Fortini v. Murphy*, 257 F.3d 39, 44 (1st Cir. 2001). *Ramirez* also holds, citing *Daye, supra*, that the assertions are adequate if they put forward a pattern of facts that is well within the mainstream of constitutional litigation.

In any event, by letter to Judge Levine of the Court of Appeals dated June 25, 2002, seeking leave to appeal, trial counsel for Petitioner expressly raised the Constitutional issue. Respondent argues that “the New York Court of Appeals does not have an interest of Justice jurisdiction and thus, could not have entertained Petitioner’s constitutional claims raised for the first [time] in the leave application to that Court” (Respondents Supplemental Memo. at 7).

Whether this is really so is far from clear. This Court believes that the hard fought case of *People v. McLucas*, 15 N.Y.2d 167, 172 (1965) remains good law, in which then Chief Judge Desmond held:

Defendant insists . . . that no exception is necessary to preserve for appellate review a deprivation of a fundamental constitutional right. This is correct under our decisions (citations omitted) .

See also *People v. Thomas*, 50 N.Y.2d 467, 474 (1980) (Fuchsberg, J. concurring).

Our reading of the New York Constitution suggests that whatever practice there may be in the New York Court of Appeals to deny leave to appeal issues of constitutional law perceived as not clearly raised before the Appellate Division is based solely on prudential grounds and not on lack of jurisdiction or power. Whether or not this is correct, the nationwide federal

requirement of exhaustion of state remedies would seem to be satisfied when the issue is raised in constitutional terms in an application to the highest court of the state as it clearly was in this case.

Claims may be substantially re-formulated and survive a contention on non-exhaustion, *Vasquez v. Hillery*, 474 U.S. 254 (1986). The exhaustion doctrine is neither rigid nor inflexible. It exists in order to give state courts the opportunity to address and correct violations of federal rights. *Granberry v. Greer*, 481 U.S. 129, 133-134 (1987). Exhaustion has been accomplished when a *habeas* petitioner previously provides the state courts with a *fair and meaningful* opportunity to grant relief on what is in “substance” the same claim now sought to be reviewed in federal court. *O’Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *Vasquez v. Hillary*, 474 U.S. 254, 257 (1986).

Based on the foregoing, and for the reasons set forth in Petitioner’s brief, this Court concludes that there is sufficient exhaustion of state remedies to permit this Court to consider the merits of Petitioner’s constitutional claim.

The Constitutional Violation

Petitioner contends and this court agrees that the distinction between the crime of Reckless Manslaughter (N.Y. Penal Law § 125.15) and Depraved Indifference Murder (N.Y. Penal Law § 125.25(2)) has been so blurred and conflated by recent interpretive decisions of the New York Court of Appeals with the result that there is no principled basis in which to

distinguish the two crimes. This results in a Constitutional violation of Due Process and Equal Protection. Sub-paragraph 2 of Section 125.25 of the New York Penal Law under which Petitioner was convicted defines an alternate version of murder in the second degree when “under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person”. In contrast, Section 125.15 of the Penal Law which defines manslaughter in the second degree, reads in relevant part, as follows:

“A person is guilty of manslaughter in the second degree when:

1. He recklessly causes the death of another person”.

On the face of the statutes two separate distinguishable crimes would seem to be defined, with “depraved indifference” an additional element of the more serious charges. However, a persistent series of judicial glosses placed on the statutory concept of “depraved indifference murder, by New York’s highest court has, in effect, removed any distinction between the two crimes. This violates the Constitutional rights of persons convicted under the more serious of the two offenses.

A statutory definition of recklessness is found in New York Penal Law Section 15.05(3). A person acts recklessly “when he is aware of and consciously disregards a substantial and unjustifiable risk that [a result described by a statute defining an offense] will occur or that such circumstances exist. The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would

observe in the situation.”

The words “depraved indifference to human life” do possess a clear meaning in the general speech of the people. Standing alone they may well be sufficient to give adequate warning to a non-lawyer member of the public as to what conduct is rendered unlawful by the statute. Classic textbook definitions abound: throwing the squib into the market place is depraved indifference. The New York Court of Appeals held in *People v. Jernatowski*, 238 NY 188 (1924) that firing two or more shots from the street into a house where the Defendant knew that human beings were present, and killing one of the occupants constituted depraved indifference murder. In *People v. Poplis*, 30 N.Y.2d 85, 87 (1972), the New York Court of Appeals upheld the statute in a situation where “repeated brutal, callous and inhuman beatings” inflicted on a small child over several days resulted in injuries producing death.

