Third Circuit Court of Appeals

Notice of Docket Activity

The following transaction was filed on 08/14/2019

Case Name: Jerome Marshall v. Jeffrey Beard, et al

Case Number: 18-9007

Document(s): Document(s)

Docket Text:
ORDER (MCKEE, JORDAN and FUENTES, Circuit Judges) The foregoing request for a certificate of appealability is denied. We may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. Section 2253(c)(2). When the District Court denies a habeas petition on procedural grounds without reaching the merits of the underlying claims, we will issue a certificate of appealability when the prisoner shows that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and debatable whether the District Court was correct in its procedural ruling. Slack v. McDaniel, 529 U.S. 473, 484 (2000). Jurists of reason would not debate the District Court's denial of Marshall's claim that counsel was ineffective for failing to investigate and present a diminished capacity defense. See Strickland v. Washington, 466 U.S. 668, 687-96 (1984); Commonwealth v. Hutchinson, 25 A.3d 277, 312 (Pa. 2011) (defendant must admit criminal liability and establish that his cognitive abilities were compromised such that he could not formulate the specific intent to kill.) (See order for complete text)., filed. Panel No.: ELD-012. JORDAN, Authoring Judge. (DW)

Notice will be electronically mailed to:

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Document Description: Notice of Judgment
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JEROME MARSHALL,	:	
	:	
Petitioner,	:	
	:	
v.	:	No. 03-cv-03308
	:	
JOHN E. WETZEL, Commissioner, Pennsylvania Department of Corrections; ROBERT D. GILMORE, Superintendent, State Correctional Institution at Greene; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,	:	
	:	
Respondents.	:	

* * *

APPEARANCES:

CHRISTIAN J. HOEY, ESQUIRE
MAUREEN CLAIRE COGGINS, ESQUIRE
On behalf of Petitioner

MAX C. KAUFMAN, ESQUIRE
On behalf of Respondents

* * *

OPINION

Petition of Jerome Marshall for Writ of Habeas Corpus Pursuant to 28 U.S.C. §2254

JOSEPH F. LEESON, JR.
United States District Judge **November 6, 2018**

same date, a Memorandum of Law of Petitioner, Jerome Marshall in Support of His Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 ("Petitioner's Amended Memorandum")[8] was filed. On May 22, 2017, the Commonwealth filed its Supplemental Response to Petition for Writ of Habeas Corpus ("Supplemental Response").[9]

On June 6, 2018 respondents filed a Status Report[10] indicating that they agreed to a conditional grant of petitioner's writ of habeas corpus with respect to the death sentences imposed for the murders of Myndie McCoy and Karima Saunders. Respondents further indicated that after consultation with the families of the victims, they would not seek new death sentences upon resentencing in state court. On June 25, 2018, respondents filed a Status Report[11] stating that respondents had discussed the conditional grant of petitioner's writ of habeas corpus with the victims' families and that they now formally do not contest the conditional grant of habeas relief concerning the two death sentences. That concession by respondents however, does not resolve all the claims in this case.

On July 20, 2018, respondents filed a letter memorandum[12] outlining the claims that remain for this court's resolution.[13] Specifically, there are 17 claims that relate to the death sentences imposed for the murders of Myndie McCoy and Karima Saunders that no longer need

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8 Document 146.

9 Document 158.

10 Document 171.

11 Document 172.

12 Document 177.

13 The numbering of the claims presented in the Amended Petition are those utilized in respondents' Supplemental Response. I have chosen to utilize respondents' numbering because it is clear what each claim is in a consecutive numbering system versus petitioner's haphazard approach.

death sentence for Karima Saunders based on its determination that the jury had improperly found an aggravating factor that did not apply. See id.

Specifically, the jury had found that Karima "was killed for the purpose of preventing [her] testimony against the defendant". 42 Pa.C.S.A. § 9711(d). The Pennsylvania Supreme Court explained that "[t]here was no direct or circumstantial evidence to establish the Appellant's intent at the time he murdered Karima. All that was presented was that in response to Karima's cries for her mother, Appellant killed her." Marshall I, 568 A.2d at 599. Based on the finding that the jury had improperly found an aggravating circumstance which did not apply, the court vacated the death sentence for Karima Saunders and remanded the case for a new penalty phase. Id.

A second penalty phase occurred on July 27, 1990 to sentence petitioner for the one death sentence that had been vacated.[18] On July 27, 1990, the retrial jury again sentenced petitioner to death, finding one aggravating circumstance that outweighed two mitigating circumstances.[19]

Petitioner filed a direct appeal of the re-sentence of death for the murder of Karima Saunders. On May 24, 1994, the Supreme Court of Pennsylvania affirmed the sentence. Marshall II. Petitioner was represented at the penalty phase retrial and on appeal therefrom by Bernard L. Siegel, Esquire. See id.

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[18] Amended Petition at ¶ 6; see also Commonwealth v. Marshall, 643 A.2d 1070, 1072 (Pa. 1994) ("Marshall II").

[19] Amended Petition at ¶ 6; Marshall II, 643 A.2d at 1072. The aggravating factor found by the jury was that "[t]he defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense." Marshall II, 643 A.2d at 1072 n.2 (citing 42 Pa.C.S.A. § 9711(d)(10)).

The mitigating factors found by the jury were his lack of a significant history of prior criminal convictions, and the residual factor regarding "evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense". Id. at 1072 n.3 (citing 42 Pa.C.S.A. §§ 9711(e)(1) and (e)(8)).

pro se filed a Motion to Remove Counsel, Appoint New Counsel, to Stay Proceedings and Hold in Abeyance; Tolling Time ("Motion to Remove Counsel").[26] In the Motion to Remove Counsel, petitioner alleged that he had never given consent to being represented by the Federal Community Defender Office and requested to be appointed new counsel. On December 22, 2014, counsel from the Federal Community Defender Office filed a Motion By Counsel for Petitioner to Withdraw from Representation ("Motion to Withdraw").[27]

After a hearing held on December 29, 2014, by Order of Judge Gardner dated December 29, 2014 and filed January 9, 2015,[28] he granted the Motion to Withdraw and removed the Federal Community Defender Office as counsel for petitioner. By Order dated December 29, 2014 and filed January 9, 2015,[29] Judge Gardner granted petitioner's Motion to Remove Counsel and indicated that new counsel would be appointed to represent petitioner. By Order dated and filed January 13, 2015, Judge Gardner appointed Christian J. Hoey, Esquire, and Maureen C. Coggins, Esquire, to represent petitioner in this matter.[30]

On April 1, 2015, petitioner pro se filed Petitioner's Pro Se Omnibus Motion,[31] in which he requested: (1) that court-appointed counsel be removed; (2) that all documents filed by the Federal Community Defender Office, including the Original Petition, be stricken; (3) that the court grant leave to file a new habeas corpus petition; and (4) that the court remand this matter to

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26 Document 85.

27 Document 88.

28 Document 92.

29 Document 93.

30 Document 95.

31 Document 102.

assist counsel, denied his requests to remove counsel, and set a briefing schedule for the parties to update their original filings.[35]

On July 7, 2016, petitioner filed his Amended Petition,[36] along with Petitioner's Amended Memorandum.[37] On May 22, 2017, respondents filed their Supplemental Response.[38]

III. STANDARD OF REVIEW

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA")[39] imposes certain procedural requirements and standards on federal courts for analyzing federal habeas corpus petitions. Specifically, the AEDPA limits habeas corpus relief for claims adjudicated on the merits by a state court. 28 U.S.C. §2254(d) (1)-(2).

