

United States Court of Appeals For the First Circuit

No. 16-2031

JOHN WILBORN,

Petitioner, Appellant,

v.

KELLY RYAN,

Respondent, Appellee.

Before

Howard, Chief Judge,
Kayatta and Barron, Circuit Judges.

JUDGMENT

Entered: October 15, 2018

We have carefully considered petitioner's application for a certificate of appealability and his supplemental letters. Petitioner's request for a certificate of appealability is denied because petitioner has failed to make "a substantial showing of the denial of a constitutional right[.]" 28 U.S.C. § 2253(c)(2), substantially for the reasons stated in the magistrate judge's July 13, 2016 report and recommendation, which the district court adopted in its August 1, 2016 order.

The appeal is terminated.

By the Court:

Maria R. Hamilton, Clerk

cc:

John Wilborn

Jennifer Kay Zalnasky

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Case No. 15-12827-RGS

JOHN WILBORN

v.

KELLY RYAN, SUPERINTENDENT
OF OLD COLONY CORRECTIONAL CENTER

ORDER ON REPORT AND RECOMMENDATION
OF THE MAGISTRATE JUDGE ON A PETITION
FOR WRIT OF HABEAS CORPUS

August 1, 2016

STEARNS, D.J.

I agree with Magistrate Judge Bowler that petitioner has failed to show cause and prejudice or a fundamental miscarriage of justice sufficient to excuse the procedural default of his claim of ineffective assistance of trial counsel. *See Costa v. Hall*, 673 F.3d 16, 25 (1st Cir. 2010). Consequently, her Recommendation is ADOPTED and the petition is DISMISSED with prejudice. The Clerk will so notify the parties and close the case. Petitioner is advised that any request for the issuance of a Certificate of Appealability pursuant to 28 U.S.C. § 2253 of this Order dismissing the petition for writ of

habeas corpus is DENIED, the court seeing no meritorious or substantial basis for an appeal.¹

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE

¹ Petitioner has filed two identical oppositions to the Report and Recommendation, the second with a supplement seeking equitable relief. Neither Opposition raises issues that the Magistrate Judge did not implicitly or explicitly consider in her careful analysis of his defaulted claim.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN WILBORN,
Petitioner,

v.

CIVIL ACTION NO.
15-12827-RGS

KELLY RYAN,
Respondent.

REPORT AND RECOMMENDATION RE:
MOTION TO DISMISS THE PETITION FOR
WRIT OF HABEAS CORPUS
(DOCKET ENTRY # 28)

July 13, 2016

BOWLER, U.S.M.J.

Respondent Kelly Ryan ("respondent"), Superintendent of the Massachusetts Correctional Institution in Shirley, Massachusetts ("MCI-Shirley"), moves to dismiss the above styled petition for writ of habeas corpus filed under 28 U.S.C. § 2254 ("section 2254"). (Docket Entry # 21). Petitioner John Wilborn ("petitioner"), an inmate at MCI-Shirley, attacks his March 1978 conviction of first degree murder, kidnapping and rape in Massachusetts Superior Court (Essex County) ("the trial court") on the basis of the ineffective assistance of trial counsel. Petitioner submits that trial counsel failed "to submit all exculpatory evidence," including transcripts of a probable cause hearing and affidavits, and also failed to provide sufficient evidence of petitioner's actual innocence. (Docket Entry ## 1, 4).

Respondent maintains that the petition is untimely under a one year grace period applicable to convictions that became final prior to the April 24, 1996 enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d) ("section 2244(d)"). In the alternative, respondent contends that decisions by a single justice of the Massachusetts Supreme Judicial Court ("SJC") denying petitioner leave to appeal from a denial of a fourth new trial motion (Docket Entry # 29, pp. 1-2) and an eighth new trial motion (Docket Entry # 29, p. 10) operate as a procedural default barring federal habeas relief. (Docket Entry # 29, pp. 1-2, 10-11). Finally, respondent submits that petitioner cannot show cause and prejudice or actual innocence to excuse the default.

An evidentiary hearing is not warranted. Before allowing an evidentiary hearing, a federal "habeas judge 'must first consider whether such [a] hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief.'" Companionio v. O'Brien, 672 F.3d 101, 112 (1st Cir. 2012) (quoting Teti v. Bender, 507 F.3d 50, 62 (1st Cir. 2007)). The petitioner "must therefore demonstrate that his allegations would entitle him to relief and that the hearing is *likely* to elicit the factual support for those allegations." Id. (emphasis added). The facts relative to the procedural default and actual innocence are sufficiently

complete. Petitioner otherwise fails to show that his allegations regarding the blood type evidence, the position of the victim's body and the time of death would entitle him to habeas relief on the ineffective assistance of trial counsel claim and that a hearing is likely to elicit facts to support the allegations at this point in time years after the events. As recounted in the factual background, the evidence against petitioner at trial, including eye-witness testimony of petitioner removing the murder weapon (a knife) from the victim's body, was overwhelming.

