PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-3111

ADAM ROSEN,
Appellant

v.

SUPERINTENDENT MAHANOY SCI;
ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-15-cv-04539)
District Judge: Honorable Nitza I. Quiñones Alejandro

Argued March 11, 2020

Before: McKEE, AMBRO, and PHIPPS *Circuit Judges*

(Opinion filed: August 26, 2020)

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OPINION OF THE COURT

McKEE, *Circuit Judge.*

Adam Rosen asks us to reverse the District Court's denial of his petition for habeas corpus.[1] The Commonwealth of Pennsylvania requested a psychiatric exam of Rosen in preparation for his first murder trial, where he raised a diminished capacity defense. After his first conviction was overturned, he abandoned his diminished capacity defense. Rosen argues that the second trial court violated his Fifth Amendment right to remain silent when it ruled that his statements from the court-ordered psychiatric exam were admissible to impeach Rosen if he chose to testify at his second trial. After electing not to testify, Rosen was again convicted of murder. Because Rosen cannot demonstrate that using his statements to the Commonwealth's psychiatric expert at the second trial for the limited purpose of impeachment would violate clearly established Fifth Amendment law, we will affirm the District Court's dismissal.

I. FACTS AND PROCEDURAL HISTORY

A. Factual Background

On June 30, 2001, Adam Rosen stabbed his wife, Hollie Rosen, to death in their home.[2] Thereafter, Rosen called the police and claimed that masked intruders had invaded his home and stabbed his wife.[3] However, within several hours, he confessed to the stabbing but claimed it was an unintentional

[1] 28 U.S.C. § 2254.
[2] *Rosen v. Kerestes*, Civil Action No. 15-4539, 2017 U.S. Dist. LEXIS 179378, at *2 (E.D. Pa. Oct. 25, 2017).
[3] *Id.*

response to his wife swinging a knife at him.[4] According to Rosen, he and his wife had been arguing in the kitchen that morning when she nicked him on the neck and stomach with a knife.[5] He claimed he followed her upstairs and then blacked out. The next thing he said he remembered was seeing his severely wounded wife on the bedroom floor. Hollie Rosen died of stab wounds to her back, neck, and chest.[6] Adam Rosen was arrested and charged with first degree murder.[7]

B. Rosen's First and Second Murder Trials

At his first trial, Rosen presented a diminished capacity defense.[8] In support of his defense, Rosen retained and was evaluated by psychiatrist Dr. Paul Fink.[9] The trial court granted the Commonwealth's motion to have Rosen evaluated by its own expert, Dr. Timothy Michals, in order to rebut the diminished capacity defense.[10] The record does not show that he was Mirandized prior to this evaluation.[11] Dr. Fink testified

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[4] *Id.* at *2-3, *6; Rosen Br. 2.

[5] This version of events is based on Rosen's statements to his psychiatric expert. A121-22.

[6] A122; *see also Rosen*, 2017 U.S. Dist. LEXIS 179378, at *2.

[7] A69.

[8] *Rosen*, 2017 U.S. Dist. LEXIS 179378, at *3.

[9] *Id.*

[10] *Id.*

[11] Rosen claims that Dr. Michals did not administer *Miranda* warnings before Rosen's interview, and that he did not waive his right to remain silent. The Commonwealth, on the contrary, argues that Dr. Michals administered *Miranda* warnings and sought a waiver from Rosen before examining him. The Commonwealth bears the burden of establishing waiver and offers little to show that Rosen was indeed given a comprehensive set of warnings and thereafter knowingly and voluntarily waived his right to remain silent. *See Commonwealth v. Rosen*, 42 A.3d 988, 1001 (Pa. 2012) (Saylor, J., dissenting) (explaining that the Commonwealth did not argue or brief warning-as-waiver issues below and therefore cannot rely on waiver as a basis for admitting Rosen's statements to Dr. Michals); *see also Gibbs v. Frank*, 387 F.3d 268, 274 (3d Cir. 2004) (explaining that a compelled psychiatric

at trial that Rosen was incapable of forming the intent to kill due to his manic-depressive mental illness, accompanied by psychotic features and paranoia, and the stress caused by the volatile deterioration of his marriage.[12] Dr. Michals, on the other hand, testified that Rosen did not have a mental disorder that impaired his ability to form the specific intent to kill.[13] Dr. Michals also testified that discrepancies between the statements Rosen made to the two psychiatric experts and Rosen's changing version of events—including his initial false statement about the home invaders—demonstrated that Rosen was self-serving.[14] Rosen did not testify in his own defense and the jury convicted him of first-degree murder.[15]

After Rosen was granted a new trial for reasons unrelated to this appeal, he abandoned his diminished capacity defense and notified the Commonwealth that he did not intend to call a mental health expert.[16] This time, Rosen planned to testify in his defense and argue that he did not premeditate or have the deliberate, willful intent to kill his wife.[17] Nevertheless, the Commonwealth filed a motion *in limine* seeking to admit Rosen's statements to Dr. Michals about killing his wife and those in which Rosen admitted he previously attempted to rape her.[18] The trial court ruled that Rosen's statements could *not* be used as substantive evidence in the Commonwealth's case-in-chief, but that the Commonwealth could use the statements to impeach Rosen if

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interview implicates the Fifth Amendment and therefore the defendant-subject is entitled to *Miranda* warnings). Assuming *arguendo* that Rosen was not given *Miranda* warnings and did not waive his right to remain silent, Rosen still fails to establish that he is entitled to relief.

