

DLD-099

February 14, 2019

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 18-3265

DAMON JONES, Appellant

vs.

COMMISSIONER PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.

(E.D. Pa. Civ. No. 2-08-cv-04222)

Present: JORDAN, GREENAWAY, Jr., and NYGAARD, Circuit Judges

Submitted is appellant's application for a certificate of appealability under 28 U.S.C. § 2253(c)(1) in the above captioned case.

Respectfully,

Clerk

ORDER

The foregoing request for a certificate of appealability is denied. For substantially the reasons given by the District Court and the Magistrate Judge, appellant has not made a substantial showing of the denial of a constitutional right nor shown that reasonable jurists would find the correctness of the procedural aspects of the Court's determination debatable. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484 (2000).

By the Court,

s/Joseph A. Greenaway, Jr.
Circuit Judge

Dated: April 1, 2019
SLC/cc: Damon Jones
Joshua S. Goldwert, Esq.



A True Copy:

Patricia A. Dodszeit

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

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-3265

DAMON JONES,
Appellant

v.

COMMISSIONER PENNSYLVANIA DEPARTMENT OF CORRECTIONS;
SUPERINTENDENT GRATERFORD SCI; ATTORNEY GENERAL
PENNSYLVANIA

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN,
HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS,
PORTER, MATEY, and NYGAARD, * *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 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.

* Judge Nygaard's vote is limited to panel rehearing only.

BY THE COURT,

s/Joseph A. Greenaway, Jr.

Circuit Judge

Dated: July 24, 2019

kr/cc: Damon Jones
Joshua S. Goldwert, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAMON JONES

Petitioner

v.

JEFFREY BEARD, *et al.*

Respondents

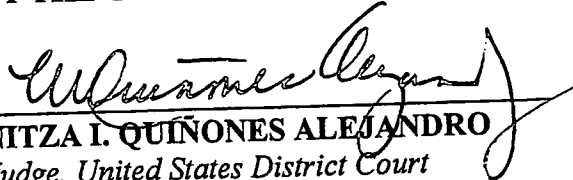
CIVIL ACTION

NO. 08-4222

ORDER

AND NOW, this 16th day of October 2018, upon consideration of Petitioner Damon Jones' motion to proceed in forma pauperis on appeal, [ECF 49], it is hereby **ORDERED** that said motion is **GRANTED**.

BY THE COURT:


NITZIA I. QUIÑONES ALEJANDRO
Judge, United States District Court

ENT'D OCT 17 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAMON JONES

CIVIL ACTION

v.

JEFFREY BEARD, *et al.*

NO. 08-4222

ORDER

AND NOW, this day of , 2017, upon consideration of the Petition and Amended Petitioner for a Writ of Habeas Corpus, the Commonwealth's Response, the other documents filed by the parties, and after review of the Report and Recommendation of United States Magistrate Judge Carol Sandra Moore Wells, is hereby **ORDERED** that:

1. The Report and Recommendation is **APPROVED and ADOPTED**;
2. The Petition for a Writ of Habeas Corpus is **DISMISSED and DENIED**, without an evidentiary hearing; and
3. Petitioner has neither shown denial of a federal constitutional right, nor established that reasonable jurists would disagree with this court's procedural disposition of his claims. Consequently, a certificate of appealability is **DENIED**.

IT IS SO ORDERED.

BY THE COURT:

NITZA I. QUINONES ALEJANDRO, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED OCT 13 2017

DAMON JONES

CIVIL ACTION

v.

JEFFREY BEARD, *et al.*

NO. 08-4222

REPORT AND RECOMMENDATION

CAROL SANDRA MOORE WELLS
United States Magistrate Judge

October 12, 2017

Presently before the court are a counseled Petition and Amended Petition for a Writ of Habeas Corpus filed by Damon Jones ("Petitioner"), pursuant to 28 U.S.C. § 2254. Petitioner, a state prisoner, is currently serving a life term of incarceration at the State Correctional Institution-Graterford. He seeks habeas relief based on claims of a deficient criminal complaint, deficient jury instructions, insufficient evidence, a *Batson*¹ violation, denial of needed transcripts, and ineffective assistance of counsel. The Honorable Nitza I. Quinones Alejandro referred this matter to the undersigned for preparation of a Report and Recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons set forth below, it is recommended that Petitioner not obtain habeas relief.

I. FACTUAL AND PROCEDURAL HISTORY²

As stated by the Pennsylvania Supreme Court:

[Petitioner's] convictions arose from a drug-related massacre in which two persons were killed and six others were seriously wounded in a courtyard at the Richard Allen Housing Project (Project) in the City of Philadelphia. The factual background is as follows.

ENTERED
OCT 13 2017
CLERK OF COURT

¹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

² The facts set forth in this background and procedural history were gleaned from Petitioner's counseled Habeas Corpus Petition, his counseled Amended Petition, the Commonwealth's Response, and the documents attached to the parties' filings.

On August 28, 1982, Sylvester Williams confronted Ernest Wright and demanded that he stop selling drugs in the Project. Williams confiscated \$200.00 from Wright. Later that day, Williams encountered Isaiah Givens and discussed the earlier confrontation with Wright. Givens told Williams that there would be no acts of reprisal from himself, [Petitioner], or Portie Robertson. Nevertheless, on the following day, [Petitioner] accompanied by Givens and Robertson, entered the courtyard of the Project. All three men were carrying handguns. At that time, Williams was near the steps of a building that fronted the courtyard. An unidentified man approached the well-armed trio, whereupon [Petitioner] announced, "This is not meant for you. Move." [Petitioner], Givens, and Robertson then began to fire their weapons. In rapid succession they fired approximately twenty shots towards Williams. Numerous people were in the courtyard at the time, standing near Williams. Two of them, including one seven-year-old child, were killed and six others were seriously wounded. Williams was not hit. [Petitioner], Givens, and Robertson fled but were soon apprehended by police.