Under this deferential standard, habeas corpus relief is barred unless the state court determination was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). In addition, a state court's factual findings are "presumed to be correct," and the habeas corpus petitioner "shall have the burden of rebutting

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35 On February 29, 2016, petitioner pro se filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit (Document 137) concerning what he believed to be Judge Gardner's ruling that he is incompetent. However, at that time, Judge Gardner had not yet ruled on petitioner's competency. Ultimately, by Order and Opinion dated March 21, 2016 and filed March 23, 2016 (Documents 140 & 141), Judge Gardner determined that petitioner is incompetent to assist counsel, or to proceed pro se, and therefore denied his request to remove his counsel.

By decision of the Third Circuit dated October 25, 2016 (Third Circuit Docket No. 16-9000), the Third Circuit dismissed petitioner's appeal, ruling that his Notice of Appeal was premature because it was filed before Judge Gardner's Order and Opinion ruling on his competency.

36 Document 145.

37 Document 146.

38 Document 158.

39 See 28 U.S.C. §§ 2254(d)(1)-(2) and (e)(1).

IV. FACTS

The following facts have been taken from the Supreme Court of Pennsylvania's decision in Marshall I, 568 A.2d 590.

On January 25, 1983, James Burley and his mother went to the Philadelphia apartment of James' sister, Sharon Saunders. Id. at 593. They observed that the apartment was very hot with a foul odor. Id. They then discovered the bodies of Sharon, her two-year-old daughter, Karima Saunders and Myndie McKoy. Id. Their nude bodies were found under a mattress in one of the bedrooms. Id. Additionally, Sharon's stereo and speakers were missing. Id. James and his mother called the police and reported the incident. Id.

When the police arrived at the scene, they recovered a manila envelope with petitioner's name and address along with documents indicating the time and place where he was scheduled to retrieve his welfare check. Id. On the front of the envelope was written: "Jerome and Sharon 4 ever". Id.

The police then began a search for petitioner. Id. They went to his listed address, waited for him at the bank, and visited his parents, aunts, and uncles. Id. The police also went to the home of petitioner's brother Eugene Marshall, and Eugene's wife, Irene Marshall. Id. At Eugene's home, the police observed a stereo and speakers fitting the description of the ones missing from Sharon's apartment. Id. The police obtained a search warrant for the stereo and speakers and returned to seize them. Id. at 593-594. Irene told the police that petitioner brought the stereo and speakers to their home and sold them to Eugene. Id. at 594.

Eugene told the police that he encountered his brother, petitioner, on a street corner near to where the victims lived around the time of their deaths. Id. He stated that petitioner was carrying a knife and had blood on his shirt. Id. Eugene reportedly harbored petitioner in his home

Marshall I, 568 A.2d at 563-565.

V. ANALYSIS

A. Exhaustion of State Court Remedies.

"It is axiomatic that a federal habeas court may not grant a petition for a writ of habeas corpus filed by a person incarcerated from a judgment of a state court unless the petitioner has first exhausted the remedies available in the state courts." Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997); see also 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement is rooted in principles of comity, and it affords state courts the first opportunity to adjudicate constitutional challenges to state convictions. Coleman v. Thompson, 501 U.S. 722, 731, 111 S. Ct. 2546, 2555, 115 L. Ed. 2d 640, 657 (1991).

To properly satisfy the exhaustion requirement, the petitioner must provide the state court with the first opportunity to hear the same claim raised in the federal habeas petition. Picard v. Connor, 404 U.S. 270, 276, 92 S. Ct. 509, 512, 30 L. Ed. 2d 438, 444 (1971). The petitioner must invoke "one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845, 119 S. Ct. 1728, 1732, 144 L. Ed. 2d 1, 9 (1999). Once the issue has been raised on direct appeal, a petitioner is not required to raise it again in a state post-conviction proceeding. Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000).

The claim must be "fairly presented" to the state courts, which means the petitioner must "present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999). "It is not enough that all the facts necessary to support the federal claim were before the state courts...." Anderson v. Harless, 459 U.S. 4, 6, 103 S. Ct. 276, 277, 74 L. Ed. 2d 3, 7 (1982). The "mere similarity of claims is insufficient to exhaust." Keller v. Larkins, 251

A state court decision rests on "independent" state grounds when "resolution of the state procedural law question" does not depend on a "federal constitutional ruling." Laird v. Horn, 159 F. Supp. 2d 58, 73 (E.D.Pa. 2001)(internal quotations omitted), aff'd, 414 F.3d 419 (3d Cir. 2005).

For a state rule to provide an "adequate" basis for precluding federal review of a state prisoner's habeas claim, the rule must have been firmly established and regularly followed at the time the alleged default occurred. Albrecht v. Horn, 485 F.3d 103, 115 (3d Cir. 2007). This requirement ensures that petitioner had fair notice of the need to follow the state procedural rule before barring habeas review. Bronshtein, 404 F.3d at 707.

A state procedural rule is considered "adequate" when it has the following attributes: "(1) the state procedural rule speaks in unmistakable terms; (2) all state appellate courts refused to review the petitioner's claims on the merits; and (3) the state courts' refusal in this instance is consistent with other decisions." Jacobs, 395 F.3d at 117.

In this case, the Supreme Court of Pennsylvania held that certain claims raised by petitioner on PCRA appeal[40] were waived for petitioner's failure to raise them on direct appeal.

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[40] The Supreme Court of Pennsylvania held that the following claims were waived for failure to raise them on direct appeal:

> (1) The Commonwealth used its Peremptory strikes to discriminate against women, African-Americans and persons of Jewish ancestry; (2) The trial court improperly excluded prospective jurors in violation of Appellant's rights to an impartial jury and fair trial; (3) The prosecutor committed misconduct by introducing improper evidence at the guilt phase and making improper closing arguments in violation of Appellant's right to a fair trial; (4) Appellant's rights were violated at the guilt phase of his trial and both penalty phase proceedings when the trial court gave a reasonable doubt instruction to the jury; (5) Appellant's rights were violated by the trial court's erroneous lessening of the burden of proof on the element of corpus delicti; (6) The trial court's instructions after the jury reported a deadlock impermissibly suggested the verdict favored by the court and coerced the jury to return a death verdict with respect to the counts on which they were deadlocked; (7) Appellant is entitled to relief from his death sentence because the penalty phase jury instructions and verdict sheet unconstitutionally indicated that the jury had to unanimously find any mitigating circumstance before it could give effect to that circumstance in its

waiver and would consider the merits of claims otherwise waived for failure to properly preserve for appellate review. Id.; see also Szuchon, 273 F.3d at 325-326.

Petitioner was not fairly on notice that the ordinary waiver rule would apply to his capital case on his direct appeals, the first of which was decided in 1989 and the second of which was decided in 1994, because the Pennsylvania courts did not have a firmly established and regularly followed rule enforcing waiver. See Marshall I, 568 A.2d 590; Marshall II, 643 A.2d 1070. Therefore, as the United States Court of Appeals for the Third Circuit has held, the holding that a claim has been waived for petitioner's failure to raise it on direct appeal in a capital case is not "adequate" to support the judgment for purposes of procedural default. Szuchon, 273 F.3d at 327.

On November 23, 1998 the Supreme Court of Pennsylvania held that the relaxed waiver rule would no longer apply to capital cases at the post-conviction appellate stage. Commonwealth v. Albrecht, 554 Pa. 31, 44, 720 A.2d 693, 700 (1998). The Court held that "the negligible benefits of relaxed waiver at the PCRA appellate stage are more than outweighed by the need for finality and efficient use of the resources of this court." 554 Pa. at 45, 720 A.2d at 700.