[12] *Rosen*, 42 A.3d at 990; A199-120.

[13] *Rosen*, 42 A.3d at 990.

[14] A150-51; *see also* Rosen Br. 4.

[15] A70; *Rosen*, 2017 U.S. Dist. LEXIS 179378, at *3.

[16] *Rosen*, 2017 U.S. Dist. LEXIS 179378, at *4.

[17] A191; Rosen Br. 7.

[18] A75. Rosen also submitted a motion *in limine* seeking to exclude the testimony, and the trial court held oral argument on the cross-motions. *Rosen*, 42 A.3d at 991.

he testified.[19] After the trial court's ruling, Rosen changed his mind and chose not to testify at the ensuing bench trial.[20] At that trial, Rosen was convicted of first-degree murder and sentenced to life in prison without the possibility of parole.

C. Pennsylvania Supreme Court Ruling

After the Pennsylvania Superior Court affirmed the conviction, the Pennsylvania Supreme Court granted allocatur review on the question of "[w]hether the limited Fifth Amendment waiver occasioned by a mental health defense in a defendant's first trial allows the Commonwealth to use the evidence obtained pursuant to such waiver as rebuttal in a subsequent trial where no mental health defense is presented."[21] Based upon several Pennsylvania state cases and Supreme Court law on the Fifth Amendment, the court affirmed the trial court's ruling on the motion *in limine*.

In *Commonwealth v. Morley*, 681 A.2d 1254 (Pa. 1996), the court held that a defendant who raises a mental health defense in Pennsylvania waives the privilege against self-incrimination under the Fifth Amendment and can be compelled to submit to an examination by the Commonwealth's psychiatric expert. Likewise, in *Commonwealth v. Sartin*, 751 A.2d 1140 (Pa. 2000), the court held that a defendant who intends to use the results of his or her own psychiatric exam can be compelled to submit to examination by an expert of the Commonwealth's choosing for the purpose of rebutting the defense.[22] Reading *Morley* and *Sartin* together with *Commonwealth v. Santiago*[23] and

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[19] This oral ruling was not transcribed. Fortunately, the parties agree on the trial court's ruling. *Rosen*, 2017 U.S. Dist. LEXIS 179378, at *14.

[20] *Rosen*, 42 A.3d at 991.

[21] *Id.* at 993.

[22] *Sartin* also made clear that the Fifth Amendment waiver only allowed the Commonwealth to use the results of its exam to rebut those issues implicated by the defense's own expert. *Sartin*, 751 A.2d at 1143.

[23] *Commonwealth v. Santiago*, 662 A.2d 610 (Pa. 1995) (holding that a defendant who presents his own expert

Commonwealth v. Boyle,[24] the Pennsylvania Supreme Court distilled the following rule: "[w]hen the defendant voluntarily presents a mental health defense that he subsequently abandons, the Commonwealth may, upon retrial, utilize the results of its psychological examination as to those issues that have been implicated by the defendant's own expert."[25] The court explained that because the Commonwealth could introduce Dr. Fink's testimony as substantive evidence, Dr. Michals' testimony "clearly could have been utilized in response to those issues implicated by Dr. Fink's testimony."[26]

Finally, the court found that any error would have been harmless because, if Rosen had testified, "all of the impeachment evidence could have been elicited solely from Dr. Fink, who was in possession of the same mental health records and reports that Dr. Michals possessed."[27] Rosen "made admissions of guilt to both" experts and could have been impeached by the admissible statements he made to Dr. Fink.[28] Therefore, "there is no reasonable possibility that the error may have contributed to the verdict."[29]

D. District Court's Ruling on Habeas Review

Rosen filed a habeas petition pursuant to 28 U.S.C. § 2254, arguing that the trial court's ruling that his statements to the Commonwealth's psychiatric expert could be used to impeach him violated his Fifth Amendment right to remain

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psychiatric testimony at a first trial waives psychiatrist-patient privilege with regard to his expert's testimony at a second trial where he no longer raises an insanity defense).

[24] *Commonwealth v. Boyle*, 447 A.2d 250 (Pa. 1982) (admitting defendant's testimony from his first trial at a subsequent trial where the defendant did not testify does not violate the Fifth Amendment right to remain silent because the constitutional privilege is waived).

[25] *Rosen*, 42 A.3d at 997.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 998.

silent.[30] The District Court denied the petition, explaining that Rosen failed to show that the Pennsylvania Supreme Court's conclusion that there was no Fifth Amendment violation ran afoul of clearly established federal law.[31] The court explained that Rosen "relies on snippets from several Supreme Court cases and a Third Circuit case, in an attempt to extrapolate 'clearly established Federal law' from general principles and materially distinguishable holdings of the Supreme Court."[32] Thus, the District Court concluded that Rosen had failed to overcome the deference owed to state court decisions under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[33]

II. JURISDICTION AND STANDARD OF REVIEW

A. Jurisdiction

Rosen brought this habeas corpus action under 28 U.S.C. § 2254. The District Court had jurisdiction under 28 U.S.C. §§ 2241(a) and 2254(a). The order of the District Court dismissing the petition is an appealable final order. The District Court denied a certificate of appealability, but we later granted one on Rosen's claimed Fifth Amendment violation.[34] Jurisdiction for this appeal arises under 28 U.S.C. § 1291 and 28 U.S.C. § 2253(c)(1).