[Petitioner], Givens, and Robertson were tried jointly for this crime and all were convicted. In accordance with the jury's verdict in the penalty phase of trial, Givens and Robertson were sentenced to life imprisonment and [Petitioner] was sentenced to death.

Commonwealth v. Jones, 610 A.2d 931, 935 (Pa. 1992). Since Petitioner was a capital defendant, his direct appeal went directly to the Pennsylvania Supreme Court, which affirmed his judgment of conviction.³ *Id.* at 948. Petitioner was represented by one attorney at trial, a different attorney for post-verdict motions, and a third attorney for his direct appeal. *Commonwealth v. Jones*, 912 A.2d 268, 274 n.7. (Pa. 2006).

³ On direct appeal, Petitioner's attorney raised the following guilt-phase arguments: (1) his pre-trial severance motion was erroneously denied; (2) "foolish pranks" committed by two sequestered jurors rendered them unfit to continue serving; (3) the evidence adduced at trial was insufficient to sustain his first degree murder conviction; (4) the prosecutor committed misconduct during his opening statement; (5) trial counsel was ineffective for failing to move to strike testimony from Sylvester Williams; (6) the prosecutor should have revealed the results of a lie detector test taken by Williams; (7) the prosecutor posed improper questions to two of Petitioner's alibi witnesses; (8) trial counsel was ineffective for failing to object when the prosecutor impeached his own witness, Williams; (9) the trial court erred by allowing the prosecutor to introduce during rebuttal a television newscast videotape concerning the shooting; (10) portions of the prosecutor's rebuttal exceeded the scope of Petitioner's evidence; (11) trial counsel was ineffective for failing to object to comments made by the prosecutor during closing argument; (12) the trial court erred when summarizing the evidence adduced at trial; (13) the trial court gave an erroneous instruction on voluntary manslaughter. 610 A.2d at 935-45. In addition, Petitioner raised several *pro se* claims, including an assertion that post-verdict motions counsel rendered ineffective assistance by failing to adequately examine trial counsel during post-verdict motion hearings. *Id.* 948 n.3.

In July 1994, Petitioner filed a *pro se* petition for a writ of habeas corpus in this court. *Jones*, 912 A.2d at 274. Eventually, his habeas petition was dismissed for lack of exhaustion. *Id.*

While his habeas petition was pending, on January 16, 1997, Petitioner filed a timely PCRA⁴ petition. 912 A.2d at 274. State post-conviction proceedings were protracted; after oral argument held on July 26, 2000, the PCRA court granted a hearing. *Id.* Prior to the hearing, Petitioner moved for written discovery, seeking the prosecutor's hand-written notes taken during jury selection, to help establish a *Batson* claim that the prosecutor had exercised his peremptory challenges in a racially discriminatory manner. *Id.* The PCRA court granted the motion on July 26, 2001; the Commonwealth took an interlocutory appeal. *Id.* at 275. ~~The Pennsylvania Supreme Court reversed the PCRA court's order, finding that no *Batson* claim had been preserved at trial.~~ *Commonwealth v. Jones*, 802 A.2d 1232 (Pa. 2002). On remand, the PCRA court held an evidentiary hearing on the remaining issues and granted a new penalty phase hearing – on grounds of ineffective assistance – but denied guilt phase relief. 912 A.2d at 275. On December 29, 2006, the Pennsylvania Supreme Court affirmed the denial of guilt phase relief and remanded the case so Petitioner could properly plead his layered claims of ineffective assistance of counsel, concerning the sentencing phase of his trial.⁵ *Id.* at 295.

⁴ PCRA refers to Pennsylvania's Post Conviction Relief Act, codified at 42 Pa. Cons. Stat. Ann. §§ 9541-46.

⁵ On PCRA appeal, Petitioner raised the following guilt-phase claims: (1) the jury instructions violated due process because they lowered the Commonwealth's burden of proof; (2) admission of hearsay evidence from Nassia Ford violated his rights; (3) prosecutorial misconduct pervaded the trial; (4) violation of *Batson*; (5) denial of trial transcripts violated his rights; (6) the Commonwealth's concealment of an agreement it made with Sylvester Williams violated his rights; (7) jury instructions were improper; (8) his constitutional rights were violated by the trial court's constant criticism of co-defense counsel; (9) his constitutional rights were violated when the trial court admitted a newscast from the evening of the murder; (10) the reasonable doubt jury instructions violated due process; (11) the trial court violated due process by improperly instructing the jury on first degree murder and aggravated assault; (12) the trial court's instruction on aggravated assault violated *Commonwealth v. Nichols*, 692 A.2d 181 (Pa. Super. Ct. 1997); (13) his conviction violated *Beck v. Alabama*, 447 U.S. 625 (1980); (14) his rights were violated because the information in his case failed to give proper notice of the specific intent requirement; (15) the cumulative errors at trial violated his rights; (16) he was entitled to an evidentiary hearing; (17) he was entitled to additional discovery. 912 A.2d at 275-76.

Petitioner's re-sentencing was delayed until December 14, 2012, when the Commonwealth, finally, elected not to seek the death penalty; Petitioner was re-sentenced to two consecutive terms of life imprisonment. *Commonwealth v. Jones*, 2014 WL 10558249, *2 (Pa. Super. Ct. Nov. 24, 2014). The Superior Court affirmed the new judgment of sentence on November 24, 2014.⁶ *Id.* at 13.