Following Albrecht, the Supreme Court of Pennsylvania "deems an issue waived where the petitioner failed to present it to the PCRA court." Jacobs, 395 F.3d at 117. Accordingly, after Albrecht the waiver rule would be considered an "adequate" state-law ground for procedural default purposes on habeas review because a petitioner would have fair notice of its application in capital cases.[41]

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[41] The Third Circuit has not explicitly held when the waiver rule, as applied in capital cases on PCRA review, specifically became firmly established and regularly followed. Instead, the Third Circuit has only had occasion to

in a direct appeal after 1995. See Holloway v. Horn, 161 F. Supp. 2d 452, 475 (E.D.Pa. 2001), reversed in part on other grounds by Holloway v. Horn, 355 F.3d 707 (3d Cir. 2004). However, petitioner here filed his first direct appeal, the point at which it is alleged he waived certain claims, many years prior to the 1995 amendments.

Following respondents logic, there would be no distinction between "discretionary" rules and those rules which are simply inconsistently applied. Every inconsistently applied rule would be converted into a discretionary rule. This is, however, an important distinction because the purpose of requiring state law to be regularly-followed in order to be "adequate" to bar federal review is to ensure that petitioner had notice of the state law ground before forfeiting his right to pursue a claim. Bronshtein, 404 F.3d at 707.

Discretionary rules still allow for notice because "judicial discretion is the exercise of judgment according to standards that, at least over time, can become known and understood within reasonable operating limits." Morales v. Calderon, 85 F.3d 1387, 1392 (9th Cir. 1996). In this case, respondents have not pointed to any set of factors forming an understandable standard regarding when the relaxed waiver doctrine would be invoked. Accordingly, the waiver rule is insufficient to support a procedural default of petitioner's Claims VI, VII and VIII.

C. Previously-Litigated Bar.

The Pennsylvania Supreme Court also upheld the PCRA court's refusal to hold an evidentiary hearing to address the merits of one of petitioner's other claims--that his "trial counsel was ineffective for failing to investigate and present evidence that [petitioner's] mental impairments, in conjunction with the conduct of the police, rendered his confession involuntary." Marshall III, 812 A.2d at 544.

Amendment can constitute cause for procedural default. Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397, 409 (1986).

A petitioner can establish the "prejudice" requirement by showing that the alleged error "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Werts, 228 F.3d at 193 (internal quotations omitted). Where ineffective assistance of counsel is the alleged "cause," prejudice occurs "where there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." Werts, 228 F.3d at 193 (internal quotations omitted).

The United States Supreme Court has held that there is no constitutional right to an attorney in state post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566, 115 L. Ed. 2d 640, 671 (1991). Consequently, a petitioner cannot make a Sixth Amendment claim for ineffective assistance of post-conviction counsel. Id. In Coleman, the United States Supreme Court explained that procedural default resulting from constitutionally ineffective assistance of counsel is an external factor that is imputed to the state because of the state's responsibility to provide competent counsel pursuant to the Sixth Amendment. Id. However, "[i]n the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation...." 501 U.S. at 754, 111 S. Ct. at 2567, 115 L. Ed. 2d at 672.

However, the United States Supreme Court has created a narrow exception to the rule set forth in Coleman. In Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012) the Supreme Court held that a prisoner may establish cause for the procedural default of an ineffective-assistance-of-trial-counsel claim by demonstrating the ineffectiveness of counsel in an "initial-review collateral proceeding". The Supreme Court defined "initial-review collateral

below, Claims XXXII and XXXIII are time-barred, thus, it will be unnecessary to address the applicability of Martinez as cause to overcome procedural default.

E. Grounds for Relief.

1. Claim III: Petitioner's Confession Was Involuntary; Trial Counsel Was Ineffective for Failing to Investigate and Present Evidence that Petitioner's Mental Impairments, in Addition to the Conduct of the Police, Rendered His Statement Involuntary.

The Pennsylvania Supreme Court rejected the ineffectiveness portion of this claim as previously-litigated. However, as discussed above, an ineffectiveness claim is distinct from the underlying claim. See Commonwealth v. Collins, 888 A.2d 564 (Pa. 2005). Accordingly, the entirety of this claim has been exhausted and is now reviewable.

To demonstrate ineffectiveness of counsel, petitioner must demonstrate: (1) "that counsel's performance was deficient"; and (2) "that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). The deficiency must consist of "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. Furthermore, to establish prejudice, petitioner must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id.

Petitioner's underlying claim that his confession was involuntary lacks merit, and therefore his trial counsel was not ineffective for failing to investigate it further. "[T]actics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness." Miller v. Fenton, 474 U.S. 104, 110, 106 S. Ct. 445, 449, 88 L. Ed. 2d 405 (1985).

Petitioner claims, and cites evidence for the proposition, that there was a pattern or practice of police brutality within the Philadelphia Police Department during the general time

court's credibility determinations regarding petitioner and the officers who testified at the suppression hearing. Petitioner has failed to rebut these findings.

Petitioner also alleges that his trial counsel was ineffective for failing to present mental health evidence in support of his suppression motion. However, the record reflects that petitioner refused to be evaluated by a mental health professional. See Marshall III, 812 A.2d at 548 & 548 n.9. Petitioner's counsel cannot be faulted for failing to present evidence that petitioner himself rendered unavailable.

Furthermore, petitioner has still not provided any mental health evaluations which support his claim that his confession was involuntary. Rather, no later evaluation to which he submitted ever specifically addressed the voluntariness of his confession.

Petitioner has been evaluated by four medical professionals, court psychologist Jules deCruz, M.S.; neuropsychologist Carol Armstrong, Ph.D., clinical psychologist Jethro Toomer, Ph.D.; and clinical psychologist Kirk Heilbrun, Ph.D. Mr. deCruz found petitioner competent, less than a year from his confession to police.[43] Dr. Armstrong opines that petitioner suffers from neurocognitive deficits that make him more vulnerable and less able to deal with stressful situations.[44] Dr. Toomer states that petitioner can become psychotic in stressful situations,[45] suffers from cognitive and emotional impairments as a result of organic brain damage,[46] and was psychotic at the time of the killings.[47] Dr. Heilbrun opined that at the time of the offense

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43 Respondent's Exhibit 13, p. 5.

44 Petitioner's Exhibit 5, p. 1.

45 Petitioner's Exhibit 6, at ¶ 20.

46 Id. at ¶ 17.

47 Id. at ¶ 22.

waiver rule does not constitute an "adequate" state law ground which would prevent federal review.

Deferential review under the AEDPA applies to this claim because, although the Pennsylvania Supreme Court found that this claim had been waived, it nevertheless reviewed its merits. See Marshall III, 812 A.2d at 549-50; see also Rolan v. Coleman, 680 F.3d 311, 321 (3d Cir. 2012) (noting that the "AEDPA draws no such distinction for alternative rulings").

The state court's conclusion that the testimony of the medical examiner, Dr. Aronson, was not misleading or deceptive is not "contrary to" or an "unreasonable application" of federal law. Moreover, because Dr. Aronson's testimony was not false or misleading, petitioner's attorney was not ineffective for failing to impeach him.

Petitioner asserts that Dr. Aronson's testimony at trial was false or misleading because he testified that he could not rule out drowning as a cause of death for Myndie McKoy and Karima Saunders, but later testified at petitioner's second penalty phase hearing that he could rule out drowning as a cause of death.