B. Standard of Review under AEDPA

We exercise plenary review over the District Court's denial of Rosen's habeas petition.[35] The Pennsylvania Supreme Court decided the Fifth Amendment issue on the merits. Therefore, pursuant to 28 U.S.C. § 2254(d), AEDPA requires Rosen to show that the state court ruling:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

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[30] *Rosen v. Kerestes*, Civil Action No. 15-4539, 2018 WL 4030740 (E.D. Pa. Aug. 22, 2018).

[31] *Id.* at *1 n.1.

[32] *Id.*

[33] *Id.*

[34] A3.

[35] *Ross v. Dist. Atty. Allegheny Cnty.*, 672 F.3d 198, 205 (3d Cir. 2012).

> 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 proceeding.[36]

In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court elaborated on § 2254(d)(1), explaining:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.[37]

We have further explained that a state court decision is "contrary to" clearly established law where "the Supreme Court has established a rule that determines the outcome of the petition."[38] "[I]t is not sufficient for the petitioner to show merely that his interpretation of Supreme Court precedent is more plausible than the state court's; rather, the petitioner must demonstrate that Supreme Court precedent *requires* the contrary outcome."[39]

A state court's decision is an "unreasonable application" of clearly established law where "evaluated objectively and on the merits, [it] resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent. In making this determination, mere disagreement with the state court's conclusions is not enough to warrant

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[36] 28 U.S.C. § 2254(d).
[37] *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000).
[38] *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 888 (3d Cir. 1999) (en banc), *cert. denied* 528 U.S. 824 (1999).
[39] *Id.* (emphasis in the original).

habeas relief."[40] Importantly, this entails a "substantially higher threshold" than a federal court's independent judgment that the state court's application of Supreme Court precedent was incorrect.[41] Instead, the state court's application of federal law must be objectively unreasonable, not merely incorrect.[42]

Section 2254(d)(2), in turn, sharply restricts the circumstances in which a federal habeas court may grant relief based on a state court's factual determinations. The petitioner must show that the state court verdict was based on an unreasonable determination of the evidence and that a reasonable factfinder could not have reached the same conclusion.[43]

III. DISCUSSION

A. Rosen failed to demonstrate that using his statements to the Commonwealth's psychiatric expert to impeach him at his second trial would be contrary to or an unreasonable application of clearly established Fifth Amendment law.

We have previously described our approach to § 2254(d)(1) as a two-step analysis whereby "federal habeas courts first . . . identify whether the Supreme Court has articulated a rule specific enough to trigger 'contrary to' review; and second, only if it has not, . . . evaluate whether the state court unreasonably applied the relevant body of precedent."[44] The plain language of § 2254(d)(1) applies to "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law"—applying the latter to both the "contrary to" and "unreasonable application" prongs of § 2254(d)(1).[45] As we acknowledged in *Matteo*, there

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[40] *Id.* at 890.

[41] *Renico v. Lett,* 559 U.S. 766, 773 (2010) (citing *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)).

[42] *Williams*, 529 U.S. at 410 ("[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law.") (emphasis in the original).

[43] *Campbell v. Vaughn,* 209 F.3d 280, 291 (3d Cir. 2000).

[44] *Matteo*, 171 F.3d at 888.

[45] *See Williams*, 529 U.S. at 412 ("Under § 2254(d)(1), the writ may issue only if one of the following two conditions

is likely some overlap amongst the parts of § 2254(d)(1), "but we must attempt to read the statute so that each has some operative effect . . . ."[46]

Accordingly, identifying an applicable principle of clearly established Supreme Court law can be treated as a prerequisite—or Step 0.5—to applying the two-step test from *Matteo*. This approach is consistent with our decision in *Fischetti v. Johnson*, where we explained that § 2254(d)(1) "requires us to determine what the clearly established Supreme Court decisional law was at the time petitioner's conviction became final[,]" and then "analyze the challenged state decision in light of that decisional law under each of the two prongs of the AEDPA test."[47]

"Clearly established" Supreme Court law "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision."[48] Furthermore, in determining what is "clearly established," Supreme Court decisions cannot be viewed "at a broad level of generality," but instead must be viewed on a "case-specific level."[49] The "clearly established Federal law" provision requires Supreme Court decisions to be viewed through a "sharply focused lens."[50]

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is satisfied—the state-court adjudication resulted in a decision that (1) 'was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States,' or (2) 'involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States.'"). While *Matteo* was decided before *Williams*, we have since affirmed that the analytical framework from *Matteo* remains applicable. *See Werts v. Vaughn*, 228 F.3d 178, 197 (3d Cir. 2000).

[46] *Matteo*, 171 F.3d at 888; *see also Lindh v. Murphy*, 521 U.S. 320, 336 (1997) ("[I]n a world of silk purses and pigs' ears, [AEDPA] is not a silk purse of the art of statutory drafting.").

[47] *Fischetti v. Johnson*, 384 F.3d 140, 148 (3d Cir. 2004).

[48] *Williams*, 529 U.S. at 412.

[49] *Fischetti*, 384 F.3d at 148.

[50] *Id.* at 149.