In 2008, while his re-sentencing was still pending, Petitioner filed the instant application for federal habeas relief. In 2009, the habeas case was placed in civil suspense, pending his re-sentencing. After Petitioner was re-sentenced and his appeal decided by the Superior Court, this case was removed from suspense and counsel was appointed. On May 26, 2016, a counseled habeas petition was filed. The Commonwealth responded to that petition, on June 27, 2017. On August 3, 2017, a counseled amended petition addressed Petitioner's habeas claims six through eight. On August 18, 2017, the Commonwealth, by letter, indicated that it would rely upon its June 27 response. Hence, the matter is ripe for review.

In his amended petition, Petitioner asserts that: (1) the trial court violated his right to due process because the court failed to instruct the jury properly on how it could infer the specific intent to kill required for first degree murder; (2) the prosecutor violated *Batson* when exercising his peremptory challenges; (3) the state courts denied his right to an effective appeal by failing to provide him with transcripts of the jury selection and his pre-trial severance motion hearing; (4) post-verdict counsel was ineffective when presenting Petitioner's claims of trial counsel's alleged ineffectiveness; (5) the criminal information in his case violated due process, because it omitted notice of the alleged basis for proving the specific intent to kill required for first degree murder;

⁶ On appeal of his re-sentencing, Petitioner claimed: (1) his speedy trial and due process rights were violated by the lengthy delay between the time the trial court vacated his death sentence and re-sentenced him; (2) his speedy trial, due process and equal protection rights were violated by the Commonwealth's failure to provide him with a full record of the proceedings. 2014 WL 10558249, at *2.

(6) the evidence adduced at trial was insufficient to sustain his convictions for first degree murder and aggravated assault; (7) the trial court failed to instruct the jury on all of the elements required for first degree murder and aggravated assault; and (8) the trial court's instructions concerning aggravated assault failed to comply with *Commonwealth v. Nichols*, 692 A.2d 181 (Pa. Super. Ct. 1997). Amended Petition ("Am. Pet.") at 13-64. The Commonwealth responds that all of Petitioner's claims are procedurally defaulted or lack merit. Response ("Resp.") at 13-63. This court finds that Petitioner is not entitled to habeas relief.

II. DISCUSSION

A. Claims Two and Eight are Procedurally Defaulted

1. Principles of Exhaustion and Procedural Default

A habeas petitioner must exhaust state court remedies before obtaining habeas relief. 28 U.S.C. § 2254(b)(1)(A). For non-capital defendants, the traditional way to exhaust state court remedies in Pennsylvania is to fairly present a claim to the trial court, the Pennsylvania Superior Court and the Pennsylvania Supreme Court. *See Evans v. Court of Common Pleas, Delaware County*, 959 F.2d 1227, 1230 (3d Cir. 1992). However, since Petitioner was a capital defendant, his first two appeals bypassed the Superior Court and went directly to the Pennsylvania Supreme Court. *See Pa. Cons. Stat. Ann. § 9711(h)*. At the time of Petitioner's final appeal, he was no longer a capital defendant, hence, in light of a May 9, 2000 order of the Pennsylvania Supreme Court, he was not required to seek allowance of appeal ("*allocatur*") from the Pennsylvania Supreme Court in order to exhaust state remedies on his last appeal. *See Lambert v. Blackwell*, 387 F.3d 210, 233-34 (3d Cir. 2004).

If a habeas petitioner has presented his claim to the state courts, but the state courts have declined to review the claim on its merits, because the petitioner failed to comply with a state rule

of procedure when presenting the claim, the claim is procedurally defaulted. *See Harris v. Reed*, 489 U.S. 255, 262-63 (1989). When a state court has declined to review a claim based on a procedural default and the claim is not later addressed on the merits by a higher court, the habeas court must presume that the higher state court's decision rests on the procedural default identified by the lower state court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). Finally, when a habeas petitioner has failed to exhaust a claim and it is clear that the state courts would not entertain the claim because of a state procedural rule, the claim is procedurally defaulted.⁷ *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

Procedurally defaulted claims cannot be reviewed unless "the [petitioner] can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. In order to demonstrate cause, the petitioner must show that "some objective factor external to the defense impeded [the petitioner's] efforts to comply with the state's procedural rule." *Id.* at 753 (citation omitted). Examples of suitable cause include: (1) a showing that the factual or legal basis for a claim was not reasonably available; (2) a showing that some interference by state officials made compliance with the state procedural rule impracticable; (3) attorney error that constitutes ineffective assistance of counsel. *Id.* at 753-54.

The fundamental miscarriage of justice exception is limited to cases of "actual innocence." *Schlup v. Delo*, 513 U.S. 298, 321-22 (1995). In order to demonstrate that he is "actually innocent," the petitioner must present new, reliable evidence of his innocence that was not

⁷ A common reason the state courts would decline to review a claim that has not been presented previously is the expiration of the statute of limitations for state collateral review. *See Keller v. Larkins*, 251 F.3d 408, 415 (3d Cir. 2001).

presented at trial.⁸ *Id.* at 316-17, 324. The court must consider the evidence of innocence presented along with all the evidence in the record, even that which was excluded or unavailable at trial. *Id.* at 327-28. Once all this evidence is considered, the petitioner's defaulted claims can only be reviewed if the court is satisfied "that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327.

2. Claim Two

Petitioner attempted to raise a *Batson* claim during his PCRA proceedings. However, the Pennsylvania Supreme Court found that Petitioner had neither raised nor preserved a *Batson* claim at trial. 802 A.2d at 1232. The Commonwealth argues that Petitioner's default constitutes a procedural bar to this court's consideration of his *Batson* claim. Resp. at 14-15. This court agrees.

