Appendix C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1550

CAMERON A. HARINARAIN,
Appellant

v.

SUPERINTENDENT HUNTINGDON SCI;
ATTORNEY GENERAL OF THE COMMONWEALTH
OF PENNSYLVANIA

(D.C. Civ. No. 3-14-cv-02395)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, and SCIRICA*, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who

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* As to panel rehearing only.

concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Anthony J. Scirica
Circuit Judge

Dated: August 27, 2019
Lmr/cc: Cameron A. Harinarain
Raymond J. Tonkin

Appendix A

CLD-227 July 2, 2019

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **19-1550**

CAMERON A. HARINARAIN, Appellant

VS.

SUPERINTENDENT HUNTINGDON SCI, ET AL.

(M.D. Pa. Civ. No. 3-14-cv-02395)

Present: CHAGARES, RESTREPO and SCIRICA, Circuit Judges

Submitted are:

(1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1); and

(2) Appellant's motion for appointment of counsel

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's request for a certificate of appealability is denied. See 28 U.S.C. § 2253(c). Jurists of reason would agree, without debate, that the District Court properly denied Appellant's habeas petition on the merits, for essentially the reasons set forth in the District Court's opinion. See generally Slack v. McDaniel, 529 U.S. 473, 484 (2000). Appellant's motion for appointment of counsel is denied. See 18 U.S.C. § 3006A(a)(2).

By the Court,

s/Anthony J. Scirica
Circuit Judge

Dated: August 2, 2019
JK/cc: Cameron A. Harinarain
Raymond J. Tonkin, Esq.
Ronald Eisenberg, Esq.

A True Copy:

Patricia A. Dodszuweit

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

Appendix B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

CAMERON A. HARINARAIN, Petitioner	)	CIVIL ACTION NO. 3:14-cv-2395
	)	(KANE, D.J.)
v.	)	
	)	(ARBUCKLE, M.J.)
ROBERT GILMORE, *et al,* Respondents	)	

REPORT AND RECOMMENDATION

I. INTRODUCTION

On March 18, 2009, Cameron Harinarain ("Petitioner") was convicted along with two other individuals in the Court of Common Pleas of Pike County for the following offenses: (1) Murder of the Second Degree; (2) Robbery; (3) Burglary; (4) Conspiracy to Commit Robbery; (5) Conspiracy to Commit Burglary; (6) Robbery; and (7) Firearms not to be Carried Without a License. (Doc. 30, Exhibit 5). On March 19, 2009 Harinarain was sentenced to life without the possibility of parole plus fourteen (14) to thirty-four (34) years.

Presently before the Court is a *pro se* Petition for writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 in which Petitioner requests the following relief: (1) suppression of all statements he made to the State Police on September 5, 2007; (2) an Order vacating Petitioner's sentence; and (3) an Order remanding

Petitioner's criminal case for a new trial. For the reasons articulated below, I recommend Petitioner's Motion for Writ of Habeas Corpus be DENIED.

II. FACTUAL BACKGROUND

On the morning of August 24, 2007, a home invasion took place during which Barry Rose was shot and killed. (Doc. 30, p. 3) On August 30, 2007, Petitioner met with Sergeant Cavallaro at the Pennsylvania State Police Barracks to discuss his knowledge of the Rose Homicide. During this interview, Plaintiff provided exculpable information placing responsibility on Marquis Keeys.

On September 5, 2007, Petitioner again agreed to meet and speak with Sergeant Cavallaro of the Pennsylvania State Police about his involvement the Rose homicide. (Doc. 30, p. 5). Petitioner was questioned in the banquet room at the Fernwood Resort by Sergeant Cavallaro, Trooper Travis, and Trooper Vanluvender. *Id.* The questioning began at 8:00 p.m. and ended at 11:30 p.m. *Id.*

During the September 5, 2007 questioning, Petitioner initially provided information consistent with the interview conducted on August 30th, 2007. *Id.* At some point during the interview, Sergeant Cavallaro stepped out and spoke with Petitioner's companion[1]. *Id.* Upon his return, Sergeant Cavallaro told Petitioner that he did not believe Petitioner was being honest and that he believed Petitioner