1. Clearly Established Supreme Court Law on the Fifth Amendment

Rosen claims that it is clearly established federal law that impeaching a defendant using evidence from the government's mental health expert after a mental health defense is abandoned violates the Fifth Amendment. Rosen draws this proposed principle primarily from three Supreme Court cases: *Estelle v. Smith*, 451 U.S. 454 (1981); *Buchanan v. Kentucky*, 483 U.S. 402 (1987); and *Kansas v. Cheever*, 571 U.S. 87 (2013). Rosen further relies on our decision in *Gibbs v. Frank*, 387 F.3d 268 (3d Cir. 2004), although he concedes that *Gibbs* is not clearly established Supreme Court law.[51]

Rosen primarily relies upon *Estelle v. Smith*. There, the Supreme Court held that a "criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding."[52] The trial judge had *sua sponte* ordered an evaluation to determine the defendant's competency to stand trial.[53] The prosecution later used statements from that exam in a capital sentencing proceeding as evidence of the defendant's future dangerousness.[54] The defendant was sentenced to death.[55] On appeal, the Supreme Court reversed the sentence. It held that the Fifth Amendment precluded the use of the defendant's compelled statements

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[51] The state court judgment must not merely be contrary to law as articulated by any federal court; rather "[i]t must contradict 'clearly established' decisions of the United States Supreme Court alone." *Fischetti*, 384 F.3d at 147. However, "[i]n determining whether a state decision is an unreasonable application of Supreme Court precedent, this court has taken the view that decisions of federal courts below the level of the . . . Supreme Court may be helpful . . . in ascertaining the reasonableness of state courts' application of clearly established . . . Supreme Court precedent." *Id.* at 149 (internal quotation marks and citation omitted).

[52] *Estelle*, 451 U.S. at 468.

[53] *Id.* at 456-57.

[54] *Id.* at 459-60.

[55] *Id.* at 460.

against him at the penalty phase where he introduced no psychiatric evidence in his defense.[56] The Court emphasized the compelled nature of the defendant's statements, which were given in custody, pursuant to a court order, without counsel present, and in the absence of *Miranda* warnings.[57] Because the defendant was compelled to submit to the evaluation and had not attempted to introduce any psychiatric evidence of his own, the statements were inadmissible unless the psychiatrist apprised the defendant of his rights and obtained a valid waiver before questioning him.[58]

Rosen also relies on *Buchanan v. Kentucky,* 483 U.S. 402 (1987). In *Buchanan,* the defendant raised an extreme emotional disturbance defense at his murder trial and called his former social worker to testify in his defense.[59] The prosecutor cross-examined the social worker using the report from a court-ordered exam that defense counsel and the prosecutor had jointly requested for the purpose of seeking mental health treatment for the defendant.[60] The Supreme Court found no Fifth Amendment violation, explaining that "if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested."[61] The Court distinguished *Estelle* because defense counsel here had jointly requested the exam and the defendant had placed his own mental health at issue.[62] The Court concluded that "[t]he introduction of such a report for this limited rebuttal purpose does not constitute a Fifth Amendment violation."[63]

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[56] *Id.* at 468.
[57] *Id.* at 468-69.
[58] *Id.* As we have noted, we will assume *arguendo* that Rosen likewise was not apprised of his rights and did not waive his right to remain silent before his psychiatric exam.
[59] *Buchanan*, 483 U.S. at 408-09.
[60] *Id.* at 409-11.
[61] *Id.* at 422-23.
[62] *Id.* at 423.
[63] *Id.* at 423-24.

The Supreme Court in *Kansas v. Cheever*, 571 U.S. 87 (2013), applying *Buchanan*, found that the Fifth Amendment allowed the prosecution to introduce statements from a *compelled* mental health evaluation to rebut a mental health defense.[64] At his murder trial, the defendant in *Cheever* offered a psychiatric expert to support his defense that voluntary intoxication had rendered him incapable of premeditation.[65] The state offered rebuttal testimony from the defendant's court-ordered psychiatric examination.[66] The Supreme Court held: "where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit a crime, the prosecution may offer evidence from a court-ordered psychological examination for the limited purpose of rebutting the defendant's evidence."[67] The Court explained that once a defendant presents expert psychological evidence, the government cannot be denied "the only effective means of challenging that evidence: testimony from an expert who has also examined him."[68] The Court emphasized that the compelled testimony was used "only after" the defendant placed his mental health at issue and for the purpose of rebutting the mental health defense.[69]

Although our decision in *Gibbs* is not Supreme Court law, it is the most factually analogous case to Rosen's and assists our inquiry into what is "clearly established" Fifth Amendment law in this court.[70] There, Gibbs raised a mental

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[64] *Cheever*, 571 U.S. at 93-95.
[65] *Id.* at 91.
[66] *Id.* at 91-92.
[67] *Id.* at 98.
[68] *Id.* at 94.
[69] *Id.* at 95.
[70] *Fischetti*, 384 F.3d at 149 ("In determining whether a state decision is an unreasonable application of Supreme Court precedent . . . decisions of federal courts below the level of the . . . Supreme Court may be helpful . . . in ascertaining the reasonableness of state courts' application of clearly established . . . Supreme Court precedent.") (internal quotation marks and citation omitted). And while the Pennsylvania Supreme Court is not bound by *Gibbs*, it is a binding precedent in the District Court with respect to