The Third Circuit has explained that a *Batson* claim is waived, if the petitioner does not preserve it at trial. *Lewis v. Horn*, 581 F.3d 92, 101-02 (3d Cir. 2009). When, as in this case, the defendant's trial was held before *Batson* was decided, the defendant should have raised a *Swain v. Alabama*, 380 U.S. 202 (1965),⁹ challenge to the prosecutor's use of peremptory challenges in order to preserve a *Batson* claim. *Lewis*, 581 F.3d at 101-02. Petitioner failed to preserve his *Batson* claim *via Swain* at trial, therefore, the claim is waived and procedurally defaulted.

Petitioner has presented no new, reliable evidence of his actual innocence, to excuse his default. *See Schlup*, 513 U.S. at 316-17, 324. Further, he has not demonstrated that trial counsel was ineffective for failing to preserve the *Batson* claim at trial.¹⁰ Therefore, Petitioner's default

⁸ This evidence need not be directly related to the habeas claims the petitioner is presenting, because the habeas claims themselves need not demonstrate that he is innocent. *See Schlup*, 513 U.S. at 315.

⁹ *Swain* was the governing U.S. Supreme Court case on racial discrimination during jury selection prior to *Batson*.

¹⁰ Instead, Petitioner argues that post-verdict counsel and direct appellate counsel rendered ineffective assistance for failing to raise the *Batson* claim. Am. Pet. at 27. However, these were not the attorneys who committed the critical default.

cannot be excused and his *Batson* claim will not be addressed on its merits. *See Coleman*, 501 U.S. at 750.

3. Claim Eight

In claim eight, Petitioner alleges that the aggravated assault jury instruction in his case was defective, because it failed to comply with *Nichols*. Pet. at 61-61. *Nichols* addressed the requirements for a proper instruction on the *mens rea* necessary to prove aggravated assault; the court's analysis was based solely upon state law, without consideration of federal constitutional due process. *See* 692 A.2d at 185-88. Nevertheless, Petitioner asserts that the aggravated assault jury instruction given in his case deviated from the *mens rea* rule pronounced in *Nichols* and violated due process, because the defective instruction relieved the Commonwealth of its burden to prove an essential element of aggravated assault. *See* Am. Pet. at 62-63. Some legal support exists for Petitioner's contention that a jury instruction which omits or misstates the state law requirements for proving an essential element of a charged offense not only violates state law, but also may violate due process. *See Osborne v. Ohio*, 495 U.S. 103, 123, 126 (1990); *Smith v. Horn*, 120 F.3d 400, 415 (3d Cir. 1997). Hence, his claim is cognizable.

Petitioner first raised his *Nichols* claim during his PCRA appeal to the Pennsylvania Supreme Court. 912 A.2d at 275. However, that court deemed the claim waived, inasmuch as it had not been raised in the initial PCRA proceedings. 912 A.2d at 278. Thus, the claim is procedurally defaulted and barred from habeas review. *See Harris*, 489 U.S. at 262-63. Petitioner cannot excuse the default of his claim based on actual innocence, because he has not presented any new, reliable evidence of actual innocence. *See Schlup*, 513 U.S. at 316-17, 324. ~~Further, this court cannot excuse the default based upon ineffective assistance of PCRA counsel, because the defaulted claim is not one of ineffective assistance of trial counsel. *See Martinez v. Ryan*, 566~~

U.S. 1, 9 (2012) (holding that ineffective assistance of initial state collateral review counsel may only excuse the default of a claim of ineffective assistance of trial counsel). Unexcused default precludes review on the merits of Petitioner's due process claim based upon *Nichols*. See *Coleman*, 501 U.S. at 750.

B. Claims One and Three through Seven Lack Merit under Appropriate Standards

1. The AEDPA Standard

Claims one and three through seven were mainly resolved on their merits by the state courts, hence, they must be reviewed under the deferential standard established by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which provides that habeas relief is precluded, unless the state court's adjudication of a 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
- (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 proceedings.

28 U.S.C. § 2254(d). The habeas statute further provides that any findings of fact made by the state court must be presumed to be correct; Petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A state court's adjudication of a claim is contrary to U.S. Supreme Court precedent, if the state court has applied a rule that contradicts the governing law set forth in Supreme Court precedent or if the state court confronts a set of facts which are materially indistinguishable from a decision of the Supreme Court and the state court arrives at a different result from the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). When determining whether a state court's decision was contrary to U.S. Supreme Court precedent, the habeas court should not be quick to attribute error. See *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*). Instead, state court

decisions should be “given the benefit of the doubt.” *Id.* In this regard, it is not necessary that the state court cite the governing Supreme Court precedent or even be aware of the governing Supreme Court precedent. *Early v. Packer*, 537 U.S. 3, 8 (2002) (*per curiam*). All that is required is that “neither the reasoning nor the result of the state-court decision contradicts” Supreme Court precedent. *Id.*

If, however, the state court correctly identifies the governing U.S. Supreme Court precedent, unreasonable application analysis, rather than contrary analysis, is appropriate. *Williams*, 529 U.S. at 406. A state court decision constitutes an unreasonable application of Supreme Court precedent if the state court correctly identifies the governing legal rule but applies it unreasonably to the facts of the petitioner’s case. *Id.* at 407-08.