[1] The identity of the companion Sergeant Cavallaro refers to is Anthony Collichio. Petitioner states that Mr. Collichio transported Petitioner to Fernwood Resort. (N.T. 3/27/08 at 16).

was present during the homicide. *Id.* Sergeant Cavallaro told Petitioner that he should speak up if something "went wrong" or if someone else shot Mr. Rose. (Doc. 30, p. 6). Petitioner requested to speak with Trooper Travis alone. *Id.* Sergeant Cavallaro and Trooper Vanluvender left the banquet room. *Id.* While along in the banquet room with Trooper Travis, Petitioner provided an inculpatory statement, revealing that he was at the scene of the homicide. *Id.*

Concerning Ground One in the Writ of Habeas Corpus, Petitioner asserts that his conviction and sentence is in violation of the Fifth Amendment to the United States Constitution. Petitioner asserts that on September 5, 2007, he was subject to custodial interrogation without being given *Miranda*[2] warnings. Petitioner contends that all statements made during the interrogation should be suppressed.

Concerning Ground Two in the Petition, Petitioner raises a *Batson*[3] challenge and asserts that his conviction and sentence is in violation of the Sixth Amendment to the United States Constitution. Petitioner asserts that trial counsel failed to object to prosecutor's preemptory strike removing the only African American juror from the jury pool during voir dire. (Doc. 24, p. 7). Petitioner

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[2] *Miranda v. Arizona,* 384 U.S. 436 (1966).
[3] *Batson v. Kentucky*, 476 U.S. 79 (1986).

asserts that trial counsel's objection to the preemptory strike on the first day of trial was untimely and precluded the issue from appellate review. *Id.*

III. PROCEDURAL HISTORY

A. STATE COURT CRIMINAL PROCEEDINGS

On March 18, 2009, Petitioner was convicted of the following crimes: (1) Murder of the Second Degree; (2) Robbery; (3) Burglary; (4) Conspiracy to Commit Robbery; (5) Conspiracy to Commit Burglary; (6) Robbery; and (7) Firearms not to be Carried Without a License. (Doc. 30, Exhibit 5). Petitioner was sentenced to life imprisonment plus fourteen (14) to thirty-four (34) years. *Id.*

On March 23, 2009, Petitioner's counsel directly appealed the conviction to the Pennsylvania Superior Court. *Id.* On direct appeal, the Petitioner's counsel raised nine (9) issues from the trial court including: (1) Fifth Amendment *Miranda* violation; (2) *Batson* challenge; (3) error in admitting graphic photographs; (4) prosecutorial misconduct; (5) denial of request to sequester witness; (6) admission of prejudicial evidence; (7) denial of request to exclude the 911 tapes; (8) harsh and excessive sentence; and (9) denial of extension of time request. *Id.*

On February 2, 2011, the Superior Court of Pennsylvania affirmed the trial court's decision. (Doc. 30, Exhibit 6). The significant claims to the federal habeas petition include the Fifth Amendment *Miranda* violation and this *Batson* challenge. *Id.* The Superior Court held that: (1) the statements made by Petitioner on

September 5, 2007, were not obtained as a result of "custodial interrogation," and therefore no *Miranda* warning was required; and (2) found that Petitioner's *Batson* challenge had been waived because it was raised after the jury pool was empaneled and foreclosed any preferred remedies.

On February 16, 2011, Petitioner's counsel filed an Application of Re-Argument. In that Application, Petitioner challenged the Superior Court's decision to affirm the trial court's denial of Petitioner's Motion to Suppress the oral and written statements obtained from the Petitioner on September 5, 2007. (Doc. 30, Exhibit 7).