PROCEDURAL BACKGROUND

On March 16, 1978, a jury found petitioner guilty of first degree murder of a minister in Lynn, Massachusetts at the home of the minister and his wife. The jury also found petitioner guilty of raping and kidnapping the minister's wife. The trial judge sentenced petitioner to a life term on the murder conviction and concurrent terms of 15 to 20 years on the rape conviction and eight to ten years on the kidnapping conviction. Com. v. Wilborne, 415 N.E.2d 192, 194 n.1 (Mass. 1981).¹

Petitioner filed a direct appeal raising various arguments with respect to the first degree murder conviction. He did not

¹ A subsequent opinion by the SJC "adopt[s] the correct spelling of the petitioner's surname" as Wilborn. Wilborn v. Com., 861 N.E.2d 391, 391 n.1 (Mass. 2007); (Docket Entry # 35, Add. 90).

assert any error regarding the rape and kidnapping convictions. Id. Exercising plenary review, the SJC reviewed the "whole case on the law and the evidence," upheld the first degree murder verdict and determined that "[t]he interests of justice did not require either a new trial or the entry of a" reduced verdict under Massachusetts General Laws chapter 278 ("chapter 278"), section 33E ("section 33E").

In October 1983, petitioner filed a motion for a new trial under Rule 30(b) of the Massachusetts Rules of Criminal Procedure. (Docket Entry # 27-1, pp. 3-4). The attorney representing petitioner at the hearing on the new trial motion was not trial counsel, i.e., the attorney who petitioner presently claims was ineffective. (Docket Entry # 27-1, p. 3) (Docket Entry # 34, Add. 10). In December 1985, a justice of the trial court ("the first justice") denied the motion. In July 1986, an appeal of the denial "was dismissed on the Commonwealth's motion and the defendant's assent."² (Docket Entry # 52-1, A. 29).

In February 1988, petitioner filed a second motion for a new trial. A few days later, the first justice issued an order

² The above procedural background is gleaned from a December 1994 Memorandum and Order by the trial court denying petitioner's fourth new trial motion. (Docket Entry # 52-1, A. 29). Except for entries in 1977 and 1978, the docket sheet for the trial court begins in 2000. (Docket Entry # 34, Add. 11) (Docket Entry # 49-1).

declining to act on the motion which, years later, a different justice interpreted as declining to exercise the discretion afforded under Rule 30(b)(2). (Docket Entry # 52-1, A. 29). On March 1, 1988, petitioner filed a motion for reconsideration, which the first justice denied the following day. (Docket Entry # 52-1, A. 29).

In November 1992, petitioner filed a third motion for a new trial, which was denied on March 22, 1993. (Docket Entry # 51-2, A. 29) (Docket Entry # 35, Add. 88). Although a notice of appeal "was filed on April 2, 1993, it appears that no action was taken on the appeal," according to the December 1994 Memorandum and Order on the fourth new trial motion. (Docket Entry # 52-1, A. 30). A February 2007 opinion by the SJC notes that a single justice of the SJC "[t]wice" denied petitioner leave to appeal under section 33E of chapter 278.³ (Docket Entry # 35, Add. 89). Except for the section 33E appeal of the denial of the fourth new trial motion, the only other section 33E appeal prior to February 2007 logically would have been the appeal regarding the notice of appeal of the denial of the third new trial motion.⁴

³ After direct appeal, section 33E of chapter 278 restricts review by the full SJC unless a single justice of the SJC allows the appeal "on the ground that it presents a new and substantial question which ought to be determined by the full court." Mass. Gen. Laws ch. 278, § 33E.

⁴ Resolution of the existence of a section 33E appeal of the third new trial motion is not material to the outcome of the procedural default issue.