In making the unreasonable application determination, the habeas court must ask whether the state court’s application of Supreme Court precedent was objectively unreasonable. *Williams*, 529 U.S. at 409. The habeas court may not grant relief simply because it believes the state court’s adjudication of the petitioner’s claim was incorrect. *Id.* at 411. Rather, the habeas court must be convinced that the state court’s adjudication of the claim was objectively unreasonable. *Id.* In doing so, the habeas court is limited to considering the factual record that was before the state court when it ruled, *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011), and the relevant U.S. Supreme Court precedent that had been decided by the date of the state court’s decision. *Greene v. Fisher*, 565 U.S. 34, 38 (2011). It is permissible to consider the decisions of lower federal courts which have applied clearly established Supreme Court precedent, when deciding whether a state court’s application of U.S. Supreme Court precedent was **reasonable**. See *Fischetti v. Johnson*, 384 F.3d 140, 149 (3d Cir. 2004). However, the § 2254(d)(1) bar to habeas relief cannot be surmounted solely based upon lower federal court precedent, *i.e.*, lower federal court precedent cannot justify

a conclusion that a state court's application of U.S. Supreme Court precedent was **unreasonable**; only U.S. Supreme Court precedent may be the authority for that conclusion. *See Renico v. Lett*, 559 U.S. 766, 778-79 (2010).

The Supreme Court, addressing AEDPA's factual review provisions in *Miller-El v. Cokerell*, 537 U.S. 322 (2003), interpreted § 2254(d)(2) to mean that "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds, unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Id.* at 340. A clear example of an unreasonable factual determination occurs where the state court erroneously finds a fact that lacks any support in the record. *Wiggins v. Smith*, 539 U.S. 510, 528 (2003). In that extreme circumstance, the presumption of correctness under § 2254(e)(1) is also clearly and convincingly rebutted. *Id.* If the state court's decision based on a factual determination is unreasonable in light of the evidence presented in the state court proceeding, habeas relief is not barred by § 2254(d)(2). *Lambert*, 387 F.3d at 235.

2. Claim One

In claim one, Petitioner asserts that two flaws in the trial court's instructions violated due process. First, the jury was permitted to infer Petitioner's specific intent to kill Sylvester Williams from his use of a deadly weapon on a vital part of the body of the two victims who were actually killed. Am. Pet. at 13. Second, the jury was allowed to infer Petitioner's specific intent to kill based solely upon the actions of his co-defendants. *Id.* The Commonwealth argues that both assertions lack merit. Resp. at 32-38. This court finds that Petitioner's first assertion simply lacks merit.¹¹ The Pennsylvania Supreme Court's resolution of Petitioner's second assertion was reasonable, hence, § 2254(d) bars habeas relief.

¹¹ The court will not consider the state court's resolution of this assertion of error.

Petitioner first challenges where the court expressly instructed the jury on how it could infer that Petitioner had the specific intent to kill the actual decedents, Reginald Hines and Maurice Jones, if they found that he shot them in vital parts of their bodies. *See* Am. Pet. at 15 (quoting N.T. 5/18/83 at 6027-28).¹² Since these instructions did not pertain to Williams at all, Petitioner's first assertion of error is factually flawed.

As to Petitioner's second assertion of error, the state court determined that the trial court's accomplice culpability instructions indicated that, to be an accomplice, Petitioner had to possess the intent to promote or facilitate the crime and he helped to plan or commit the crime. *Id.* at 281. Hence, the jury properly focused on Petitioner's own intent and not solely upon the intent of his co-defendants in deciding his culpability. *Id.*

The Pennsylvania Supreme Court's resolution of Petitioner's second assertion was quite reasonable. Petitioner, intending to kill Sylvester Williams, took a loaded handgun into the crowded courtyard of a housing complex; he arrived with two, armed co-defendants. Upon entering the courtyard, Petitioner warned a bystander to move, as he was not the intended victim.

¹² The instruction Petitioner challenges follows:

There is evidence in this case, surrounding the deaths of the two victims, that Reginald Hines died as a result of several gunshot wounds to the body, one of the wounds through the back, below the armpit, which penetrated the lungs and targeted itself through the heart sac itself, that there was the second wound, to the lower back, which pierced the internal organs of the intestines.

There is further evidence through the Medical Examiner that the victim Maurice Jones sustained a gunshot wound to the left temple which shattered bone matter in the head and tore the brain and penetrated and exited through the right side of the head.

As to that the law holds, with respect to that type of evidence, for your consideration, that, where anyone, without sufficient cause or provocation, unlawfully kills another person by using a deadly weapon upon a vital part of the body with manifest intention to so use it, an inference may be drawn in the absence of qualifying circumstances by common knowledge that such use of a deadly weapon is likely to cause death.

Thus, as was the case in malice, previously explained to you, further under Pennsylvania law, an intent to kill may be inferred by reason of the killer's use of a deadly weapon to a vital part of the body of his victim.

(N.T. 5/18/83 at 6027-28).

Then, Petitioner and his two co-defendants fired their weapons in the direction of Williams; they missed Williams, but killed two people and wounded six others. Under these proven facts, it was permissible for the jury to infer that Petitioner intended to kill Williams and to transfer that deadly intent onto the two unfortunate bystanders who were actually killed. Further, the jury was clearly instructed that, to convict Petitioner as an accomplice to this horrific crime, **he himself** (not just his co-defendants) had to possess actual intent to promote or facilitate the crime that occurred. Based on this record, the state court reasonably found no due process violation. Hence, the AEDPA standard bars relief.

3. Claim Three

Petitioner asserts that the state court failed to provide him with transcripts of the jury selection (“*voir dire*”) proceedings and the hearing on his pre-trial motion for severance of his trial from that of his co-defendants. Am. Pet. at 28. He protests failure to produce these transcripts violated his due process and equal protection rights to pursue a direct appeal. *Id.* at 28-29. The Commonwealth responds that Petitioner’s failure to obtain the transcripts was not caused by the state court, but, rather, the failure of direct appellate counsel to request them. Resp. at 23. This court finds that Petitioner cannot prevail on this claim.