On April 13, 2011, Petitioner's counsel filed a petition for the allowance of appeal to the Pennsylvania Supreme Court. (Doc. 30, Exhibit 8). On September 14, 2011, the Pennsylvania Supreme Court denied the petition. *Id.*

On June 4, 2012, Petitioner filed a Petition for Post Conviction Collateral Relief to the Court of Common Pleas of Pike County. *Id.* Petitioner raised several issues: (1) Prosecutorial Misconduct; (2) Ineffective Assistance of Counsel; (3) Batson challenge; (4) Violation of Due Process; and (5) Violation of Equal Protection Clause. *Id.* On January 20, 2013, Petitioner filed an "Amended, Extended, and Continued Attachment" to Previously filed Post Conviction Collateral Relief Petition. (Doc. 30, Exhibit 9). On October 17, 2013, the Court of Common Pleas of Pike County denied the Petition for Post Conviction Collateral

Relief. (Doc. 30, Exhibit 10). On February 18, 2014, Petitioner appealed the decision denying Post Conviction Collateral Relief to the Superior Court of Pennsylvania. (Doc. 30, Exhibit 11). On June 4, 2014, the Superior Court affirmed the Court of Common Pleas decision denying Post Conviction Collateral Relief. (Doc. 30, Exhibit 13).

B. FEDERAL HABEAS PROCEEDINGS

On November 28, 2014, Petitioner initiated this *pro se* action by filing a Petition for Writ of Habeas Corpus and Memorandum of Law in Support to the United States District Court for the Eastern District of Pennsylvania. (Doc. 1).

On December 15, 2014, United States District Judge Restrepo issued a memorandum (Doc. 2) and an order (Doc. 3) transferring the case to the United States District Court for the Middle District of Pennsylvania. On January 5, 2015, United States District Judge Edwin M. Kosik issued an Order directing Respondents to file a response to the Petition. (Doc. 6).

On March 27, 2015, Respondents filed their response. (Doc. 11). Respondents argue that the Petition was filed outside of the statute of limitations. *Id.*

On April, 4, 2015, Petitioner filed a Reply. (Doc. 16). Petitioner argued that the statute of limitation should be equitably tolled because: (1) the state moved Petitioner to level 5 restricted housing, where Petitioner's legal materials were

confiscated and he was confined to a cell for twenty-three (23) hours per day; and (2) the state transferred Petitioner to different prison without legal materials and thus prevented from timely filing the petition. *Id.*

On June 14, 2016, Judge Kosik found that the Petition was timely filed. (Doc. 20). Judge Kosik also issued an order advising Plaintiff of the procedural consequences of filing a Petition under section 2254, including that, once the Petition is considered on its merits it would be unlikely that Peitioner would be permitted to file a second petition under section 2254. (Doc. 21). Judge Kosik instructed Petitioner to notify the Court within twenty days if he would like to withdraw or amend his Petition. (Doc. 21). On June 29, 2016, the Petitioner filed a Motion for leave to withdraw his Petition. (Doc. 22). Judge Kosik construed Petitioner's Motion as seeking an enlargement of time to amend his Petition, and granted it. (Doc. 23).

On July 1, 2016, Petitioner filed an Amended Petition, in which he requests the following relief: (1) suppress all statements from September 5, 2007; (2) vacate his conviction; and (3) remand for a new trial. (Doc. 24).

On July 21, 2016, Judge Kosik ordered Respondents to file an answer addressing the following issues: (1) identify the Petitioner exhausted all state options; (2) include transcripts relevant to disposing of claims raised in the petition; (3) indicate relevant proceedings to the petition which have been recorded

but awaiting transcription; and (4) include copies of Petitioner's briefs on appeal (Doc. 25).

On October 3, 2016, Respondents filed their opposition to the petition. (Doc. 30). Respondents' assert that the state courts appropriately denied Petitioner's Motion to Suppress and followed proper procedure when striking the *Batson* challenge that Petitioner belatedly made after voir dire. *Id.*

On November 17, 2016, Petitioner filed a Reply. (Doc. 33). Petitioner argues that his conviction and sentence violate the Fifth (Doc. 33, p. 6) and Sixth (Doc. 33, p. 14) Amendments. First, Petitioner asserts that statements made to the Pennsylvania State Police Troopers on September 5, 2007, should be suppressed as they were a product of custodial interrogation and Petitioner was not given *Miranda* warnings. (Doc. 33, p. 6). Second, Petitioner's asserts that his Sixth Amendment right to effective counsel was violated due to counsel's failure to raise the *Batson* challenge in voir dire. (Doc. 33, p.14).

III. LEGAL STANDARD

Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts provides in pertinent part: "If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the

petitioner." Rule 4 of the Rules Governing Section 2254 Cases in the United States District Court.