infirmity defense at his first murder trial.[71] The Commonwealth's expert, Dr. Sadoff, testified at the first trial to rebut Gibbs' expert testimony on diminished capacity.[72] That testimony introduced several inculpatory statements Gibbs made during the court-ordered exam.[73] After his conviction was overturned on other grounds, Gibbs decided not to raise a mental health defense at his second trial. Instead, he contested the identity of the shooter.[74] Nevertheless, the trial court allowed Sadoff to testify during the Commonwealth's case-in-chief.[75] That testimony included Gibbs' inculpatory statements to Sadoff during his psychiatric interview.[76] On habeas review, we found that the trial court's decision, as affirmed by the Pennsylvania Superior Court, was an unreasonable application of clearly established Supreme Court law and granted Gibbs' habeas petition.[77] Importantly, we granted the petition based on the limited scope of the *Miranda* warnings given to Gibbs, which misstated the consequences of his Fifth Amendment waiver—an issue not relevant to Rosen's appeal.[78] However, we also stated that if Gibbs had not been Mirandized at all—as Rosen claims he was not—"the state ruling admitting the Gibbs interview in the second trial [would be] contrary to [*Estelle v.*] *Smith* itself."[79] In justifying this conclusion, we explained that "Sadoff was permitted to testify in the prosecution case in chief... simply to repeat incriminating statements that Gibbs had made."[80] This was problematic because those statements were offered "simply for the truth of the admissions of fact" and "not even to prove a psychological point, since the second trial presented no psychological issue before Sadoff testified."[81]

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what constitutes an unreasonable application of Fifth Amendment law on habeas review.

[71] *Gibbs*, 387 F.3d at 271.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.* at 277.

[78] *Id.* at 276.

[79] *Id.* at 275.

[80] *Id.*

[81] *Id.*

2. Application of Clearly Established Law to Rosen

Having reviewed the relevant Supreme Court law through "a sharply focused lens[,]" we cannot conclude that there is a directly applicable Supreme Court precedent that would preclude the Commonwealth from using Rosen's statements against him at his second trial for the limited purpose of impeachment.[82] Rosen attempts to extrapolate a principle of Fifth Amendment law from the similar yet materially distinguishable cases we have just discussed.[83] However, AEDPA's deferential standard of review demands more than this jigsaw approach. We therefore cannot find that the Pennsylvania Supreme Court's decision was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court . . . ."[84]

The rule from *Estelle*—that a "criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding"—is far too narrow to help Rosen here.[85] Rosen both initiated an evaluation and introduced psychiatric evidence at his first criminal trial. It is undisputed that the Commonwealth could compel Rosen to be examined by its own expert for the purposes of preparing a rebuttal in the first trial.[86] The *Estelle* Court expressly

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[82] *Fischetti*, 384 F.3d at 149.

[83] We reiterate that cases Rosen relies upon are *materially* distinguishable, such that we can identify discrete issues the Supreme Court has not yet addressed. It would not be enough to point to irrelevant or meaningless differences. *See Matteo*, 171 F.3d at 888 (emphasizing that the petitioner is not required "to cite factually identical Supreme Court precedent"). The bar for relief under AEDPA is high but must not be insurmountable lest we effectively close the door to all relief on habeas. AEDPA requires that we defer, not that we abdicate.

[84] 28 U.S.C. § 2254(d)(1).

[85] *Estelle*, 451 U.S. at 468.

[86] A529 ("Federal courts have consistently reiterated . . . that when a defendant places his mental status at issue, his

acknowledged that "a different situation arises where a defendant intends to introduce psychiatric evidence" and expressed concern about the government's ability to rebut such evidence.[87] Viewed through a "sharply focused lens," *Estelle* speaks only to the Fifth Amendment rights of someone who never raises a mental health defense and not to the scope of the Fifth Amendment waiver for someone, like Rosen, who raises and presents an unsuccessful mental health defense that he later abandons.[88] The Pennsylvania Supreme Court could thus rely on *Commonwealth v. Boyle* to find that the Fifth Amendment waiver triggered by Rosen's mental health defense at his first trial extended to his second trial, at least with respect to the issues raised by his own expert.[89]

Buchanan is even less helpful to Rosen. There, the defense had joined in the request for the psychiatric evaluation and therefore the defendant's statements did not result from an involuntary examination. Rosen stresses the phrase "limited

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Fifth Amendment privilege against self-incrimination is not violated by a court-ordered psychiatric examination."); *see also Rosen*, 42 A.3d at 996-97 (discussing *Morley* and *Sartin*).

[87] *Estelle*, 451 U.S. at 472; *see also id.* at 465 ("When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case.").

[88] *Penry v. Johnson*, 532 U.S. 782, 795 (2001) (noting that the Supreme Court has "never extended *Estelle*'s Fifth Amendment holding beyond its particular facts").

[89] 447 A.2d 250 (Pa. 1982). In *Boyle*, the Pennsylvania Supreme Court held that a defendant who testifies at his first trial waives his Fifth Amendment privilege and cannot reclaim it at a later trial on the same indictment, even where he declines to testify. *Id.* at 256. Without endorsing this decision or its application to Rosen, we merely note that the Pennsylvania Supreme Court could reasonably, even if incorrectly, determine that Rosen waived his Fifth Amendment privilege at his first trial by introducing expert psychiatric testimony regarding his mental health, and that this waiver transferred to his second trial despite the abandonment of his mental health defense.

rebuttal purpose" to conclude that "[t]he *Buchanan* [c]ourt could avoid the Fifth Amendment problem only because of this limitation on the use of such evidence."[90] Rosen therefore proposes that *Buchanan* "clearly establishes" that psychiatric evidence is *only* admissible to rebut the defendant's mental health defense. This inference is not supported by either the text or reasoning of *Buchanan.* The Court explicitly stated that the psychiatric evidence there was admissible "at the very least" to rebut a mental health defense. The Court's focus was on the voluntary nature of the examination jointly requested by the defense.[91] *Buchanan* leaves open the scope of a Fifth Amendment waiver triggered by a defendant's mental health defense. For example, *Buchanan* does not address what would happen if the defense was raised and later abandoned, or whether the waiver applies to involuntary examinations compelled by the government.