First, Petitioner did not raise his claim concerning the lack of *voir dire* transcripts in his direct appeal to the Pennsylvania Supreme Court.¹³ *See supra* n.3. Hence, this portion of his claim is unexhausted and procedurally defaulted. *See Evans*, 959 F.2d at 1230. Even if Petitioner could excuse the default of his *voir dire* transcript claim, he could not obtain habeas relief, because he waived his *Batson* claim by failing to preserve the issue at trial. *See supra* Section II(A)(2). Since Petitioner’s *Batson* claim could never be considered on its merits, any error concerning the failure

¹³ Those transcripts could have helped substantiate Petitioner’s *Batson* claim. Am. Pet. at 22 n.21, 37.

to produce the jury selection transcripts would be harmless. *See Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993) (holding that, habeas relief may not be granted for non-structural constitutional error if the error is harmless).

Moreover Petitioner was able to challenge the denial of his severance motion on direct appeal without the transcripts. *See* 610 A.2d at 935. The Pennsylvania Supreme Court found no error in denying the severance motion, because Petitioner was unable to demonstrate any prejudice to him from a joint trial. *Id.* at 936. First, the state court noted that, even if Petitioner's severance motion had been granted and he had been tried separately, the Commonwealth would have been able to present the same evidence it presented at the joint trial; six eyewitnesses saw Petitioner participate in the shooting. *Id.* Further, although Petitioner complained that three of co-defendant Givens' alibi witnesses implicated him in the crime, those witnesses were obviously not believed, since Givens was also convicted.¹⁴ *Id.*

4. Claim Four

Petitioner claims that post-verdict motion counsel rendered ineffective assistance when examining trial counsel during the post-verdict motion hearing. Am. Pet. at 39-40. The Commonwealth counters that the Pennsylvania Supreme Court reasonably rejected this claim. Resp. at 54. This court agrees.

Petitioner's claim of ineffective assistance of counsel must be assessed against the two-part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In making this determination, the court's scrutiny of counsel's performance must be "highly

¹⁴ In light of the record the state court relied upon, even if the state court's decision was deemed erroneous, there is no likelihood that the missing transcripts had a substantial or injurious effect on the outcome of Petitioner's severance motion; hence, any error in failing to produce the transcripts was harmless. *See Brecht*, 507 U.S. at 638.

deferential.” *Id.* at 689. The court should make every effort 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.” *Id.* In short, the “court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Id.* (quotation omitted).

Second, the petitioner must show that counsel’s deficient performance “prejudiced the defense” by “depriv[ing] the [petitioner] of a fair trial, a trial whose result is reliable.” *Id.* at 687. That is, the petitioner must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome,” *id.*, but it is less than a preponderance of the evidence. *Id.* at 693, 694.

If the petitioner fails to satisfy either prong of the *Strickland* test, there is no need to evaluate the other part, as his claim will fail. *Id.* at 697. Finally, counsel will not be found ineffective for failing to present an unmeritorious claim or objection. *Johnson v. Tennis*, 549 F.3d 296, 301 (3d Cir. 2008).

Petitioner’s fourth claim was not presented by his direct appellate counsel; Petitioner raised it in a *pro se* addendum to his appellate brief. 610 A.2d at 948 n.3. The Pennsylvania Supreme Court rejected the claim as follows:

Because the hearing on ineffectiveness was conducted four years after trial, trial counsel’s recollection of the case was extremely weak. The hearing was adjourned so that counsel would have a month to review the case. Subsequently, counsel’s recollection remained poor, and counsel repeatedly testified that he did not remember details of the case. There is no reason to believe that, if a further continuance had been obtained, trial counsel would have provided any testimony supportive of [Petitioner’s] claim. While

[Petitioner] would have preferred that counsel testify in depth as to all of the ineffectiveness claims, he has not alleged any specific testimony that would likely have been elicited to advance his claims. We find no indication that [Petitioner] was prejudiced by the decision of post-[verdict] motions counsel not to seek further testimony.

610 A.2d at 948 n.3.

The state court's rejection of Petitioner's claim was reasonable. *Strickland* required the state court to presume that post-verdict counsel's decision was professionally reasonable. 466 U.S. at 689. It was Petitioner's burden to rebut that presumption. *Id.* The state court found that he had failed to do so. 610 A.2d at 948 n.3. The state court's decision is entitled to this court's deference. *See Harrington v. Richter*, 562 U.S. 86, 105 (2011). Further, it was Petitioner's burden to demonstrate prejudice. *Strickland*, 466 U.S. at 687. The state court found no harm to Petitioner, because there was no reason to believe that more time would have improved trial counsel's poor recollection of the trial. This state court decision is entitled to federal habeas deference. *Harrington*, 562 U.S. at 105. In light of the passage of time (four years) and the failure of trial counsel's recollection to improve, even after a continuance, 610 A.2d at 948 n.3, it was reasonable for the state court to conclude that there was no prejudice from post-verdict counsel's failing to press trial counsel harder. Hence, the AEDPA standard bars relief.¹⁵

5. Claim Five

Petitioner contends that the criminal information in his case violated due process, because it failed to provide him adequate notice of the alleged basis for proving the specific intent to kill

¹⁵ Petitioner also asserts that he is entitled to an evidentiary hearing to develop his claims of trial counsel's alleged ineffective assistance. Am. Pet. at 39. He is incorrect. Petitioner already had an evidentiary hearing to challenge trial counsel's ineffectiveness in state court, therefore, the AEDPA standard bars a further evidentiary hearing in this court. *Brown v. Wenerowicz*, 663 F.3d 619, 629 (3d Cir. 2011) (holding that the Supreme Court's decision in *Cullen v. Pinholster*, 563 U.S. 170 (2011), construes § 2254(d) to bar district courts from conducting evidentiary hearings to supplement the state court record).

required for first degree murder. Am. Pet. at 44-54. The Commonwealth responds that the state court reasonably rejected this due process claim. Resp. at 45. This court agrees that Petitioner's due process claim was reasonably rejected.