In order to obtain federal habeas corpus relief, a state prisoner seeking to invoke the power of this Court to issue a writ of habeas corpus must satisfy the standards prescribed by 28 U.S.C. § 2254, which provides:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State;
>
> . . . .
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

28 U.S.C. § 2254(a) and (b).

As this statutory text implies, state prisoners must meet exacting substantive and procedural benchmarks in order to obtain habeas corpus relief. The petition must satisfy exacting substantive standards to warrant relief. Federal courts may "entertain an application for a writ of habeas corpus on behalf of a person in

custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). By limiting habeas relief to state conduct which violates "the Constitution or laws or treaties of the United States," section 2254 places a high threshold on the courts. Typically, habeas relief will only be granted to state prisoners in those instances where the conduct of state proceedings led to a "fundamental defect which inherently results in a complete miscarriage of justice" or was completely inconsistent with rudimentary demands of fair procedure. *See, e.g., Reed v. Farley,* 512 U.S. 339, 354 (1994). Thus, claimed violations of state law, standing alone, will not entitle a petitioner to habeas relief under section 2254 absent a showing that those violations are so great as to be of a constitutional dimension. *See Priester v. Vaughan,* 382 F.3d 394, 401–02 (3d Cir. 2004).

These same principles, which inform the standard of review in habeas petitions and limit habeas relief to errors of a constitutional dimension, also call upon federal courts to give an appropriate degree of deference to the factual findings and legal rulings made by the state courts in the course of state criminal proceedings. There are two critical components to this deference mandated by 28 U.S.C. § 2254.

First, with respect to legal rulings by state courts, under section 2254(d), habeas relief is not available to a petitioner for any claim that has been adjudicated

on its merits in the state courts unless it can be shown that the decision was either: (1) "contrary to" or involved an unreasonable application of clearly established case law, *see* 28 U.S.C. § 2254(d)(1); or (2) was "based upon an unreasonable determination of the facts," *see* 28 U.S.C. § 2254(d)(2). Applying this deferential standard of review, federal courts frequently decline invitations by habeas petitioners to substitute their legal judgments for the considered views of the state trial and appellate courts. *See Rice v. Collins,* 546 U.S. 333, 338-39 (2006); *see also Warren v. Kyler,* 422 F.3d 132, 139-40 (3d Cir. 2006); *Gattis v. Snyder,* 278 F.3d 222, 228 (3d Cir. 2002).

In addition, section 2254(e) provides that the determination of a factual issue by a state court is presumed to be correct unless the petitioner can show by clear and convincing evidence that this factual finding was erroneous. *See* 28 U.S.C. § 2254(e)(1). This presumption in favor of the correctness of state court factual findings has been extended to a host of factual findings made in the course of criminal proceedings. *See, e.g., Maggio v. Fulford,* 462 U.S. 111, 117 (1983) (per curiam); *Demosthenes v. Baal,* 495 U.S. 731, 734-35 (1990).

Federal courts are not free to substitute their views for the findings of state judges on issues of: competence to stand trial, *Maggio v. Fulford,* 462 U.S. 111, 117 (1983); competence to waive rights, *Demosthenes v. Baal,* 495 U.S. 731, 734-35 (1990); or whether the defendant's mental competence affected his ability to

comply with post-conviction petition filing deadlines, *Nara v. Frank,* 488 F.3d. 187, 200-01 (3d Cir. 2007) (state court finding that defendant's mental incompetence interfered with his ability to file timely petition entitled to a presumption of correctness.) Rather, these factual findings must be presumed to be correct unless the petitioner can show by clear and convincing evidence that these factual findings were erroneous. *See* 28 U.S.C. § 2254(e)(1).

These deferential standards of review also guide our assessment of the legal claims concerning the effectiveness of counsel. Thus, any state court factual findings in this field are presumed correct unless a petitioner can show by clear and convincing evidence that these findings were erroneous. Moreover, the state courts' decisions applying the Supreme Court's *Strickland* standard for assessing the competence of counsel must be upheld unless it can be shown that these decisions were either: (1) "contrary to" or involved an unreasonable application of clearly established case law, *see* 28 U.S.C. § 2254(d)(1); or (2) were "based upon an unreasonable determination of the facts," *see* 28 U.S.C. § 2254(d)(2). *See, e.g.*, *Roland v. Vaughn,* 445 F.3d 671, 677-78 (3d. Cir. 2006) (applying § 2254(d) standard of review to ineffectiveness claim analysis); *James v. Harrison,* 389 F.3d 450, 453-54 (4th Cir. 2004) (same).