The Supreme Court of Pennsylvania reviewed petitioner's claim and stated as follows:

> Next, [petitioner] claims that the PCRA court erred by denying his petition without first holding an evidentiary hearing regarding his claim that the trial testimony of the medical examiner, Dr. Aronson, was misleading, and therefore, his trial counsel was ineffective for failing to impeach him. This claim fails.
>
> At [petitioner's] trial, Dr. Aronson testified that the cause of Myndi McKoy's and Karima Saunders deaths was ligature strangulation, but that he could not exclude drowning as a contributing cause to their deaths. (N.T., 8/3/84, 23-24, 28, 57-58.) [Petitioner] contends that his trial counsel should have impeached Dr. Aronson's testimony that he could not exclude drowning as a contributing cause of the deaths because such testimony was misleading and/or deceptive. In support of his contention, [petitioner] points to a specific portion of Dr. Aronson's testimony

> misleading, [petitioner's] instant ineffectiveness claim necessarily fails.[49]

Marshall III, 812 A.2d at 549-50.

It was entirely reasonable for the state court to conclude that Petitioner's claim of ineffective assistance of counsel was without merit. Johnson v. Tennis, 549 F.3d 296, 301 (3d Cir. 2008). As stated by the Superior Court of Pennsylvania, the misleading aspect of this claim is not Dr. Aronson's testimony, it is petitioner's argument about it. There is no evidence of trial counsel's ineffectiveness for failing to properly impeach Dr. Aronson. Hence, the doubly deferential AEDPA standard dooms Petitioner's ineffectiveness claim. See Harrington v. Richer, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (explaining that applying the AEDPA standard to a *Strickland* claim requires the habeas court to apply double deference because each standard it itself "highly deferential").

Finally, there is not a scintilla of evidence of prosecutorial misconduct. The Supreme Court's determination that the prosecutorial misconduct aspect of this claim also falls because of the false premise supporting it was not "contrary to, or involved an unreasonable application of, clearly established Federal law" or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d) (1)-(2). Therefore, under the deference that must be afforded under the AEDPA standard, Claim IV is denied.

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[49] [Petitioner's] instant claim for relief is fashioned both as a prosecutorial misconduct claim and an ineffective assistance of counsel claim. To the extent that [petitioner] claims that the Commonwealth's presentation of Dr. Aronson's testimony constituted prosecutorial misconduct, said claim is waived, since [petitioner] could have but did not raise the claim in his direct appeal to this Court. 42 Pa. C.S. § 9544(b). assuming arguendo that [petitioner] did not waive his prosecutorial misconduct claim for purposes of the PCRA by failing to raise it in his direct appeal, we would nevertheless find the claim to be without merit, since it too would be based on the false premise that Dr. Aronson's trial testimony was misleading and/or deceptive.

also Lark v. Secretary Pennsylvania Department of Corrections, 645 F.3d 596 (3d Cir. 2011) ("We have held that, even in trials before the Supreme Court's decision in Batson, a timely objection to the prosecutor's exercise of peremptory strikes is a prerequisite to raising a Batson claim on appeal.") (citing Lewis, 581 F.3d at 102).

Although Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), was not decided until after petitioner's trial and during the pendency of his first direct appeal, he could have raised a challenge under Batson's antecedent, Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), which was in effect at the time of petitioner's trial. See Lewis v. Horn, 581 F.3d at 101-02 ("Although Batson was not decided until after Lewis's trial and during the pendency of his direct appeal, Lewis did not make any objections to the prosecutor's use of peremptory challenges under the then-prevailing standard of Swain .... As the Supreme Court explained, an objection to the jury selection process under Swain 'necessarily state an equal protection violation subject to proof under the Batson standard'".) (quoting Ford v. Georgia, 498 U.S. 411, 420, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991)). Accordingly, this claim is forfeited. Clausell v. Sherrer, 594 F.3d 191, 194-95 (3d Cir. 2010).

(b) Petitioner Has Failed to Make Out a Prima Facie Case Under *Batson/J.E.B.*

Even assuming petitioner had not forfeited this claim, he has failed to state a prima facie case. Because he has failed to establish a prima facie case, no evidentiary hearing is warranted. See Williams v. Beard, 637 F.3d 195, 211 (3d Cir. 2011).

Batson laid out a three-step burden-shifting framework:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light

framework, petitioner has failed to establish a prima facie case which would shift the burden to the Commonwealth to justify its use of peremptory strikes.

(c) Racial Strikes at the Trial and First Penalty Phase Hearing.

Petitioner alleges that he has established a prima facie case under Batson with respect to his trial and first penalty phase hearing based on the prosecutor's strike rates for African Americans and whites. Petitioner provides numbers for how many African American and white individuals were available to be struck by the prosecutor, and how many were indeed struck.

However, it is unclear where petitioner obtained this information, which makes it impossible to discern its accuracy. The Commonwealth contends that there is no complete record of the races of all venirepersons against whom peremptory challenges were brought.[50] Furthermore, the numbers petitioner provides are different in different places within his submissions. In his Amended Petition, he asserts that the prosecutor used seven strikes to remove seven of thirteen available African Americans, and seven strikes to remove seven of twenty-five available white venirepersons.[51] In his Memorandum of Law, however, he alleges that the prosecutor used six peremptory strikes to remove six of thirteen available African American venirepersons and seven strikes to remove seven of twenty-four whites.[52] The Commonwealth provides yet another different set of figures.[53]

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50 See Original Commonwealth Brief at page 123 n.55.

51 See Amended Petition at ¶¶ 104, 105.

52 See Memorandum of Law at pages 54-55.

53 See Original Commonwealth Brief at page 124. The Commonwealth asserts that the prosecutor's notes indicate that the prosecutor struck six of sixteen available African Americans (a strike rate of 37.5%), and six out of twenty-five available white venirepersons (a strike rate of 24%).

even though the jury was ultimately composed of all white jurors. Those numbers are perhaps more indicative of an improper motive than here, where the prosecutor allegedly used equal strikes to remove non-African Americans as African Americans, and the ultimate jury was composed of six African Americans and six white jurors.

In Holloway, by contrast, the Third Circuit did find a Batson violation. However, in that case, the prosecutor exercised all but one (eleven out of twelve) peremptory strikes to remove African Americans, and the prosecutor provided contemporaneous explanations for his strikes that were ultimately found to be merely pretextual. In the present case, unlike in Holloway, the prosecutor's peremptory strikes were used equally to remove whites and African Americans (seven strikes for each). Moreover, there were no statements made by the prosecutor during voir dire that would indicate a racial animus or which petitioner claims were provided as a pretext for discrimination.

A case which falls more in between is Williams v. Beard, 637 F.3d 195 (3d Cir. 2011). In that case, the Third Circuit found that the petitioner had established a prima facie case based on the prosecutor's strike rate for African Americans compared to whites. Id. at 214. The prosecutor there exercised fourteen out of sixteen peremptory strikes to remove fourteen of nineteen African Americans available to be struck (a strike rate of 87.5%). Id. By contrast, the prosecutor exercised only two strikes to remove two out of twenty-one white venirepersons available to be struck (a strike rate of 12.5%). Id. Ultimately, however, the court found no Batson violation because the prosecutor offered race-neutral reasons for the strikes at an evidentiary hearing in state court. Id.

The Williams court noted that in other cases where petitioners were found to have made out a prima facie case, "the strike rate exceeded 85%", as compared to another case where no

See Lewis, 581 F.3d at 104 ("Although many of the practices advocated in the McMahon tape flout the principles outlined in Batson, the tape was created four years after Lewis's trial and fails to provide any information about the routine practices of the particular prosecutor in Lewis's case or the practices actually utilized at Lewis's trial.").