The origin of the problem begins with *People v. Register* 60 N.Y.2d 270 (1983), *cert. den.* 466 US 953 (1984), in which the Defendant, intending to shoot one Mitchell, shot and killed another person. This case concerned primarily the issue of voluntary intoxication as bearing on intent, and arose in the context of a shooting incident in the early morning in a crowded saloon. The Court in *Register* held that the statutory phrase “under circumstances evincing a depraved indifference to human life” referred only to the factual setting in which a crime occurs, and contrasted the case with manslaughter in the second degree by holding that the “statute requires in addition not only that the conduct which results in death present a grave risk of death, but that it also occurred under circumstances evincing a depraved indifference to human life”. The Court

held “this additional requirement refers to neither the *mens rea* or the *actus reus* . If it states an element of the crime at all, it is not an element in the traditional sense but rather a definition of the factual setting in which the risk creating conduct must occur - objective circumstances which are not subject to being negated by evidence of Defendant’s intoxication.” The Court also held that in a “depraved mind murder the actor’s conduct must present a grave risk of death whereas in manslaughter it presents the lesser substantial risk of death” (*Register*, 60 N.Y. 2d 276). It went on to hold that the phrase refers to the “wantonness of Defendant’s conduct and converts the *substantial* risk present in manslaughter to a *very substantial* risk present in murder (Id at p.276-277). This seems to be a largely circular definition which this Court has previously described in *Jones v. Keane, supra*, as worthy of the committee that wrote the Internal Revenue Code, and tells us not very much.

The Court in *Register* held that while the concept of depraved indifference functions “to objectively define the circumstances which must exist to elevate a homicide from manslaughter to murder”, *Register*, 60 N.Y.2d at 278, “‘recklessness’ is”, nevertheless, “the *mens rea*, and the only *mens rea*, of the crime”. *Register*, 60 NY2d at 278. The *Register* court also made the somewhat contradictory statement that “the statutory requirement that the homicide result from conduct evincing a depraved indifference to human life is a legislative attempt to qualitatively measure egregiously reckless conduct and to differentiate it from manslaughter.” *Register*, 60 N.Y.2d at 279. Thus, while insisting that the “depraved mind” non-element of the crime is separate and distinct from the sole *mens rea* of recklessness, it is only “egregious” recklessness which differentiates it from manslaughter.

Judge Jasen pointed out in dissent in *Register* that:

[a]s the majority concede[d], the predecessor statutes to subdivision 2 of section 125.25 of the Penal Law defined the requisite *mens rea* “as a depraved mind”. . . Thus, unless a significant change was intended by the Legislature in enacting subdivision 2 of section 125.25, this statute must be similarly construed as characterizing “depraved indifference” as a *mens rea*.

Register, 60 NY2d at 281-282. This construction, Judge Jasen contended, “is not only consistent with the Legislature’s intent, the history of the statute and precedent of [the Court of Appeals], but is also in line with the basic underpinnings of our system of criminal justice.” Judge Jasen observed that “[t]he rule announced by the [*Register*] majority. . . effectively eviscerate[d] the distinction between manslaughter in the second degree (Penal Law, § 125.15, subd. 1) and murder in the second degree (Penal Law, § 125.25, subd. 2) with respect to the accused’s state of mind.” *Register*, 60 N.Y.2d at 282. Judge Jasen explained that a person acts with depraved indifference, thereby elevating his reckless conduct from manslaughter to murder, “not because the surrounding circumstances happened to create a ‘grave’ as opposed to a ‘substantial’ risk, but because the accused has acted with greater culpability and a wickedness akin to that of one whose conscious objective is to kill.” *Register*, 60 N.Y.2d at 286. Judge Jasen continued:

[A]s a result of the majority’s interpretation of the statute, prosecutors will be able to obtain murder convictions simply by proving that the defendant acted recklessly in killing another. This is so because the simple fact that the defendant’s conduct resulted in the victim’s death will, with 20/20 hindsight, be proof enough to a jury that the circumstances existing at the time and place of the killing presented a “grave risk” of death and that the defendant, therefore, acted with depraved indifference to human life. This result is clearly at odds with the legislative scheme set forth in article 125 of the Penal Law.