Furthermore, state prisoners seeking relief under Section 2254 must also satisfy specific, and precise, procedural standards. Among these procedural

standards is a requirement that the petitioner "has exhausted the remedies available in the courts of the State" before seeking relief in federal court. 28 U.S.C. § 2254(b). Section 2254's exhaustion requirement calls for total exhaustion of all available state remedies. Thus, a habeas petitioner "shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). In instances where a state prisoner has failed to exhaust the legal remedies available to him in the state courts, federal courts typically will refuse to entertain a petition for habeas corpus. *See Whitney v. Horn,* 280 F.3d 240, 250 (3d Cir.2002).

This statutory exhaustion requirement is rooted in principles of comity and reflects the fundamental idea that the state should be given the initial opportunity to pass upon and correct alleged violations of the petitioner's constitutional rights. *O'Sullivan v. Boerckel,* 526 U.S. 838, 844 (1999). As the Supreme Court has aptly observed, "a rigorously enforced total exhaustion rule" is necessary in our dual system of government to prevent a federal district court from upsetting a state court decision without first providing the state courts the opportunity to correct a constitutional violation. *Rose v. Lundy,* 455 U.S. 509, 518 (1982). Requiring exhaustion of claims in state court also promotes the important goal of ensuring that a complete factual record is created to aid the federal courts in their review of

a section 2254 petition. *Walker v. Vaughn,* 53 F.3d 609, 614 (3d Cir.1995). A petitioner seeking to invoke the writ of habeas corpus, therefore, bears the burden of showing that all of the claims alleged have been "fairly presented" to the state courts, and the claims brought in federal court must be the "substantial equivalent" of those presented to the state courts. *Evans v. Court of Common Pleas,* 959 F.2d 1227, 1231 (3d Cir.1992); *Santana v. Fenton,* 685 F.2d 71, 73–74 (3d Cir.1982). A petitioner cannot avoid this responsibility merely by suggesting that he is unlikely to succeed in seeking state relief, since it is well-settled that a claim of "likely futility on the merits does not excuse failure to exhaust a claim in state court." *Parker v. Kelchner,* 429 F.3d 58, 63 (3d Cir. 2005).

IV. DISCUSSION

A. MERIT ANALYSIS, GENERALLY[4]

The Third Circuit has described the highly deferential standard for reviewing the merits of claims under section 2254 as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

[4] Respondents do not challenge whether Petitioner's claims were either timely or fully exhausted. As such, I need not address these issues in this Report.

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); *Marshall*, 307 F.3d at 50. A federal habeas court must presume that a state court's findings of fact are correct. *See* 28 U.S.C. § 2254(e)(1). The petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. *Id.*

A state court decision is contrary to Supreme Court precedent under § 2254(d)(1) where the state court reached a "'conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.'" *Marshall*, 307 F.3d at 51 (quoting *Williams v. Taylor*, 529 U.S. 362, 413, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)). A state court decision is an unreasonable application under § 2254(d)(1) if the court "identifies the correct governing legal rule from the Supreme Court's cases but unreasonably applies it to the facts of the particular case or if the state court either unreasonably extends a legal principle from the Supreme Court's precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Gattis v. Snyder*, 278 F.3d 222, 228 (3d Cir. 2002) (citing *Williams*, 529 U.S. at 407, 120 S. Ct. (1495)). The unreasonable application test is an objective one--a federal court may not grant habeas relief merely because it concludes that the state court applied federal law erroneously or incorrectly. *Wiggins v. Smith*, 539 U.S. 510, 520-521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Gattis*, 278 F.3d at 228.

Jacobs v. Horn, 395 F.3d 92, 99-100 (3d Cir. 2005). Bearing these principles in mind, I now turn my attention to the merits of Petitioner's arguments.