The most compelling Supreme Court support for Rosen's proposed principle of Fifth Amendment law comes from *Cheever.* The reasoning in *Cheever* focuses on the defendant placing his mental health at issue through his own evidence, and the right of the prosecution to rebut such evidence. The Supreme Court referred several times to the evidence being admissible for the "limited purpose of rebutting" the defense's mental health defense. Citing to *Buchanan*, the Court explained that it previously "held that testimony based on a court-ordered psychiatric evaluation is admissible only for a 'limited rebuttal purpose.'"[92]

According to Rosen, *Cheever* established that compelled testimony from the government's psychiatric expert is only admissible to the extent it directly rebuts psychiatric

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[90] Rosen Br. 27.

[91] *Buchanan*, 483 U.S. at 422; *see also id.* at 424 ("Here, in contrast [to *Estelle*], petitioner's counsel himself requested the psychiatric evaluation . . . .").

[92] *Cheever*, 571 U.S. at 97; *see also id.* at 93-94 ("The rule of *Buchanan*, which we reaffirm today, is that where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal.").

evidence presented by the defendant. Yet, even this narrow reading of *Cheever* does not touch on several vital aspects of Rosen's case. Therefore, we cannot conclude that it clearly established an applicable precedent. *Cheever*, for example, does not address whether impeaching the defendant with statements from the compelled exam, if he chose to testify, would constitute a proper "rebuttal purpose." In fact, *Cheever* alluded to limitations on the Fifth Amendment protections for testifying defendants.[93] The Court further explained that precluding the use of compelled psychiatric testimony "would undermine the adversarial process, allowing a defendant to provide the jury, through an expert operating as proxy, with a one-sided and potentially inaccurate view of his mental state at the time of the alleged crime."[94] These concerns about the integrity of the judicial process and fairness to the government undermine Rosen's claim that he should have been allowed to testify at his second trial without impeachment by his own prior inconsistent statements. Nor does *Cheever* touch on whether the proper admission of testimony for a "limited rebuttal purpose" at one trial constitutes a Fifth Amendment waiver in future proceedings where the mental health defense is abandoned.[95]

Given the limitations of AEDPA, the absence of Supreme Court precedent addressing the use of compelled statements given to the government's mental health expert as impeachment evidence is fatal to Rosen's claim here. As we have noted, the second trial court ruled that Rosen's compelled statements were inadmissible as substantive evidence and admissible only for the limited purpose of impeachment in the event Rosen testified. *Estelle*, *Buchanan*, and *Cheever* address situations where the government sought to admit the

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[93] *Id.* at 94 ("The admission of this rebuttal testimony harmonizes with the principle that when a defendant chooses to testify in a criminal case, the Fifth Amendment does not allow him to refuse to answer related questions on cross-examination.").

[94] *Id.*

[95] *See Boyle,* 447 A.2d at 256 (acknowledging that a defendant who testifies in one trial and thus waives his Fifth Amendment privilege cannot object to the admission of testimony at a later trial even where he does not testify).

defendant's statements to prove or disprove a contested issue—such as the defendant's future dangerousness, intent, or mental state. However, there was no indication in any of these cases that the defendant intended to testify and was precluded from doing so by the prospect of impeachment by compelled statements.[96] Therefore they do not address the admissibility of a defendant's statements for the purpose of impeaching the defendant.

Even *Gibbs*, with its otherwise striking factual similarity to Rosen's circumstances, is distinguishable on this point. The testimony of the Commonwealth's expert in *Gibbs* was introduced "in the prosecution [case-in-chief]. . . simply to repeat incriminating statements" made by the defendant and offered "simply for the truth" of the matters asserted.[97] In contrast, Rosen's second trial court specifically found that Dr. Michals' testimony was *inadmissible* in the case-in-chief and would be allowed solely for the purpose of impeachment if Rosen chose to testify. Impeachment evidence is not offered to prove the truth of the matter asserted, but rather is offered to

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[96] Because we deny Rosen's petition on other grounds, we do not reach the issue of whether the state court's ruling on the motion *in limine* effectively denied Rosen his right to testify, or whether he forfeited his right to appeal the Fifth Amendment issue by electing not to testify. *Compare Luce v. United States*, 469 U.S. 38, 41-43 (1984) (holding that a defendant failed to preserve an issue for appeal where the trial court ruled that he could be impeached with a prior conviction under Fed. R. Evid. 609(a) and he thereafter declined to testify), *with New Jersey v. Portash*, 440 U.S. 450, 454 (rejecting state's claim that defendant's Fifth Amendment challenge to the trial court's ruling that his immunized testimony could be used as impeachment evidence is too "abstract and hypothetical" to review because defendant did not take the stand); *and Brooks v. Tennessee*, 406 U.S. 605, 612 (1972) (reviewing a state statute requiring a testifying defendant to testify first at his trial, despite the petitioner choosing not to testify because of the statute, and finding it violates the Fifth Amendment).