In March 1994, petitioner filed a combined motion to dismiss the Indictments or for a new trial. (Docket Entry # 52-1, A. 2-4). The latter request constitutes petitioner's fourth new trial motion. The fourth new trial motion raises an ineffective assistance of trial counsel claim based on counsel's failure to: seek dismissal of the Indictments; cross-examine certain Commonwealth witnesses as to the time of death; cross-examine the victim's wife concerning her bias and inconsistent testimony at the probable cause hearing; make an effective closing argument; and object to the prosecutor's closing argument.⁵ (Docket Entry # 52-1, A. 2-3). In December 1994 (Docket Entry # 52-1, A. 40), another justice of the trial court ("the second justice"), who

⁵ The grounds and rulings regarding the fourth new trial motion implicate the procedural default and limitations arguments. The ineffective assistance of trial counsel claim in the petition concerns the failure to submit all exculpatory evidence. The supporting facts state that trial counsel failed "to put all crucial facts in front of the court" and that "the crucial information" consisting of the probable cause hearing transcripts and the exhibits attached to the petition are now available. The supporting memorandum discusses the absence of the probable cause transcripts and the failure to put the testimony of the medical examiner at the probable cause hearing regarding the wrong time of death before the jury. The supporting memorandum additionally challenges the discrepancy between the time of the two television shows the victim was watching while eating and the medical examiner's statements regarding the time of death. The ineffective assistance of trial counsel claim raised in the fourth new trial motion therefore overlaps those raised in the petition. The eighth new trial motion similarly corresponds to the grounds raised in the petition to support the ineffective assistance of trial counsel claim. Both appeals were denied due to the absence of any new and substantial question under section 33E.

was not the trial judge, denied the motion in a comprehensive, exhaustive 13 page Memorandum and Order.

Notably, the portion of the opinion that addressed the new trial motion begins with a procedural ruling that petitioner waived the claims. The relevant language reads as follows:

Defendant clearly has no right to a hearing on the merits of his motion for a new trial. All of the grounds for a new trial he asserts in the present motion were available to him at the time he filed his first motion. His failure to assert them in that motion means he cannot do so now unless the court in its discretion permits him to do so. Mass. R.Civ. P. 30(B)(2). I decline to do so.

(Docket Entry # 52-1, A. 36).

In the alternative, the second justice addressed the merits of the ineffective assistance of trial counsel claims and rejected it. He also, correctly, discounted the impact of the purportedly false testimony before the grand jury as well as petitioner's argument regarding the time of death. (Docket Entry # 52-1, A. 32, 35).

Petitioner filed a section 33E petition seeking leave to appeal the denial to the SJC. (Docket Entry # 34, Add. 151).⁶ On December 21, 2001, a single justice of the SJC denied leave to appeal to the full court. (Docket Entry # 34, Add. 152). The single justice concluded, "based essentially on the same reasons stated by [the second justice] who heard and decided the motion,

⁶ The docket sheet reflects the same date (December 2, 1994) of the second justice's decision. (Docket Entry # 52-1, A. 40) (Docket Entry # 34, Add. 151).

that the defendant has not demonstrated that the issues he seeks to advance are either new or substantial." (Docket Entry # 70-1).

On January 16, 2002, petitioner filed a petition for relief under Massachusetts General Laws chapter 211 ("chapter 211"), section three. (Docket Entry # 35, Add. 74). On June 29, 2005, a single justice of the SJC summarily denied the petition without a hearing. (Docket Entry # 35, Add. 77). A few days later on July 8, 2005, petitioner filed a notice of appeal to the full court. (Docket Entry # 35, Add. 76). On February 7, 2007, the SJC affirmed the single justice's denial. (Docket Entry # 35, Add. 89-90). The SJC explained that petitioner filed the petition "seeking relief that either was sought or could have been sought in the Superior Court." (Docket Entry # 35, Add. 89). It concluded that, "The fact that the petitioner 'failed to pursue the alternative route or pursued it unsuccessfully' does not create a right to relief under G.L. c. 211, § 3."⁷ (Docket

⁷ With respect to the statute of limitations issue, the First Circuit in Rodriguez v. Spencer, 412 F.3d 29 (1st Cir. 2005), rejected the Commonwealth's argument that a chapter 211 petition can never constitute "other collateral review" within the meaning of section 2244(d)(2) thereby tolling the one year limitations period during the pendency of the petition. Even more to the point, the court "reject[ed] the Commonwealth's position that categorically a ch. 211, § 3 petition denied due to an alternative, adequate remedy can never be 'properly filed'" within the meaning of section 2244(d)(2). Id. at 36 n.5. The Rodriguez court did not decide whether the single justice's denial of Rodriguez's chapter 211 petition because, like the reason for the denial here, "Rodriguez had failed to take the

Entry # 35, Add. 89).