B. IS PETITIONER'S CONVICTION AND SENTENCE IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE PETITIONER DID NOT RECEIVE A *MIRANDA* WARNING?

As an initial matter, Respondents acknowledge that Petitioner's *Miranda* claim was exhausted, properly brought before State Courts, and, thus, it survives procedural default. (Doc. 30, p. 15). Petitioner claims his conviction and sentence are in violation of the Fifth Amendment to the United States Constitution; specifically, the requirement for a *Miranda* warning. (Doc. 24, p. 6). Petitioner alleges the statements he made to Pennsylvania State Police on September 5, 2007, were involuntary and used in trial despite the fact that he was not given an appropriate *Miranda* warning before making these statements. *Id.*

Respondents reply that "[t]he State Courts did not make an unreasonable application of clearly established Federal law or an unreasonable determination of the facts surrounding the decision to allow the introduction of Harinarain's incriminating statements at trial." (Doc. 30, p. 14).

The Fifth Amendment to the Constitution of the United States provides,

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

The Fifth Amendment's relevance to the instant Petition is the right against self-incrimination. *Id.* The United States Supreme Court extended protection against self-incrimination to custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 441. (1966). In *Miranda,* the Supreme Court described "custodial interrogation" as " questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444.

The Supreme Court has since had the opportunity to better define the "custodial interrogation" in the *Miranda* decision. The Supreme Court has held:

> In the present case, however, there is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a 1/2-hour interview respondent did in fact leave the police station without hindrance. It is clear from these facts that Mathiason was not in custody "or otherwise deprived of his freedom of action in any significant way. Such a noncustodial situation is not converted to one in which Miranda applies…

Oregon v. Mathiason, 429 U.S. 492, 494. (1977). *see also California v. Beheler*, 463 U.S. 1121, 77 L. Ed. 2d 1275. (1983) (held that the Defendant came to the police voluntarily and gave a confession does not constitute custodial interrogation).

Additionally, the Court held, "Nor is the requirement of warnings to be imposed . . . because the questioned person is one whom the police suspect." *Oregon*, 429 U.S. at 495. (1977); *Beckwith v. United States*, 425 U.S. 341 (1976) (held that "in holding that the Miranda requirements are applicable to interviews . . . when the subject is in custody; the Court thus squarely grounded its holding on the custodial aspects of the situation, not the subject matter of the interview."); *California v. Beheler*, 463 U.S. 1121, 1124 n.2 (1983) (held that "Our holding in *Mathiason* reflected our earlier decision in *Beckwith* . . . in which we rejected the notion that the "in custody" requirement was satisfied merely because the police interviewed a person who was the "focus" of a criminal investigation").

The United States Supreme Court has stated that Petitioners in federal habeas proceedings face a "high bar . . . because they are subject to two layers of judicial deference." *Coleman v. Johnson,* 566 U.S. 650, 651 (2012). The Supreme Court explained:

> First, on direct appeal, "it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." *Cavazos v. Smith,* 565 U.S. 1, ——, 132 S.Ct. 2, 4, 181 L.Ed.2d 311 (2011) (*per curiam*). And second, on habeas review, "a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was 'objectively

> unreasonable.' " Ibid. (quoting *Renico v. Lett,* 559 U.S. 766, ——, 130 S.Ct. 1855, 1862, 176 L.Ed.2d 678 (2010)).

Id. Further, the minimum evidence the Due Process Clause requires to prove a crime is a matter of federal law in a habeas review. *Id.* at 2064.

In this instant Petition, this Court must determine whether the state court's ruling "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" as Petitioner does not contend the State Court made any unreasonable factual determinations. 28 U.S.C. § 2254. The "unreasonable application" of federal law is a demonstrably high standard to meet and the Third Circuit established inquiries to evaluate the state court decisions and held that:

> A state-court decision is contrary to clearly established federal law if the state court (1) contradicts the governing law set forth in [the Supreme] Court's cases or (2) confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a [different] result. A state-court decision involve[s] an unreasonable application of clearly established federal law if the state court (1) identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular ... case; or (2) unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply."