Petitioner also seeks to bolster his claim by pointing to an article published by the University of Pennsylvania's Journal of Constitutional Law authored by David C. Baldus and others. See Baldus, et al., The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis, 3 U. Pa. J. Const. L. 3 (2001). This article discusses, *inter alia*, discrimination in the use of peremptory challenges.

(d) Gender Strikes at the Trial and First Penalty Phase Hearing.

Petitioner claims that the Commonwealth also executed peremptory strikes in a discriminatory manner to eliminate females at the 1984 jury selection in violation of J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994). In support of this claim, petitioner relies principally on the prosecutor's alleged strike rates for males and females. As with his Batson claim, petitioner's numbers are inconsistent within his various filings. In his Petition, he alleges that the prosecutor used eleven of fourteen peremptory strikes to remove eleven of twenty-two available female venirepersons (a strike rate of 50%), whereas the prosecutor used only three strikes to remove three of eighteen available men (a strike rate of 16.6%).[56]

However, in his Memorandum of Law, petitioner alleges that the prosecutor used ten (rather than eleven) of thirteen (rather than fourteen) strikes to remove women.[57] However,

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[56] See Amended Petition at ¶¶ 124, 125.

[57] See Memorandum of Law at pages 54-55.

death penalty from this case, it is unnecessary to analyze any racial strikes at the second penalty phase hearing.

Therefore, for the reasons expressed above, petitioner's Batson/J.E.B. claim would be denied on the merits even if not forfeited. Because his underlying claim lacks merit, his former counsel were not ineffective for failing to pursue it. Accordingly, Claim VI is denied.

5. Claim VII: The Trial Court Improperly Death-Qualified the Jury and Improperly Excluded Prospective Jurors in Violation of Mr. Marshall's Rights to an Impartial Jury and Fair Trial.

Petitioner alleges that "the trial court improperly disqualified for cause three jurors who did not indicate that they would not follow the law as set forth by the trial court, and prematurely dismissed prospective jurors without adequate opportunity for defense counsel to respond."[59] Petitioner contends that this violated his right to an impartial jury that is not "uncommonly willing to condemn a man to die" in violation of the Sixth Amendment. See Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968).

The Pennsylvania Supreme Court found that this claim was waived, but the waiver rule is not an adequate state law ground which would bar federal review, as explained above. See Marshall III, 812 A.3d at 543. Nevertheless, the court need not address the merits of this claim because it has already set aside petitioner's death sentences. Any bias of the jury in favor of the death sentence is moot because the death sentences have been vacated. Accordingly, Claim VII is dismissed as moot.

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[59] Amended Petition at ¶ 132.

(a) Improper Evidence and Closing Arguments on Victim Suffering.

Petitioner contends that the prosecutor improperly admitted evidence concerning the degree of pain Myndi McKoy experienced when petitioner stabbed her prior to strangling her. This evidence was admitted by the trial court over defense counsel's objection. Petitioner contends that there was no proper purpose for admission of this evidence and was completely irrelevant to any issue in the case. Thus, petitioner contends that he did not receive a fair trial. This portion of Claim VIII seems to infer that the trial court's admission of the evidence was improper and appeal counsel should have raised the issue on direct appeal.

The trial court addressed this in its PCRA decision as follows:[61]

> Dr. Aronson testified that the stab wound defendant inflicted on Myndi McKoy would be as painful as any stab wound. He also described the effects the wound would have on Ms. McKoy while she was still alive. [Petitioner] states that his appellate counsel should have argued that this testimony was inadmissible because it lacked probative value and was prejudicial. Contrary to [petitioner's] claims, this evidence did have probative value. It substantiated part of [petitioner's confession], it showed the force and methods defendant used to kill Ms. McKoy, and it showed defendant's intent to kill.
>
> [Petitioner] reasons that since this evidence was damaging to his case he is entitled to PCRA relief. The problem with [petitioner's] argument is that "all of the prosecution's evidence is intended to 'prejudice' the [defense], and simply because it is damaging to the defense is no reason to exclude the evidence." Commonwealth v. Rigler, 488 Pa. 441, 453, 412 A.2d 846, 852 (1980). In addition, the trial court is not "required to sanitize the trial to eliminate all unpleasant facts from the jury's consideration...[.]" Commonwealth v. Wharton, 530 Pa. 127, 147, 607 A.2d 710, 720 (1992). Finally, defendant's assertion of prejudice without more is insufficient to warrant relief based on a theory of ineffective assistance of counsel. See Commonwealth v. Silo, 509 Pa. 406, 411, 502 A.2d 173, 176 (1985); Commonwealth

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61 See Respondent's Exhibit 7, Opinion of Glazier, J. at 20-21.

trial transcript[63] for this proposition. Respondents contend that this claim is not supported by the citations to the record. I agree.

The two pages cited by petitioner refer to Myndi McKoy screaming (pgs. 43 and 51) and crying by Karima Saunders (pg. 51). These references are not in conjunction with any pain that these victims were experiencing, rather, it refers to aspects of petitioner's confession wherein he stated that he had to kill each of them because they were screaming (Myndi McKoy) or crying out for her mother (Karima Saunders). I find no misconduct by the prosecutor in stating in closing arguments information that was contained in petitioner's confession. Moreover, I find no ineffectiveness of prior counsel for failing to raise a meritless claim. Johnson, 549 F.3d at 301. Accordingly, this aspect of Claim VIII is denied.

(b) Misconduct Based on the Outburst by Evangeline McKoy.

On PCRA review, the Pennsylvania Supreme Court found the underlying substantive prosecutorial misconduct portion of this claim waived when petitioner failed to raise it on direct appeal. See Marshall III, 812 A.2d at 550 n.2. However, in light of the relaxed waiver doctrine which applied in capital cases in Pennsylvania at the time petitioner filed his direct appeal, the waiver rule does not constitute an "adequate" state law ground which would prevent federal review.

Petitioner contends that the prosecutor committed misconduct by presenting the testimony of Evangeline McKoy, the mother of Myndi McKoy, at the guilt stage of petitioner's trial. Petitioner asserts that although ample other evidence was presented to identify the body of Myndi McKoy, the prosecutor chose to present this evidence through her mother. Petitioner avers that the testimony of Evangeline McKoy was extremely inflammatory and emotional.

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63 N.T. 8/24/84 at 43, 51.

> mistrial. We disagree. The harm caused by such an outburst can be cured by an immediate curative instruction to the jury. Commonwealth v. Duffey, 519 Pa. 348, 548 A.2d 1178 (1988). Here, the trial court immediately cautioned the jury that it should ignore the outburst and to decide the case exclusively on the evidence and not on emotion, sympathy or prejudice. Given the fact that the outburst was brief, occurred only once, and was followed by an immediate instruction to the jury, we are satisfied that any prejudice was diffused and that [petitioner's] fair trial was not threatened. The trial court did not abuse its discretion in refusing the motion for mistrial. Commonwealth v. Colson, 507 Pa. 440, 490 A.2d 811 (1985).
>
> [Petitioner] next argues that Mrs. McKoy should not have been permitted to testify as her testimony was cumulative. The trial court found her testimony to be admissible because it tended to establish that last time her daughter was seen alive, which consequently helped to establish when the murders were committed. The trial court also ruled the testimony to be admissible to establish Myndie's [sic] identity, since Mrs. McKoy identified her daughter's body for the police. Whether such testimony was cumulative was for the trial court to determine, and we will not reverse that decision absent an abuse of discretion. None has been demonstrated here and [petitioner's] contrary assertions are rejected.