[97] *Gibbs*, 387 F.3d at 275.

impugn the credibility of the person testifying.[98] Moreover, the jury can be specifically instructed that impeachment evidence may be considered only for that limited purpose and cannot be considered as substantive evidence of the defendant's mental state or intent.[99]

The trial court's ruling that Rosen's statements could be used only for impeachment is a material distinction on habeas review under AEDPA. There is reason to believe that the Supreme Court might treat impeachment by compelled statements differently than the admission of such testimony as substantive evidence in Rosen's situation. In *Harris v. New York*, the Supreme Court held that statements obtained in violation of the Fifth Amendment under *Miranda* are still admissible for the purposes of impeachment, even though such statements are inadmissible as substantive evidence.[100] The Supreme Court explained that the right of the defendant to testify "cannot be construed to include the right to commit perjury[,]" and therefore "[h]aving voluntarily taken the stand, [the defendant] was under an obligation to speak truthfully and accurately, and the prosecution . . . did no more than utilize the traditional truth-testing device[]" of impeachment by the defendant's own inconsistent statements.[101] On the other hand,

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[98] *Impeachment evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Evidence used to undermine a witness's credibility.").

[99] Because Rosen elected a bench trial and chose not to testify, such an instruction was not necessary here. However, the possibility of giving such an instruction in a similar case is relevant to distinguishing between the use of evidence for substantive versus impeachment purposes. In addition, a judge at a bench trial would understand that she could not consider impeachment evidence for any purpose other than assessing a witness's credibility.

[100] *Harris v. New York*, 401 U.S. 222, 226 (1971) ("The shield provided by [*Miranda*] cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.").

[101] *Id.* at 225; *see also United States v. Havens*, 446 U.S. 620, 626 (1980) (explaining that "the deterrent function of the rules excluding unconstitutionally obtained evidence is sufficiently served by denying its use to the government on

coerced statements—such as where "the [speaker] is told to talk or face the government's coercive sanctions[]"—are deemed involuntary and therefore inadmissible for any purpose, including impeachment.[102]

A court-ordered psychological or psychiatric exam, like a custodial police interrogation, is an inherently coercive situation. To the extent the District Court concluded that Rosen's "statements to Dr. Michals cannot be deemed involuntary, coerced, or compelled since he voluntarily raised the mental health defense[,]" we cannot agree.[103] Rosen's statements, given while in custody, under court order, without the benefit of *Miranda* warnings, are compelled testimony under the Fifth Amendment.[104] Nevertheless, whether

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its direct case" and therefore allowing the government to impeach a testifying defendant using evidence inadmissible in the case-in-chief).

[102] *Portash*, 440 U.S. at 459 (holding that testimony given in response to a grant of legislative immunity is "coerced testimony" because the person must testify or potentially face contempt charges, and under such circumstances "there is no question whether physical or psychological pressures overrode the defendant's will"); *see also Kansas v. Ventris,* 556 U.S. 586, 590 (2009) ("The Fifth Amendment guarantees that no person shall be compelled to give evidence against himself, and so is violated whenever a truly coerced confession is introduced at trial, whether by way of impeachment or otherwise."); *Mincey v. Arizona*, 437 U.S. 385, 398-402 (1978) (holding that a statement taken from a defendant while he was hospitalized and in intensive care, slipping in and out of consciousness, and in "unbearable" pain was inadmissible, even for impeachment, because the statement was not "the product of his free and rational choice").

[103] *Rosen*, 2018 WL 4030740, at *1 n.1.

[104] *Estelle*, 451 U.S. at 467, 469 ("The considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination" because an examination "while in custody with a court-ordered psychiatric" expert is "not given freely and voluntarily without any compelling influences.") (internal quotation marks and citation

testimony given to a psychiatrist under court order is "truly coerced" and therefore involuntary, or merely compelled in the same sense as a statement given to police in violation of *Miranda* (and therefore still admissible for impeachment), is yet to be determined by the Supreme Court.[105]

Nor do we decide today whether Rosen's statements were voluntary or involuntary under the Fifth Amendment. Rather, we merely conclude that the Pennsylvania Supreme Court's decision approving of the trial court's admissibility ruling is not contrary to or an unreasonable application of an ambiguous area of Fifth Amendment law.[106] This is not to say that Rosen's interpretation of the Fifth Amendment is not plausible, or even compelling.[107] However, such a rule is not

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omitted); *see also Gibbs*, 387 F.3d at 274 (affirming that *Miranda* warnings apply to court-compelled psychiatric interviews). And unlike in the *Miranda* context, the only way Rosen could remain silent was to forfeit his mental health defense at trial. *See Morley*, 681 A.2d at 1258, 1258 n.5 (holding that a defendant who raises a mental infirmity defense "may not refuse to allow the Commonwealth psychiatrist to examine him or her on the basis that it violates the defendant's privilege against self-incrimination" and "may be compelled to submit to a psychiatric exam").

[105] *Compare Ventris*, 556 U.S. at 590 ("The Fifth Amendment . . . is violated whenever a truly coerced confession is introduced at trial, whether by way of impeachment or otherwise."), *and Portash*, 440 U.S. at 458 (distinguishing *Harris* because there the defendant made no claim that his statements obtained in violation of *Miranda* were coerced or involuntary), *with Harris*, 401 U.S. at 224 (admitting statement obtained in violation of *Miranda* for the purpose of impeachment where "[p]etitioner makes no claim that the statements made to the police were coerced or involuntary").

[106] *See Mitchell v. Esparza*, 540 U.S. 12, 17 (2003) (denying habeas petition where "precedent from [the Supreme] Court is, at best, ambiguous").