Serge v. State Corr. Ins., U.S. Dist. WL 3764047, at *12 (M.D. Pa. June 1, 2012) (quoting Williams v. Taylor, 529 U.S. 362, 405-07 (2000)). Moreover the Third Circuit held, "the holdings, as opposed to the dicta, of [the Supreme] Court's

decisions as of the time of the relevant state-court decision." *Lambert v. Blackwell*, 387 F.3d 210, 234 (3d Cir. 2004). Meaning this Court evaluates the clearly established federal law at the time of the state court decision.

I agree with Respondents that Petitioner has failed to demonstrate the State Court conclusions were contrary to, or involved an unreasonable application of, clearly established Federal law. Petitioner attempted, through his counsel, to suppress his statements from trial based on alleged *Miranda* violations.

On March 20 and 31, 2009, the trial court held an Omnibus hearing dedicated to Petitioner's Motion to Suppress and issued an order denying the Motion. The trial court judge appropriately applied the standard given in *Miranda* holding law enforcement officers do not have to *Mirandize* an individual absent custodial interrogation. On the issue of whether Petition was subject to custodial interrogation on September 5, 2007, the trial court held that:

> The test for determining whether a person is being subjected to custodial interrogation is whether he is physically deprived of his freedom in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by such interrogation. *Commonwealth v. Busch,* 713 A.2d 97, 100 (Pa. Super. 1998). In other words, "police detentions become custodial when, under the totality of the circumstances, the conditions or duration of the detention become so coercive as to constitute the functional equivalent of arrest." *Mannion,* 725 A.2d at 200.

(Doc. 33-3, p. 3). In its order, the trial court made findings as to: (1) whether Petitioner was deprived of freedom; (2) Petitioner reasonably believed he could

end the interview; and lastly (3) whether Petitioner's movements were restrained. The trial court identified and analyzed the appropriate inquiries prescribed in *United States v. Jacobs* and *Yarborough v. Alvarado. United States*, 431 F.3d at 105; *Yarborough*, 541 U.S. at 663. On direct appeal, the Superior Court found the trial court properly applied the *Miranda* case law in determining Petitioner's statements were non-custodial in nature.

This demonstrates the state court reasonably applied clearly established federal law. As such, I am not persuaded by Petitioner's argument that his conviction and sentence were imposed in violation of his Fifth Amendment right to be free from self-incrimination.

C. THE STATE COURT'S DECISION DENYING THE UNTIMELY *BATSON* CHALLENGE IS NOT AN UNREASONABLE APPLICATION OF FEDERAL LAW.

Petitioner argues his conviction and sentence were imposed in violation of the Sixth Amendment of the United States Constitution because he received ineffective assistance of counsel due to his trial counsel's unsuccessful *Batson* challenge. (Doc. 24, p. 7).

The Sixth Amendment to the United States Constitution guarantees the right of every criminal defendant to effective assistance of counsel. Under federal law, a collateral attack of a sentence based upon a claim of ineffective assistance of counsel must meet a two-part test established by the Supreme Court in order to

survive. A petitioner must establish that: (1) the performance of counsel fell below an objective standard of reasonableness; and (2) that, but for counsel's errors, the result of the underlying proceeding would have been different. *Strickland v. Washington,* 466 U.S. 668, 687–88, 691–92, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A petitioner must satisfy both of the Strickland prongs in order to maintain a claim of ineffective counsel. *George v. Sively,* 254 F.3d 438, 443 (3d Cir.2001).

At the outset, *Strickland* requires a petitioner to "establish first that counsel's performance was deficient." *Jermyn v. Horn,* 266 F.3d 257, 282 (3d Cir.2001). This threshold showing requires a petitioner to demonstrate that counsel made errors "so serious" that counsel was not functioning as guaranteed under the Sixth Amendment. *Id.* Additionally, the petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Id.* However, in making this assessment "[t]here is a 'strong presumption' that counsel's performance was reasonable." *Id.* (quoting *Berryman v. Morton,* 100 F.3d 1089, 1094 (3d Cir.1996)).