Marshall I, 568 A.2d at 596-97. I find no error in the analysis undertaken by the Supreme Court. I must show deference to its determinations. The admission of Mrs. McKoy's testimony in this case did not deprive petitioner of the fundamental fairness of his trial and provides no basis for federal habeas corpus relief. Contrary to petitioner's assertions, the testimony did have a proper purpose as set forth by the Supreme Court. The Commonwealth prosecutor cannot have committed misconduct by presenting proper evidence.

The Supreme Court's determination of the issue of Mrs. McKoy's outburst is also correct. After the outburst, the trial court immediately gave a curative instruction. The jury is presumed to have followed the court's instruction. See Weeks v. Angelone, 528 U.S. 225, 234, 120 S. Ct. 727, 733, 145 L. Ed. 2d 727, 738 (2000). Moreover, as noted in the trial transcript,

(c) Misconduct Based on Comments by the Prosecutor at Closing Argument .

Petitioner claims that the prosecutor made numerous improper comments during his closing argument to the jury at the guilt phase of his trial. In addition, petitioner contends that the closing argument was little more than a loosely-connected series of improper, inflammatory statements that individually and collectively deprived him of a fair trial.

The United States Supreme Court has held that federal habeas corpus relief may be granted when "the prosecutorial misconduct may 'so infect the trial with unfairness as to make the resulting conviction a denial of due process.'" Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 3109, 97 L. Ed. 2d 618, 630 (1987) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (4 S. Ct. 1868, 1871, 40 L. Ed. 2d 431, 437 (1974). The Supreme Court further stated that for due process to be offended "the prosecutorial misconduct must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial." Id. (citations omitted). This determination will at times, require the court to draw a fine line between ordinary trial error and conduct so egregious that it amounts to a denial of due process. See Werts, 228 F.3d at 198. In order to evaluate whether the remarks of a prosecutor rise to the level of a constitutional violation, the court must examine them in the context of the whole trial. Id.

In Werts the Third Circuit discussed the concept of the prosecutor responding to arguments made by defense counsel in closing arguments as follows:

> Viewing the prosecutor's remarks during the heat of argument, counsel may make remarks that are not supported by the testimony and which are or may be prejudicial to the defendant. United States v. Young, 470 U.S. 1, 8 & 10, 84 L. Ed. 2d 1, 105 S. Ct. 1038 (1985) (citation omitted). Where in a criminal trial, defense counsel argues improperly, thereby provoking the prosecutor to respond in kind, and the trial judge does not take any corrective action, a criminal conviction will not be "overturned on the basis of a prosecutor's comments standing alone, for the statements or

defense closing argument wherein defense counsel attacked every portion of the Commonwealth's case. For the following reasons, I agree with respondents and find no prosecutorial misconduct.

The remainder of the beginning of the prosecutor's closing argument went as follows:

> If I put on 10 witnesses, Mr. McAllister somehow will argue why didn't I put on 20. If I put on one hundred witnesses, his argument would be probably that the Commonwealth overkilled in its presentation of its evidence.
>
> If we had videotapes, if we had electronic surveillance some fault would be found in that. I read recently of an instance of an on camera bank robbery that an expert was brought in to say the person shown in the photograph didn't have a forehead that fit the profile of the robber.

Id. at 41. Taking the rest of the first two paragraphs of the prosecutor's closing argument as a whole, it is clear what was attempted was to set forth the role of defense counsel. That was not that he had an obligation to lie, which was never stated, rather, to give a quick and appropriate indication to the jury what the adversary system is about. Defense counsel's role is to try and put holes in the Commonwealth's case and to question everything on behalf of his client. Defense counsel had just spent his closing argument attempting to do exactly that by questioning the veracity of each witness' testimony, the conduct and veracity of the police and prosecution and what evidence and witnesses were not presented by the Commonwealth.[65] I find no misconduct by the prosecutor. Moreover, I do not find that the fairness of defendant's trial was compromised in any way by these statements. Finally, it was proper argument under the "invited reply" rule. Werts, supra.

Next, petitioner contends that the following statement by the prosecutor about defense counsel constitutes misconduct.

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[65] See N.T. 8/28/84 at 11-40.

. . .

> Before you, ladies and gentlemen, you see all that remains of three human beings, Myndi McKoy, the knee length socks, the white bra, the West Catholic sweatshirt with the name Myndi on the back. For Sharon Ballard, you see the cords and ligatures taken from around her neck. For Sharon Karima Sanders [sic] you see a pair of Buster Brown shoes, the clothing she wore.
>
> Other than the Great Depression, Herbert Hoover said, "One other thing that I think comes to play here." He says, "A child has two things to be. One is to be a child and the second thing is to grow up to be a man or woman." Karima Sanders [sic] does not have that chance and, ladies and gentlemen, that is why I am standing up here and I'm asking you to do to do you duty, to bring justice to bear on a person if you believe the witnesses and if you believe that statement....
>
> . . .
>
> Now, it is nothing, I can say to minimize the one package that you don't have here before you today and that's the sense of loss, but you are not to be swayed by any sympathy for the victims. You are not to be swayed by any sense of revenge. I'm not asking you that.

N.T. 8/28/84 at 43, 44-45.

In addition to challenging the statement about decomposing bodies, petitioner contends that the prosecutor's reference to Karima Saunders not having the opportunity to grow up was especially prejudicial, inflammatory and irrelevant to the question of whether petitioner was guilty of her murder. Petitioner further contends that it constituted impermissible victim impact argument offered only to inflame the jury's emotions, with no relevance or probative value.

Respondents contend that what prosecutor said in these statements to the jury was to comment on the evidence presented at trial and to point out reasonable inferences from the evidence. Moreover, respondents argue that the prosecutor's reference to Karima Saunders never having the chance to grow up is not victim impact evidence. I agree with respondents.

The petitioner further objects to the prosecutor's use of the word "nightmare" in the following context:

> I don't want you to equivocate and all we want is justice. All we want is first degree murder for if in your heart of hearts you can think or have a nightmare about what kind of person that could do this to three people, at different times using different methods, using different types of ties, different types of ligatures, the search and the watching of life go out of their body....

N.T. 8/28/84 at 53. Petitioner contends that the prosecutor incited jurors' fears and such appeals to passion and prejudice are clearly improper. Respondents contend that the prosecutor was arguing for a first degree murder verdict rather than some lesser compromise. Respondents argue that defense counsel had characterized the Commonwealth's evidence as a "spurned lover's case"[66] and considering the apparent motive for the murder of Sharon Ballard contained in petitioner's confession, the possibility that the jury would conclude that petitioner acted out of passion was reasonable. Respondents further contend that the statement was proper and constituted an aside that any thought of the doer of these deeds is in effect a nightmare. It was the deeds that were condemned as a nightmare, not petitioner, personally.

On direct appeal, the Supreme Court of Pennsylvania analyzed this statement as follows:

> It seems to us that the prosecutor was referring to the type of person that would commit such terrible crimes and we cannot say that the unavoidable effect of this isolated characterization was to prejudice the jury against [petitioner].
>
> There was no question that the crimes were grizzly and that a prosecutor would refer to these facts during closing and ask the jury to keep these facts in mind when it decided whether a verdict of murder of the first degree was appropriate. It was in this context that the prosecutor referred to the type of person that committed such acts and, because the reference is linked to the evidence presented in the case, we are satisfied that any reference to [petitioner] was not unduly prejudicial nor did it fix a bias or hostility against him that made it impossible for the jury to weigh

[66] N.T. 8/28/84 at 14.

> 336, 339 (3d Cir. 1980)), cert. denied 506 U.S. 965 (1992). In examining whether the prosecutor's statements prejudiced the defense, our precedents have considered whether the comments suggested that the prosecutor had knowledge of evidence other than that which was presented to the jury. See id.