Register, 60 NY2d at 286-287.

Later in *People v. Roe* 74 N.Y.2d 20 (1989), a majority of the Court, following *Register*, held that depraved indifference murder differs from manslaughter only in that the actor's reckless conduct must be imminently dangerous and present a grave risk of death, while in manslaughter, the conduct need only present a less substantial risk of death. This constitutes another play on words substantially similar to the definition imposed by the Court in *Register* and evoked a dissent by Judge Bellacosa, in which he observed that the majority "finalizes the obliteration of the classical demarcation between murder and manslaughter in this state" *Roe*, 74 N.Y.2d at 29.

Later cases which continued the anomalous construction placed on the statute initially in the *Register* case include *People v. Cole* 85 N.Y.2d 990 (1995) and *People v. Johnson* 87 N.Y.2d 357 (1996). In the latter case, the Court of Appeals held that the language was not unconstitutionally vague, because conduct with depraved indifference to human life is well understood. This Court agrees that the concept of depraved indifference to human life is well understood, and is essentially self-defining notwithstanding the confusing glosses placed on the statute by *Register* and its progeny, but it is not part of the *mens rea*, or a legal element of the crime. When two different statutes are construed by New York's highest Court to reach the same conduct, or indistinguishable conduct, and one carries a far lesser penalty, allowing a grand jury it whim to choose to indict for either one a clear denial of equal protection results.

As a matter of due process, a criminal statute that is so indefinite that it encourages arbitrary and erratic convictions is void for vagueness. *Colautti v. Franklin*, 439 U.S. 379, 390

(1979), quoting *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972). It is not the statute's failure to give notice which is violative of Petitioner's right to due process, it is the failure of the statute - as it is presently interpreted by the New York Court of Appeals - to define the more serious *mens rea* so that prosecutors and juries may not determine arbitrarily and erratically which crime to prosecute or to apply. "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows . . . prosecutors, and juries to pursue their personal predilections.'" *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1975). See, also, *Ramos ex rel. Ramos v. Town of Vernon*, 48 F.Supp.2d 176, 181 (D.Conn. 1999):

[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

To hold that a risk is "very substantial" merely suggests that the individual jurors should determine that the risk is more than just "substantial". An ordinary juror could honestly believe that any substantial risk which in fact results in the taking of human life is "very substantial". The distinction between "substantial" and "very substantial" is simply no *principle* at all. We quote Judge Jasen in his *Register* dissent:

While there may be a technical distinction between a "grave" risk and a "substantial" one, the only real difference is about 15 years in prison. . . . To accept this distinction as justification for the disparate penalties which the respective crimes carry defies basic principles of fairness and logic.

Register, 60 NY2d at 285.

Recently, the New York Court of Appeals in *People v. Sanchez*, 98 N.Y.2d 373 (2002) revisited this issue, with Judge Rosenblatt, in a dissenting opinion, agreeing with this Court's reasoning in *Jones v. Keane*, *supra*. In a section of the dissenting opinion entitled "Conflating Depraved Indifference Murder with Second Degree Manslaughter", Judge Rosenblatt stated:

To the extent that it endorses *Register*, the majority . . . conflates depraved indifference murder with reckless manslaughter. After today, depraved indifference murder can thus be used as a proxy for not one but two separate crimes.

In concluding that depraved indifference murder has a *mens rea* of ordinary recklessness, the Court in *Register* essentially took the "depraved" out of depraved indifference, so that depraved indifference murder is virtually indistinguishable from reckless manslaughter. According to *Register*, depraved indifference murder and reckless manslaughter have the identical *mens rea* element of recklessness. The only difference between the two crimes lies in the so-called "objective circumstances" surrounding the criminal act. If the defendant's conduct created a "substantial" risk of death, the crime is second degree manslaughter. If, however, the defendant's conduct created a "grave" risk of death, the crime is depraved indifference murder (citations omitted).

Register conflates the two crimes not only by giving them the same *mens rea*, but also by seeking to differentiate them only in terms of "objective circumstances" that are all but indistinguishable. Thus, for the factfinder, everything turns on whether the defendant's conduct created a "grave" risk of death as opposed to a "substantial" risk of death. I think it is too much to ask of any juror. The difference between reckless manslaughter, which carries a minimum punishment of one year in prison, and depraved indifference murder, which carries a minimum punishment of 15 years in prison, should not turn on the razor-thin distinction between "substantial" and "grave."