But a mere showing of deficiencies by counsel is not sufficient to secure habeas relief. Under the second *Strickland* prong, a petitioner also "must demonstrate that he was prejudiced by counsel's errors." *Id.* This prejudice requirement compels the petitioner to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

have been different." *Id.* A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Id.*

Thus, as set forth in *Strickland*, a petitioner claiming that his criminal defense counsel was constitutionally ineffective must show that his lawyer's "representation fell below an objective standard of reasonableness." 466 U.S. at 688. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Thomas v. Varner,* 428 F.3d 491, 499 (3d Cir. 2005) (quoting *Strickland*, 466 U.S. at 689). The petitioner must then prove prejudice arising from counsel's failings. "Furthermore, in considering whether a petitioner suffered prejudice, '[t]he effect of counsel's inadequate performance must be evaluated in light of the totality of the evidence at trial: "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.' " " *Rolan v. Vaughn,* 445 F.3d 671, 682 (3d Cir.2006) (quoting *Strickland*, 466 U.S. at 696.)

Accordingly, a federal court reviewing a claim of ineffectiveness of counsel brought in a petition under 28 U.S.C. § 2254 may grant federal habeas relief if the petitioner can show that the state court's adjudication of his claim was an "unreasonable application" of *Strickland. Billinger v. Cameron,* No. 08-321, 2010

WL 2632286 at *4 (W.D. Pa. May 13, 2010). In order to prevail against this standard, a petitioner must show that the state court's decision "cannot reasonably be justified under existing Supreme Court precedent." *Hackett v. Price,* 381 F.3d 281, 287 (3d Cir.2004). This additional hurdle is added to the petitioner's substantive burden under *Strickland. See Yarborough v. Gentry,* 540 U.S. 1, 6, (2003) (noting that the review of ineffectiveness claims is "doubly deferential when it is conducted through the lens of federal habeas.").

Petitioner argues he received ineffective assistance of counsel because his trial counsel did not make a *Batson* challenge during jury selection (March 6, 2009). (Doc. 33, p. 14). Rather, counsel made his *Batson* challenge on the morning of trial (March 9, 2009). *Id.* It is undisputed that trial counsel's *Baston* challenge was untimely. Petitioner, an African American man, also argues this *Batson* challenge was of particular significance because "the juror in question was the sole African American in the venire." *Id.*

Respondents argue Petitioner has not shown any prejudice resulting from the untimely challenge, as the Trial Court denied the challenge on the merits after holding a hearing. (Doc. 30, p. 20). Here, the *Batson* challenge in question was made prior to opening statements, rather than during *voir dire.* (Doc. 30, p. 20). The Superior Court acknowledged the untimeliness of the *Batson* challenge. *Id.* However, the Superior Court nevertheless allowed a hearing on the *Batson*

challenge, and denied the challenge on its merits. *Id.* Respondents further note that no evidence of racial discrimination was presented at the hearing, and the Commonwealth introduced evidence supporting a race-neutral reason to strike the juror. *Id.*

In of the fact that the Superior Court allowed a hearing on the *Batson* challenge in question, and because Petitioner has presented no evidence of racial discrimination at the hearing, I must agree with Respondent. For these reasons, I find that the State Courts did not make an unreasonable application of clearly established federal law, or an unreasonable determination of the facts surrounding the decision that no Sixth Amendment violation occurred as a result of the untimely *Batson* challenge.

V. RECOMMENDATION

For the reasons articulated herein, I RECOMMEND that:

(1) Petitioner's Motion for Writ of Habeas Corpus be DENIED; and

(2) The Clerk of Court CLOSE this case.

Date: October 1, 2018

BY THE COURT

s/William I. Arbuckle
William I. Arbuckle
U.S. Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

CAMERON A. HARINARAIN, Petitioner	)	CIVIL ACTION NO. 3:14-cv-2395
	)	(KANE, D.J.)
v.	)	
	)	(ARBUCKLE, M.J.)
ROBERT GILMORE, *et al,* Respondents	)	

NOTICE OF RIGHT TO OBJECT
[LOCAL RULE 72.3]

Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition **within fourteen (14) days** after being served with a copy thereof. Such party **shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections** which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. **The briefing requirements set forth in Local Rule 72.2 shall apply.** A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Date: October 1, 2018

BY THE COURT
s/William I. Arbuckle
William I. Arbuckle
U.S. Magistrate Judge