In October 2007, petitioner filed a fifth motion for a new trial. (Docket Entry # 34, Add. 11). The trial court's docket does not reflect a ruling.

Petitioner filed a sixth new trial motion on April 30, 2010. On March 2, 2011, the trial judge denied the motion. (Docket Entry # 34, Add. 11-12). Describing petitioner as a "'relentless serial filer,'" the trial judge denied the motion on the basis of a waiver noting, "If ever there was a 'firmly settled' conviction, Wilborn's 1978 murder conviction is it. He is entitled to no review of the merits of his sixth motion for [a] new trial." (Docket Entry # 70-2). On August 18, 2011, a single justice of the SJC denied petitioner's petition for leave to appeal the ruling to the SJC under section 33E. (Docket Entry # 34, Add. 153, 154).

Undeterred, petitioner filed a seventh new trial motion on April 15, 2014. (Docket Entry # 34, Add. 13). Here again, on April 22, 2014, the trial judge denied the motion on the basis of a waiver. As reflected on the trial court's docket, the trial judge concluded that petitioner was not entitled to a review of

opportunities available to him to assert his claim of bias" tolled the limitations period. Id. at 36. The issue remains one of first impression in the First Circuit. Because this court finds a procedural default, it is not necessary to address the limitations argument, including this issue left open in Rodriguez.

the "[m]erits of his seventh motion for a new trial, for reasons previously noted by this court" in the decision on the sixth new trial motion and "as argued by the Commonwealth's written response." (Docket Entry # 34, Add. 12, 13). The Commonwealth's response asserted that a merits review was not appropriate on the basis of a waiver. (Docket Entry # 34, Add. 21-23).

In March 2015, petitioner filed an eighth new trial motion based inter alia on ineffective assistance of counsel. (Docket Entry # 34, Add. 14). In May 2015, he filed a ninth new trial motion. (Docket Entry # 34, Add. 14). A justice of the trial court denied both motions in May 2015. (Docket Entry # 34, Add. 14, 15). In June 2015, petitioner filed a section 33E petition to a single justice of the SJC raising the ineffective assistance of trial counsel claim in this petition regarding, inter alia, the position of the body. (Docket Entry # 34, Add. 114-117) (Docket Entry ## 1, 4). On July 28, 2015, a single justice of the SJC denied the petition for leave to appeal to the full court. (Docket Entry # 34, Add. 112-113, 147-148). The single justice explained that petitioner's claims were "neither 'new' nor 'substantial' within the meaning of G. L. C. 278, § 33E." (Docket Entry # 34, Add. 147).

Separately, on April 15, 2014, petitioner filed a motion seeking access to forensic and scientific evidence under Massachusetts General Laws chapter 278A ("chapter 278A") to

obtain DNA testing of a spot of blood on a bathrobe to establish it was not his blood type. (Docket Entry # 34, Add. 13, 16-17). On July 17, 2014, a justice of the trial court denied the motion because it failed to satisfy section 3(b)(4) of chapter 278A, which requires the motion to include information demonstrating that the requested DNA analysis had "the potential to result in evidence that is material" to petitioner's "identification as the perpetrator of the crime." (Docket Entry # 34, Add. 31) (quoting chapter 278A, § 3(b)(4)). The justice reasoned that, "It was not the blood on the bathrobe that linked [petitioner] to the murder." (Docket Entry # 34, Add. 32). Rather, it was "[t]he murder victim's wife's testimony and [petitioner's] post-arrest statement to police." (Docket Entry # 34, Add. 32).

In September 2014, petitioner filed an appeal to a single justice of the SJC. (Docket Entry # 34, Add. 65-68). On January 30, 2015, the single justice denied the appeal on the basis that the "claims did not present a new or substantial question which ought to be determined by the full court." (Docket Entry # 34, Add. 64). Petitioner also filed a section 2254 petition in 1987 and a civil rights action in 2011 in the United State District Court for the District of Massachusetts. (Docket Entry # 51-1, p. 7) (Docket Entry # 34, Add. 155-163). In September 2013, the First Circuit affirmed the lower court's dismissal of the 2011 action. (Docket Entry # 34, Add. 167).