Sanchez, 98 N.Y.2d at 406-407.

Judge Rosenblatt noted that "[c]ourts and commentators alike have severely criticized *Register* and its progeny". *Sanchez*, 98 NY2d at 407, n 18 citing Gegan, More Cases of Depraved Mind Murder: The Problem of Mens Rea, 65 St. John's L. Rev. 429, 436 [observing

that “ (s)o tenuous is the [Register] court’s rationale for refusing to recognize depraved indifference as a *mens rea* element, and so superfluous did its interpretation render the statutory language, that one can speculate that the court was simply reaching a desirable result on the precise issue before it: whether evidence of intoxication can negate the necessary mental element of depraved mind murder”]; 8 Zett, N.Y. Crim. Prac. ¶ 69.2 [2][c], at 69-37 [2002] “(i)f the distinction between that recklessness which will render the actor liable for manslaughter and that which will render him liable for murder is to be a meaningful one, the courts must refine the tests necessary to make such a distinction”).

Judge Rosenblatt also observed that:

the *Register* Court’s formulation has the effect of treating defendants with the exact same mental culpability unequally by giving them vastly different sentences even though their moral culpability is identical. This consequence violates a fundamental principle of the criminal law, which seeks to punish defendants in proportion to the blameworthiness of their offense. . . If depraved indifference murder and reckless manslaughter have the same *mens rea* (i.e. ordinary recklessness), then two defendants with exactly the same mental culpability can be separately convicted of two different crimes (murder and reckless manslaughter) and receive vastly different punishments. As one harsh critic of *Register* has asked, “How can it be just to punish for murder, one offender whose mental culpability is no greater than that of another guilty only of manslaughter—thereby exposing the former to an additional fifteen years of imprisonment?” (Gegan, *More Cases of Depraved Mind Murder: The Problem of Mens Rea*, 64 St. John’s L. Rev. at 435.)

Sanchez, 98 N.Y.2d at 407-408.

The short answer is, it can’t, because the Constitution forbids this. The vague distinction, if any there be, between a “substantial” and a “very substantial” risk, necessarily invites arbitrary and irrational selectivity in the prosecution of these offenses, thereby violating both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

As one commentator recently stated:

Now that both Judge Briant [in *Jones*] and the *Sanchez* dissenters have reopened the debate as to the meaning of depraved indifference, the issue will inevitably reach the courts again. Should the Second Circuit have occasion to examine the question in an adequate procedural posture, it may not hesitate to hold that depraved indifference murder as defined in *Register* violates the constitutional precept against vagueness. Better yet, the [New York] Court of Appeals itself should restore the moral dimension to depraved indifference murder.

The moral distinction between murder and reckless manslaughter is completely lost when, as in this case, a defendant who pulls the trigger under the mistaken belief that the gun would not fire is punished with the same severity as the defendant who pulls the trigger with the intent to kill. To use Judge Bellacosa's words:

[T]o uphold this defendant's conviction on the uppermost and most heinous level of criminal homicidal responsibility cheapens the gravity with which we treat far more serious murders, e.g., cold-blooded contract killings and the like. In the eyes of the law all the slayers are now made alike, when the perpetrators themselves know and our best instincts and intelligence tell us, too, that they are very different. Justice is disfigured by the punishment of offenders so homogeneously and, yet, so disproportionately.

Roe, 74 N.Y.2d at 38.

This Court concludes that the conviction for depraved indifference murder as applied to the facts of the case as the jury must have found them violated Petitioners' Constitutional right to the equal protection of the laws, as well as substantive due process. There was no rational basis by which a grand jury could choose to indict in this case for depraved indifference murder as opposed to reckless manslaughter which carries a far lesser penalty. A rational jury could not be

expected to differentiate between a “grave risk of death” and a “substantial risk of death”, as required by the New York Court of Appeals. This is a distinction without a difference; a trial jury simply cannot slice the salami that fine, as Judges Jasen and Bellacosa and Rosenblatt in dissent have pointed out for all to see.

Petitioner has satisfied the requirements of AEDPA in that the adjudication was contrary to clearly established federal law as determined by the United States Supreme Court.