Buehl v. Vaughn, 166 F.3d 163, 176 (3d Cir. 1999). Petitioner argues that this "assurance" to the jury that "we" had not fabricated petitioner's confession suggested to the jury that the prosecutor was personally aware of the validity of the confession, based upon evidence not presented to the jury.

Petitioner further contends that at the end of his closing argument, the prosecutor placed his personal credibility before the jury. Finally, petitioner asserts that the prosecutor also improperly discussed sentencing issues at the guilt stage of petitioner's trial.

Respondents argue that the prosecutor properly responded to defense counsel's closing argument that the evidence against petitioner, including his confession, was fabricated by the Commonwealth and that he was framed for the murders. Respondents contend that defense counsel's closing argument included attacks on the integrity of the prosecutor, the medical examiner and the police. Thus, respondents assert that the statement in closing argument refuting those allegations in defense counsel's closing argument was proper.

In addition, respondents contend that the prosecutor did not place his personal credibility before the jury. Rather, the prosecutor simply suggested what the jury was likely to conclude after independently reviewing the evidence, including petitioner's confession. Respondents assert that there was nothing improper about arguing what conclusions should be drawn from the evidence and asking for a first degree murder verdict. Finally, respondents deny that the prosecutor injected sentencing issues into his guilt phase closing arguments.

The statements that petitioner complains of are as follows:

> and look him in the eye, show more courage than he did when he snuffed out the life of the two and a half year old and he says in his statement and he tells you I couldn't look. Look him in the eye and announce your verdict of guilty of murder in the first degree and I will assure you if you do that, you would have done justice and after you have done justice I hope to be standing up here again at another proceeding making another statement about how you should do complete justice and I want you to look at him and I want you to look at him for what he is and what [sic] he is not the figment of this detective's imagination or that detective's imagination or even Lieutenant Shelton's imagination.

Id. at 52-53.

In the first passage, the reference to the word "we" was not improper vouching. Rather, it reflected the prosecutor's reply to defense counsel's attacks on him, the police and Dr. Aronson in an attempt to rebut defense counsel's argument that petitioner's confession was fabricated by the Commonwealth. It was proper "invited reply", Werts, supra, not improper vouching as alleged by petitioner. Moreover, I find that there was no prejudice to petitioner in this statement. The jury could have clearly understood the context of this statement, there is no fixed bias or hostility toward petitioner in the statement. The prosecutor did not infer that he had knowledge of any evidence that was beyond that presented to the jury. Buehl, supra.

I conclude that this statement does not create any possibility that the fairness of petitioner's trial was compromised in any way by this statement, let alone being egregious enough to rise to the level of a Constitutional violation. Accordingly, this portion of Claim VIII is denied.

The second passage also includes the word "we". It is again proper argument, in part arguing the facts as set forth in petitioner's confession. The "we" spoken of is the Commonwealth as borne out in the first line of the passage. The statement simply requests that the jury return a verdict of guilty based upon the facts of the case. I find nothing improper about

proceeding making another statement about how you should do complete justice...." N.T. 8/29/84 at 53 (emphasis added).

This statement does not state or imply that the prosecutor **would be** talking to them again at another proceeding (presumably sentencing) as argued by petitioner. Rather, it states a hope that he will be before the jury again. The hope the prosecutor spoke of was that the jury will convict petitioner of the crimes. It is not improper for a prosecutor to hope that the jury will convict when that is exactly what he was asking to jury to do. He implied that the evidence supported a conviction in this matter. That is proper closing argument.

This statement is not prejudicial to defendant. I do not find that this statement alone, or in combination with the prior statements alleged to be improper vouching compromised the fairness of petitioner's trial in any way, let alone to the level of a Constitutional due process violation. Accordingly, this aspect of Claim VIII is denied.

Finally, petitioner contends that three separate statements by the prosecutor during closing arguments were improper. Two of the statements had a religious connotation. In the first statement, the prosecutor paraphrased scripture:[67]

> I would submit to you, ladies and gentlemen, that there is facts in this particular statement and I will ask you to believe that only the killer knew.
>
> A lot of things had been working on my mind. It was like she was a witch. She had just told me that I would have to leave because the guy was coming back from the Army. It's just a lot of things but while she was sleeping I got this clothes line.
>
> Now, the Judge will charge you on voluntary manslaughter. Voluntary manslaughter is a killing of another human being in the heat of passion and with sufficient provocation brought on by the dead person, and he'll tell you mere words, mere touching or a mere insulting is not in the eyes of the law sufficient provocation. He will further tell you if there is provocation without passion, you

[67] Matthew, Chapter 25, Verse 40.

> that I told somebody about what happened that day and got the whole thing out in the open. See, this would not ever have happened if Sharon hadn't had been the person that she was. She just wanted to use me and take my money.

N.T. 8/28/84 at 51 (emphasis added).

Petitioner contends that the two religious comments are not proper closing argument and relies on a number of cases from other circuits.[68] None of these cases are particularly helpful to petitioner because they all involve religious references made during the penalty phase and involve biblical references that implore the jury to follow God's law and impose the death penalty or to not show the defendant mercy based on biblical teachings. We do not have that situation here, thus, I find petitioner's reliance on these cases misplaced. Moreover, I note that petitioner makes no argument at all what is improper about the prosecutor's comment about what kind of man Mr. Marshall is. Petitioner simply states that it is improper.

Respondents argue that the first comment, "I would ask you and it is written, whatever you do to the least of thine brethren you do to me", is taken out of context. Respondents contend that taken in context, what the prosecutor stated was a fair response to petitioner's claim that he was somehow provoked by the sleeping victims and acted in the heat of passion. Respondents further contend that the prosecutor was merely arguing, with a degree of oratorical technique, that it would be absurd to conclude that petitioner's vicious acts were "provoked" by the most vulnerable of people, two sleeping women and a sleeping toddler.

As noted above, the prosecutorial misconduct must "so infect the trial with unfairness as to make the resulting conviction a denial of due process" and that for due process to be offended "the prosecutorial misconduct must be of sufficient significance to result in the denial of the

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[68] See Romine v. Head, 253 F.3d 1349 (11th Cir. 2001); Sandoval v. Calderon, 241 F.3d 765 (9th Cir. 2000); Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991); and Cobb v. Wainwright, 609 F.2d 754 (5th Cir. 1980).

> shift blame to the victim for her death. We do not view the prosecutor's reference to these figures as anything other than rhetoric meant to dispel [petitioner's] attempt at self-justification. Such an argument does not create a fixed bias or hostility toward [petitioner] and therefore is not a ground for a new trial.

Marshall I, 568 A.2d at 597.

The Supreme Court's determination that this claim fails was not "contrary to, or involved an unreasonable application of, clearly established Federal law" or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d) (1)-(2). Furthermore, I agree with the Supreme Court that this comment is in response to petitioner's claim that he was somehow provoked by the victims. This reference taken in the context of the whole trial, together with the instructions given by the trial court during its charge to the jury do not rise to the level of a constitutional due process violation. Therefore, under the deference that must be afforded under the AEDPA standard, this portion of Claim VIII is denied.

In the third statement that petitioner contends constitutes prosecutorial misconduct, the prosecutor questioned what kind of man, if any, petitioner was. As noted above, petitioner makes no argument why this statement is of such magnitude that it constitutes a due process violation. Generally, bald assertions and conclusory allegations of a constitutional violation do not provide sufficient grounds for habeas relief. See Zettlemoyer v. Fulcomer, 923 F.2d 284 (3d Cir. 1991); See also Mayberry v. Petsock, 821 F.2d 179 (3d Cir. 1987).