FACTUAL BACKGROUND

As set out by the SJC on direct appeal, the facts are as follows:⁸

In the early morning hours of October 4, 1976, the wife of William Sanders was awakened by a loud noise and gasping sounds. She ran across the hall, where she found her husband lying in the doorway of the back bedroom, and the defendant bending over him, pulling a large knife from her husband's body. Sanders's wife testified that the defendant, still carrying the knife, took her to the bathroom where he rinsed his right hand and wrapped it in a towel. At that time she observed deep cuts on the defendant's right hand. Sanders could be heard gasping for breath. Sanders's wife asked Wilborne to let her call an ambulance and he refused. Wilborne then took Sanders's wife to her bedroom and proceeded to assault her sexually throughout the remainder of the night. The next morning the defendant forced her to pack some things, load her car, and take him to a bank to get money deposited there by Sanders and his wife. At the bank, the witness walked directly to a friend who was employed there and told her to call the police, saying, "This man murdered my husband." The defendant fled from the bank. Later he was found by the police hiding behind a fence in a nearby backyard. After Wilborne was arrested and booked, the officers took him to a hospital for treatment of his cut hand.

. . . The defendant was admitted to Lynn Hospital for treatment of his cut hand at 11:50 A.M. on October 4, 1976. At 7:40 a.m., on October 6, 1976, Wilborne was given an injection of fifty milligrams of Demerol. At approximately 9:45 a.m. on October 6, he was discharged from the hospital and two Lynn police officers took him from the hospital to the Lynn police station. At the station, Wilborne was interrogated by a lieutenant of the State police and two Lynn officers, and, at approximately 10:15 a.m., he made a statement.

Com. v. Wilborne, 415 N.E.2d 192, 195, 198 (Mass. 1981).

. . . Investigating officers found Sanders's body stretched

⁸ The AEDPA presumes the correctness of facts made by a state court. 28 U.S.C. § 2254(e)(1).

across the threshold of the back bedroom in a pool of blood. He was wearing pajamas and clutching a sheet and a blanket. He had a two-inch wound in his throat. Blood was found in the hallway, back bedroom, and bathroom. Bloodied towels were found in the bathroom and front bedroom, and a small amount of blood was found in one corner of a sheet from the wife's bed. The back bedroom was in a state of disarray; a small bed was on top of a larger bed, and a portion of the wall next to the door was caved in. In the study adjacent to the back bedroom, officers found a bloody knife with an eleven-inch blade and a five-inch wooden handle lying on top of some books. The cause of death was a stab wound of the neck, which resulted in a perforation of the subclavian artery and a lung.

Id., at 195.

The trial court found the following facts:

The autopsy report stated that the defendant's gastrointestinal tract contained food with "approximately two to three hours of digestion." The decedent ate his last meal between 8:00 and 10:00 p.m. At the probable cause hearing, the medical examiner testified that death occurred between two and four hours after the decedent ate the meal that was found in his stomach. The medical examiner also testified that death occurred "ten to twelve hours" before the autopsy that was conducted at 10:30 a.m. The sum total of the medical evidence this supports a conclusion that the decedent's death occurred as early as 10:30 p.m. on the evening of October 3, and as late as 2:00 a.m. The decedent's wife testified that she observed the defendant pulling a knife out of the body of her deceased husband at 3:00 a.m. On this record, there simply is no basis for concluding beyond peradventure that the decedent was killed between "11:00-12:00."

(Docket Entry # 52-1, A. 35-36) (citations to petitioner's brief omitted).

DISCUSSION

Respondent contends that the ineffective assistance of trial counsel claim is procedurally defaulted because the single justice of the SJC rejected the claim on appeal from the denial

of the fourth new trial motion (Docket Entry # 29, pp. 1-2) and another single justice of the SJC rejected the claim on appeal from the eighth new trial motion. The ineffective assistance of trial counsel claims raised in the new trial motions and rejected on appeal by the single justices as neither new nor substantial correspond to the ineffective assistance of trial counsel claim raised in the petition.

Federal courts are barred from reviewing state court decisions that rest on "independent and adequate state ground[s]." Trest v. Cain, 522 U.S. 87, 89 (1997). As recently expressed by the First Circuit, federal habeas review is "precluded if there is an independent and adequate state law ground supporting the state court's decision." Lee v. Corsini, 777 F.3d 46, 54 (1st Cir. 2015).