The Supreme Court need not have addressed petitioner’s specific Equal Protection and Due Process claims in order to satisfy the statute. Where general principles or rules have been laid down by the Supreme Court, “case-specific concerns ‘obviate neither the clarity of the rule nor the extent to which the rule must be seen as ‘established’ by this Court.’” *Sellan v. Kuhlman*, 261 F.3d 303, 309 (2d Cir. 2001), quoting *Williams, Taylor*, 529 U.S. 362, 391 (2000).

In *Sellan* the Court rejected the argument that because the particular theory of ineffective assistance of counsel pressed by the petitioner had not been adopted by the Supreme Court as a basis for making out a successful Sixth Amendment ineffective assistance claim, that theory was not “clearly established federal law”. *Sellan*, 261 F.3d at 309. Instead, the Court held “that for AEDPA purposes, it matters only that the *Strickland* [*v. Washington*, 466 U.S. 668 (1984)] performance and prejudice test has been ‘clearly established’ - not that a particular theory of ineffective assistance derived from *Strickland* has been clearly established.” *Sellan*, 261 F.3d at 309. Our Court of Appeals applied this principle in determining that a state court rejection of a

Brady argument constituted an unreasonable application of clearly established Supreme Court law. *Boyette v. Lefevre*, 246 F.3d 76 (2d Cir. 2001); *accord, Moore v. Morton*, 255 F.3d 95 (2d Cir. 2001) (state courts unreasonably applied Supreme Court prosecutorial misconduct principles even though Supreme Court never addressed the specific challenged misconduct).

In *Jones v. Stinson*, 229 F.3d 112, 119-20 (2d Cir. 2000) - while noting that a challenged state court decision was not “contrary to” Supreme Court precedent because “[t]he Supreme Court has not decided the specific circumstances under which a criminal defendant must be allowed to introduce evidence of prior non-criminal conduct to demonstrate that he did not commit the crime at issue,” our Court of Appeals evaluated whether the decision “was objectively unreasonable in light of Supreme Court precedent that the opportunity to present a defense is one of the constitutional requirements of a fair trial”. See *Lurie v. Wittner*, 228 F.3d 113, 126 (2d Cir. 2000) (petitioner’s rule-of-lenity claim sufficiently premised on constitutional guaranty of fair notice that contested behavior is deemed criminal so that AEDPA “clearly established” standards is met). See also, *Johnson v. Norton*, 249 F. 3d 20 (1st Cir. 2001) (federal habeas analysis of state court competency decision guided by general Supreme Court due process protection for the incompetent).

The Supreme Court learning clearly reflects that the Equal Protection and Due Process Clauses of the Fourteenth Amendment prevent two penal statutes from reaching indistinguishable conduct, where one statute carries a far lesser penalty than the other, “the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient

definiteness that ordinary people can understand what conduct is prohibited *and* in a manner that does not encourage arbitrary and discriminatory enforcement.” That this sort of statutory distinction has not received specific Supreme Court attention is no more significant than whether a particular piece of evidence that should have been disclosed as *Brady* material was ever specifically labeled by the Supreme Court as Brady material. The constitutional principle underlying this Petition, that “the void-for-vagueness doctrine requires that a penal statute define the criminal offense . . . in a manner that does not encourage arbitrary and discriminatory enforcement - neither “breaks new ground [n]or imposes a new obligation on the States” within the meaning of the AEDPA standard. See *Williams, supra*, 529 U.S. at 391. Nor is there anything novel about Petitioner’s claim that a vague statutory distinction violates equal protection when it results in arbitrary and irrationally selective prosecutions.

In *Williams*, 529 U.S. at 405-406, the Supreme Court held that “[a] state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases . . . [or] if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.”

Conclusion

Petitioner’s constitutional rights to equal protection of the law and substantive due process are violated when a trial jury was permitted to convict him of the most severely punished

of two statutory crimes which under the state's reported decisions had become one. The Writ shall issue unless the prosecution within thirty (30) days resentsences Petitioner for Manslaughter in the Second Degree. The Clerk shall file a final judgment to that effect which shall provide that its operation is stayed pending Appellate finality.

SO ORDERED.

Dated: White Plains, New York
September 19, 2003

Charles L. Briant, U.S.D.J.