Due process requires that the charging document (information or indictment) contain the elements of the charged offense, fairly inform the defendant of the charge he must defend, and allow him to plead an acquittal or conviction as a bar to future prosecutions for the same offense. *Hamling v. United States*, 418 U.S. 87, 117 (1974). It is usually sufficient under due process to state the charge alleged in the words of the statute itself. *Id.* Further, if part of the alleged offense contains a legal term of art, use of that term is sufficient to comply with due process; in such cases, it is not necessary for the charging document to allege specifically the legal term of art's component parts. *Id.* at 118-19.

The Pennsylvania Supreme Court found that Petitioner's due process claim lacked merit. The information charged, in relevant part, that Petitioner did "feloniously, wilfully, and of his malice aforethought kill and murder," the two decedents, pursuant to the relevant statutory provision for first degree murder, 18 Pa. Cons. Stat. § 2502(a). 912 A.2d at 289. Clearly, Petitioner was afforded adequate notice he was charged with murder, although specific intent to kill language was not included. *Id.* Moreover, the information's failure to mention explicitly the specific intent to kill did not impede Petitioner's preparation. *Id.*

The state court's resolution of Petitioner's claim was reasonable. Petitioner's information, in relevant part, charged him with wilfully killing the victims. Title 18, § 2502(a) defines first degree murder as an intentional killing. Title 18, § 2502(d) further defines intentional killing as one that is willful, deliberate and premeditated. This means that Petitioner's information used the words of the relevant statute. Further, willfulness and specific intent to kill are interchangeable

legal terms of art in Pennsylvania. *See Commonwealth v. O'Searo*, 352 A.2d 30, 35 (Pa. 1976) (explaining, first, that "specific intent to kill" is a legal term of art that Pennsylvania's courts have developed to express the state of mind required for first degree murder, which is defined in the statute as "willful, deliberate and premeditated," and, second, that the two terms are interchangeable in Pennsylvania). Accordingly, it was certainly consistent with *Hamling* for the Pennsylvania Supreme Court to conclude that, once Petitioner's information charged him with willfully killing the victims, he was also notified, as required by due process, that he was being charged with having the specific intent to kill the victims. *See* 418 U.S. at 118-19. The AEDPA standard, therefore, bars relief.¹⁶

6. Claim Six

Petitioner asserts that his convictions for first degree murder and aggravated assault were not supported by sufficient evidence. Am. Pet. at 54-58. The Commonwealth responds that the Pennsylvania Supreme Court reasonably rejected this claim on direct appeal. Resp. at 39-40. This court agrees.

Petitioner's claim of insufficient evidence is governed by *Jackson v. Virginia*, which states:

The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt' Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic

¹⁶ Petitioner captions this claim as an ineffective assistance claim, *see* Am. Pet. at 44; however, the bulk of his brief addresses the alleged deficiency in his criminal information, not the performance of his prior counsel for failing to litigate the claim. He devotes only one paragraph to ineffective assistance, *see id.* at 53, and he does not even mention prejudice. Further, the state court explicitly determined that the due process claim lacked merit. *See* 912 A.2d at 288-89. Hence, the court will focus on Petitioner's due process claim. In any event, because the due process claim lacks merit, prior counsel were not ineffective for omitting it. *See Johnson*, 549 F.3d at 301.

facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review, *all of the evidence* is to be considered in the light most favorable to the prosecution.

Jackson, 443 U.S. 307, 318-19 (1979) (citations omitted) (emphasis in original). The habeas court is to presume that conflicting inferences of historical fact were resolved in favor of the prosecution. *Id.* at 326. Finally, when applying the sufficiency of the evidence test, the habeas court must consider the types of evidence the state's courts consider relevant to proving the elements of the offense at issue. *Id.* at 324. This review is essential inasmuch as the elements of the criminal offense are defined by state law. *Id.* at 324, n.16.

More recently, the U.S. Supreme Court has emphasized that, under the AEDPA standard, a habeas court's review of a sufficiency claim is doubly deferential. *Coleman v. Johnson*, 132 S. Ct. 2060, 2062 (2012) (*per curiam*). That is, deference is owed to the jury's determination of the facts and to the state court's review of the jury's determination. *Id.* Furthermore, the Court stated that what distinguishes a "reasonable inference" from insufficient "mere speculation" is purely a matter of federal constitutional law and must be determined without regard to state law. *Id.* at 2064. It is the Due Process Clause itself that affords the jury "broad discretion" to decide what inferences to draw from the evidence presented at trial and the reviewing court may not engage in "fine-grained factual parsing" of the evidence and the inferences drawn therefrom.¹⁷ *Id.*

The Pennsylvania Supreme Court rejected Petitioner's sufficiency challenge to his first degree murder conviction as follows:

The Commonwealth produced testimony from at least six eyewitnesses, including [Sylvester] Williams, who saw [Petitioner]

¹⁷ This doubly deferential standard of review renders it virtually impossible to grant habeas relief on a sufficiency claim, even when the conviction is barely supported by the record. Indeed, after being reversed in *Coleman*, the Third Circuit acknowledged as much in *Eley v. Erickson*, 712 F.3d 837, 853 (3d Cir.), *cert. denied sub nom Lamas v. Eley*, 134 S. Ct. 254 (2013), a case with less evidentiary support than *Coleman*. *Eley*, 712 F.3d at 849.

commit the crime. In view of this testimony, there is no doubt as to the sufficiency of the evidence.