Respondents contend that this statement was in response to petitioner's failure to take responsibility for his actions, which he attempted to blame on decedent Sharon Ballard. I agree. Moreover, I do not find that this statement alone, or in combination with the three prior

Petitioner may salvage his default if he can establish cause and prejudice. Murray v. Carrier, 477 U.S. at 488, 106 S. Ct. at 2645, 91 L. Ed. 2d at 409. Here, he cannot establish cause because the ineffectiveness of PCRA appeal counsel is not cause under Martinez. Davila, supra. Also, the "ineffectiveness or incompetence of counsel during federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i).

Finally, petitioner has made no effort to produce new, reliable evidence of actual innocence to overcome his procedural default. Thus, the miscarriage of justice exception does not apply. Schlup v. Delo, 513 U.S. 298, 321-22, 115 S. Ct. 851, 864-65, 130 L. Ed. 2d 808, 832 (1995).

7. **Claim XIII: An Adequate Record of the Trial Was Not Prepared and/or Was Not Provided to Petitioner's Counsel, Depriving Him of His Rights to Meaningful Appellate Review, the Effective Assistance of Appellate and Post-Conviction Counsel, and Full and Fair Adjudication of His Post-Conviction Claims.**

Petitioner alleges that he was deprived of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments because the trial record is incomplete. Specifically, he complains that some side bar discussions were not recorded, and that there is not a transcript of the afternoon session of voir dire from July 23, 1990. The Pennsylvania Supreme Court denied this claim on PCRA review because it found that petitioner:

> fail[ed] to raise any potentially meritorious challenge that [could not] be adequately reviewed due to the absence of a record of the sidebar discussions from his trial and/or the transcript from the alleged voir dire session on the afternoon of July 23, 1990.

Marshall III, 812 A.2d at 551. This conclusion is not contrary to, nor an unreasonable application of, federal law.

transcript of a portion of the voir dire from that proceeding has not prejudiced him especially because respondents have agreed not to seek any death sentence in this case upon remand. Furthermore, it is unclear that a verbatim transcript would be the only way to reconstruct the requisite evidence--petitioner alleged in his Petition the races of those venirepersons that were allegedly peremptorily struck by the prosecutor. Hence, that information must have been available elsewhere. For all of the foregoing reasons, the state court's conclusion regarding this claim was not contrary to, nor an unreasonable application of, federal law. Accordingly, Claim XIII is denied.

8. Count XXIII: All Prior Counsel Were Ineffective for Failing to Raise and/or Properly Litigate the Issues Presented in These Collateral Proceedings.

Petitioner contends that trial and direct appeal counsel (Attorney McAllister) was ineffective for failing to preserve any of the claims set forth in his petition. Petitioner further contends that penalty phase retrial and appellate counsel (Attorney Siegel) was also ineffective. The effectiveness of Attorney Siegel is moot because respondents have agreed to withdraw the death penalty in this case. Petitioner contends PCRA counsel and PCRA appeal counsel (Attorney Bruno) was also ineffective.

Issues of trial counsel's ineffectiveness have been addressed throughout this Opinion in conjunction with each of petitioner's substantive claims. I have found no ineffectiveness on the part of any counsel, so there can be no cumulative effect of counsel's ineffectiveness. Moreover, many of petitioner's ineffectiveness of counsel claims were procedurally defaulted as described in Count VIII. Finally, the ineffectiveness of PCRA and PCRA appeal counsel is not a ground for relief in a federal habeas corpus proceeding. 28 U.S.C. § 2254(i). Thus, I need not address this claim separately. Accordingly, Claim XXIII is denied.

Fahy, 516 F.3d at 205 (internal quotation marks omitted) (citations omitted). Here, I have found no errors. Because there are no errors, I cannot find that there are cumulative errors that would rise to the level of undermining the fundamental fairness of petitioner's trial rising to the level of a due process violation.

Moreover, there is no indication that the decision of the Supreme Court of Pennsylvania regarding this claim was "contrary to, or involved an unreasonable application of, clearly established Federal law" or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d) (1)-(2). Hence, Petitioner's claim must fail under the AEDPA standard.

Finally, the argument that his death sentence for the murders of Myndie McKoy and Karima Saunders should be vacated based on cumulative errors is moot because those sentences have been vacated by agreement of respondents. Accordingly, Claim XXIV is denied in part and denied as moot in part.

10. Claims XXVI, XXVII, XXVIII, XXX, XXXI, XXXII and XXXIII are Time-Barred.

(a) The AEDPA Statute of Limitations.

The AEDPA, enacted on April 24, 1996, imposes a one year period of limitations ("AEDPA year") for habeas corpus petitions. The time period begins to run from the latest of the following:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

filing, the court and office in which it must be filed and the requisite filing fees.[71] Artuz v. Bennett, 531 U.S. 4, 121 S. Ct. 361, 148 L. Ed. 2d 213 (2000). Answering a question left open in *Artuz*, the United States Supreme Court later explained that, despite exceptions to the timely filing requirement, an untimely PCRA petition is not "properly filed" and cannot statutorily toll the federal habeas period of limitations. Pace v. DiGuglielmo, 544 U.S. 408, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005).

Statutory tolling does not save petitioner's untimely claims. Petitioner did file a timely PCRA petition on November 16, 1996; by then 206 days of his AEDPA year had expired, leaving 159 days. Statutory tolling ceased on December 18, 2002 when the Pennsylvania Supreme Court denied his PCRA appeal. See Lawrence v. Florida, 549 U.S. 327, 127 S. Ct. 1079, 166 L. Ed. 2d 924 (2007) (holding that statutory tolling ceases upon the state's highest court denying review and does not include the time to seek *certiorari* in state collateral proceedings). The remaining 159 days expired on May 26, 2003. Hence, Petitioner's new claims contained in his motion to vacate, set aside or correct sentence filed April 22, 2015 were filed nearly 12 years too late.

(c) Equitable Tolling.

Equitable tolling is available "only when the principle of equity would make the rigid application of a limitation period unfair." Merritt v. Blaine, 326 F.3d 137, 168 (3d Cir. 2003) (internal quotations omitted). Courts should be sparing when applying this doctrine. LaCava v. Kyler, 398 F.3d 271, 275 (3d Cir. 2005). The general requirements for equitable tolling are: (1) Petitioner's diligence in pursuing his rights, and (2) the existence of extraordinary circumstances that prevented timely filing. Holland v. Florida, 560 U.S. 631, 130 S. Ct. 2549, 177 L. Ed. 2d

[71] The Supreme Court initially declined to decide whether the existence of exceptions to a timely filing requirement can prevent a late application from being considered improperly filed. *Artuz*, 531 U.S. at 8 n 2.

VII. CONCLUSION

For all the foregoing reasons, petitioner Jerome Marshall's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 is granted by agreement in part, and denied in part.

Specifically, I grant petitioner relief from his death sentences based upon respondent's agreement to a conditional grant of petitioner's writ of habeas corpus with respect to the death sentences imposed for the murders of Myndie McCoy and Karima Saunders. Petitioner's death sentences for those murders are vacated. As a result Claims I, II, IX-XII, XIV-XXII, XV and XXIX are dismissed as moot. Those claims all relate to the death sentences themselves or the circumstances surrounding the jury imposing the death sentences.

The Petition for a Writ of Habeas Corpus is denied in all other respects without an evidentiary hearing.

I direct that this case be remanded to the Court of Common Pleas of Philadelphia County for resentencing consistent with respondents' concession that they will not seek the death penalty upon resentencing.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.
JOSEPH F. LEESON, JR.
United States District Judge