A state procedural rule is "adequate" as "long as the state regularly follows the rule and has not waived it by relying on some other ground.'" Id. (quoting Jewett v. Brady, 634 F.3d 67, 76 (1st Cir. 2011)). On appeal, the single justices determined that the claims were neither new nor substantial under section 33E of chapter 278. (Docket Entry # 34, Add. 55, 147). "An issue is not 'new' for purposes of the statute if it could have been addressed at trial or on direct review, had the defendant properly raised it there." Yeboah-Sefah v. Ficco, 556 F.3d 53, 74 (1st Cir. 2009). A single justice's denial of a gatekeeper

petition, including one containing an ineffective assistance of trial counsel claim, on the basis that the federal claim "was 'not new and substantial,' within the meaning of" section 33E rests "on adequate and independent state procedural grounds" thus providing a basis for procedural default. Id.; Lee v. Corsini, 777 F.3d at 57 ("failure to satisfy the 'new' prong of the § 33E rule . . . signals procedural default").

Federal habeas review of the ineffective assistance of trial counsel claim is therefore foreclosed unless petitioner shows cause and prejudice or a fundamental miscarriage of justice. See Lee v. Corsini, 777 F.3d at 58 (federal court may review procedurally defaulted claim if "petitioner demonstrates cause for the default and prejudice resulting therefrom, or . . . 'that failure to consider the federal claim will result in a fundamental miscarriage of justice'"); Janosky v. St. Amand, 594 F.3d 39, 44-46 (1st Cir. 2010). "Federal habeas courts do not exempt ineffective assistance of counsel claims from the general rule requiring cause and prejudice for procedural default." Costa v. Hall, 673 F.3d 16, 25 (1st Cir. 2012).

As to cause, the petitioner must demonstrate "'some objective factor external to the defense' . . . 'impeded counsel's efforts to comply with the State's procedural rule.'" Lee v. Corsini, 777 F.3d at 58-59; Murray v. Carrier, 477 U.S. 478, 488 (1986). As to prejudice, a petitioner "must demonstrate

'not merely that the errors'" at trial "'created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" Costa v. Hall, 673 F.3d at 25 (quoting Murray v. Carrier, 477 U.S. at 494). At a minimum, petitioner fails to show actual prejudice, namely, that the alleged ineffective assistance of trial counsel errors worked to his actual and substantial disadvantage, infecting the entire trial. Assuming for purposes of argument that trial counsel failed explore the discrepancies between the time of death and the victim's ingestion of his last meal with testimony from the probable cause hearing, the failure did not work to petitioner's actual and substantial disadvantage. The medical examiner testified at the November 26, 1976 probable cause hearing that death occurred "anywhere from two to four hours" after the victim ingested his last meal and between ten and 12 hours before he saw the victim at 10:30 a.m. As explained by the second justice (Docket Entry # 52-1, p. 35) and set out in the factual background, the evidence supports a conclusion that the victim's death occurred at the earliest at 10:30 p.m. and at the latest at 2:00 a.m. The victim's wife saw petitioner pull the knife out of the victim's body at 3:00 a.m. (Docket Entry # 52-1, p. 35). Petitioner's assertion that the victim did not "die after midnight" (Docket Entry # 4, p. 3) is therefore misguided as a

means to support the ineffective assistance claim. The remaining alleged errors on the part of trial counsel, including the alleged failure to explore the medical evidence regarding the lividity of the body in conjunction with its position across the threshold in pictures of the crime scene, likewise did not work to petitioner's actual and substantial infecting the entire trial with constitutional error.

Even without a showing of cause and prejudice, a federal "court may excuse a procedural default if the petitioner can demonstrate that a failure to consider his claim will work a fundamental miscarriage of justice." Janosky v. St. Amand, 594 F.3d at 46; accord Lee v. Corsini, 777 F.3d at 62. The "exception is narrow and applies only in extraordinary circumstances—circumstances in which a petitioner makes some showing of actual innocence." Janosky v. St. Amand, 594 F.3d at 46; accord Lee v. Corsini, 777 F.3d at 62 (miscarriage of justice exception is "'narrow,'" "'seldom'" used and "'tied to a showing of actual innocence'"). The facts do not support the existence of actual innocence in light of the facts recounted by the SJC and the trial court, including eyewitness testimony of petitioner pulling the knife out of the victim's body.

CONCLUSION

In accordance with the foregoing discussion, this court

RECOMMENDS⁹ that the motion to dismiss the petition (Docket Entry # 28) be **ALLOWED** and that the petition be **DISMISSED**.

/s/ Marianne B. Bowler
MARIANNE B. BOWLER
United States Magistrate Judge

⁹ Any objections to this Report and Recommendation must be filed with the Clerk of Court within 14 days of receipt of the Report and Recommendation to which objection is made and the basis for such objection. See Fed.R.Civ.P. 72(b). Any party may respond to another party's objections within 14 days after service of the objections. Failure to file objections within the specified time waives the right to appeal the order.

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