[Petitioner] asserts that, in firing a barrage of twenty bullets at the people in the courtyard, he and his cohorts had no specific intent to kill. This assertion is patently without merit. Specific intent to kill can be inferred from the use of a deadly weapon upon a vital part of the victim's body. *Commonwealth v. Boyd*, 344 A.2d 864, 861 (Pa. 1975). Further, under the doctrine of transferred intent, criminal responsibility is not affected by the fact that the bullets struck persons other than the one for whom they were apparently intended. *Commonwealth ex rel. McCant v. Rundle*, 211 A.2d 460, 461-62 (1965) (transferred intent); 18 Pa. C.S. § 303(b)(1).

610 A.2d at 938.

In this case, overwhelming evidence supports Petitioner's conviction for first degree murder. First, since he and his cohorts rained a fusillade of bullets into a crowded courtyard and struck the two decedents in a vital part of their bodies, it was eminently reasonable for the jury to infer that Petitioner had the specific intent to kill even unfortunate bystanders. Likewise, it was reasonable for the state court to affirm the jury's verdict. On this ground alone, the AEDPA standard bars relief. Additionally, there was sufficient evidence under the prosecution's alternative transferred intent theory. ⁴ There was evidence presented from which the jury could infer that Petitioner and his cohorts intended to kill Sylvester Williams in retaliation for taking money from Ernest Wright. 610 A.2d at 935. ⁴ When they entered the courtyard, Petitioner told a bystander to leave, because, "This is not meant for you." *Id.* This provided further evidence that Petitioner intended to kill someone that was in the courtyard. Next, Petitioner and his cohorts fired into the crowd, in the direction of Williams, killing the two victims. This evidence was plainly sufficient to allow the jury to infer that Williams was the intended victim, since he was in the line of fire, and to convict Petitioner on a transferred intent theory, since Williams was not hit but two others were killed. Petitioner's contrary assertion is untenable, given the highly deferential AEDPA

standard.¹⁸

7. Claim Seven

Petitioner claims that the trial court failed to properly instruct the jury on all of the elements for first degree murder and aggravated assault. Am. Pet. at 58-61. Specifically, he asserts that (a) the jury was improperly instructed concerning the intent requirements for first degree murder and aggravated assault as to intended victim Sylvester Williams and (b) that his jury was not at all instructed on how that intent could be transferred to the actual victims. *Id.* at 58-59. The Commonwealth responds that the claim is procedurally defaulted; alternatively, it counters that the Pennsylvania Supreme Court reasonably rejected the claim. Resp. at 50-52. This court finds that the state court reasonably rejected this claim.

There is authority for the proposition that a jury instruction which omits or misstates the state law requirements for proving an essential element of a charged offense may violate due process. *See Osborne v. Ohio*, 495 U.S. 103, 123, 126 (1990). In order to succeed on a due process challenge to a state law jury instruction, the defendant must demonstrate a reasonable likelihood that the jury applied the challenged instruction in a manner that relieved the prosecution of its due process burden to prove each element of the charged offense. *See Waddington v. Sarausad*, 555 U.S. 179, 191 (2009) (citations omitted). In making this determination, the challenged instruction(s) must not be read in artificial isolation, but, instead, must be considered in the context of the jury instructions, as a whole, and the trial record. *Id.* at 192 (citations omitted).

¹⁸ Petitioner also asserts that there was insufficient evidence to convict him of aggravated assault. This claim was not raised on direct appeal and is not properly exhausted. *See* 610A.2d at 938. Nevertheless, since there was sufficient evidence for the jury to infer that Petitioner had the specific intent to kill Williams, there, necessarily, was sufficient evidence for it to find that Petitioner had the intent to injure Williams, which is required for aggravated assault. As with the two decedents, there was also sufficient evidence to allow that intent to be transferred to the injured victims. As this claim is meritless, it can be denied, despite the lack of exhaustion. *See* 28 U.S.C § 2254(b)(2).

Claim seven (a) is essentially a recapitulation of claim one, which this court has already found was reasonably rejected by the Pennsylvania Supreme Court. *See supra* Section II(B)(2). There is no need to address it again. The Pennsylvania Supreme Court rejected Petitioner's transferred intent argument, claim seven (b), explaining that his jury was, in fact, properly instructed on transferred intent. 912 A.2d at 288 (citing N.T. 5/18/83 at 6005-07). This court is bound by the state court's conclusion that the transferred intent instruction was proper under state law. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (*per curiam*).

Furthermore, the transferred intent instruction was not ambiguous. It clearly told the jury that, if Petitioner kills or inflicts serious bodily injury on the wrong person with shots that were intended to kill or seriously injure another, Petitioner would be guilty of the same degree of criminal offense as if his shots had killed or seriously wounded his intended victim. 912 A.2d at 288 (citing N.T. 5/18/83 at 6005-07). There is no reasonable likelihood herein that the jury misapplied that instruction. Hence Petitioner's claim must fail under the AEDPA standard. *Waddington*, 555 U.S. at 191-92.

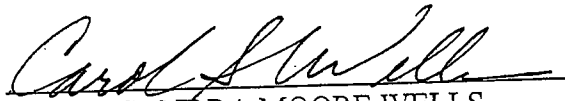
III. CONCLUSION

Petitioner's second and eighth claims are procedurally defaulted. All remaining claims lack merit under the AEDPA standard or constitute harmless error. Reasonable jurists would not debate this court's procedural or substantive disposition of Petitioner's claims; hence, a certificate of appealability should not issue for any of them. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 12th day of October, 2017, for the reasons contained in the preceding Report, it is hereby **RECOMMENDED** that habeas petition be **DISMISSED and DENIED**, without an evidentiary hearing. Petitioner has not demonstrated that any reasonable jurist could find this court's rulings debatable, nor shown denial of any federal constitutional right; hence, there is no probable cause to issue a certificate of appealability for any of his claims.

It be so **ORDERED**.


CAROL SANDRA MOORE WELLS
United States Magistrate Judge

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