[107] Rosen Br. 31-32 (arguing that testimony a defendant is compelled to give to the government's expert is admissible only for the limited purpose of rebutting a psychological

yet "clearly established." Rosen's credible argument about where the Supreme Court *should* draw the line between cases such as *Harris* and *Portash* does not satisfy the deferential standard under AEDPA.[108] It is not enough that Rosen's argument is persuasive; it must be required by law and the state court's contrary decision must not just be incorrect, but unreasonable.[109]

B. Because there is no clear Fifth Amendment violation, Rosen failed to demonstrate that he is entitled to relief under § 2254(d)(2).

Rosen also argues that he is entitled to relief under 28 U.S.C. § 2254(d)(2) because the Pennsylvania Supreme Court's harmlessness analysis was based on "an unreasonable determination of the facts in light of the evidence presented."[110]

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defense and therefore inadmissible once that defense is abandoned, even for garden variety impeachment); *see also Gibbs*, 387 F.3d at 274 (explaining that the Fifth Amendment waiver triggered by a mental health defense "is not limitless; it only allows the prosecution to use the interview to provide rebuttal to the psychiatric defense").

[108] *Carey v. Musladin*, 549 U.S. 70, 77 (2006) (holding that a state court's decision is not contrary to or an unreasonable application of federal law where there is no Supreme Court holding that would require a different outcome).

[109] *Matteo*, 171 F.3d at 888 ("[I]t is not sufficient . . . to show merely that [petitioner's] interpretation of Supreme Court precedent is more plausible than the state court's; rather, the petitioner must demonstrate that Supreme Court precedent *requires* the contrary outcome. This standard precludes granting habeas relief solely on the basis of simple disagreement with a reasonable state court interpretation of the applicable precedent."); *see also Williams*, 529 U.S. at 411 ("[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.").

[110] This claim was not raised in the District Court and we could therefore deem the argument waived. *See Nelson v.*

Rosen argues that the court improperly conflated the testimony given to Dr. Fink with that given to Dr. Michals in concluding that "the same admissions could have been established by either expert's testimony[.]"[111] Based on that conclusion, the Pennsylvania Supreme Court held that since Dr. Fink's testimony was indisputably admissible, "there is no reasonable possibility that the error may have contributed to the verdict."[112] However, Rosen is correct that there are significant discrepancies between the statements that he gave to the two experts. In fact, Dr. Michals testified to these discrepancies during Rosen's first trial in order to suggest that Rosen was self-serving and challenge Rosen's inconsistent version of events.[113] It is therefore unlikely that, if Rosen had testified, "all of the impeachment evidence could have been elicited solely from Dr. Fink, who was in possession of the same mental health records and reports that Dr. Michals possessed."[114]

Nevertheless, Rosen's challenge to the harmlessness analysis is predicated on a finding that there was indeed a Fifth Amendment violation. Consequently, rebutting the state court's harmlessness analysis is a necessary but not sufficient basis for relief. As we discussed above, we cannot conclude that the Pennsylvania Supreme Court's decision violated Rosen's clearly established Fifth Amendment rights. We therefore need not delve into whether any such hypothetical error was prejudicial to Rosen at trial.

IV. CONCLUSION

Adams USA, Inc., 529 U.S. 460, 469 (2000) (noting that "[i]t is indeed the general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts"); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (noting that "[i]t is the general rule . . . that a federal appellate court does not consider an issue not passed upon below"). However, we can within our discretion choose to take up the issue on appeal and will do so briefly to dismiss the claim on the merits. *Id.* at 121.

[111] *Rosen*, 42 A.3d at 998.

[112] *Id.*

[113] A149-50; Rosen Br. 35-40.

[114] *Rosen*, 42 A.3d at 997.

For the foregoing reasons, we will affirm the District Court's denial of the petition for habeas corpus.

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

ADAM ROSEN	:	**CIVIL ACTION**
Petitioner	:	
	:	**NO. 15-4539**
v.	:	
	:	
JOHN KERESTES, *et al.*	:	
Respondents	:	

ORDER

AND NOW, this 22nd day of August 2018, upon consideration of the pleadings and record herein, including, *inter alia*, the petition for writ of *habeas corpus* filed by Petitioner Adam Rosen ("Petitioner") pursuant to 28 U.S.C. § 2254 (the "Petition"), [ECF 1], Petitioner's memorandum of law in support thereof, [ECF 9], the response to the Petition filed by Respondents, [ECF 24], the state court record; the *Report and Recommendation* (the "R&R") issued by the Honorable David R. Strawbridge, United States Magistrate Judge ("the Magistrate Judge"), [ECF 26], recommending that the Petition be denied; and Petitioner's objections to the R&R, [ECF 31], and after conducting a *de novo* review of the objections, it is hereby **ORDERED** that:

1. The *Report and Recommendation* (the "R&R") is **APPROVED** and **ADOPTED**;

2. The objections to the R&R are without merit and are **OVERRULED**;[1]

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[1] In his Petition, Petitioner asserts two claims; *to wit*; that the trial court essentially violated his Fifth Amendment rights when it denied Petitioner's motion *in limine* with respect to statements he made to psychiatrists before his first trial; and that trial counsel provided ineffective assistance at his second trial by failing to adequately respond to the testimony of one of the Commonwealth's experts with respect to the injuries of his wife, the victim of the murder of which he was convicted. In his objections to the R&R, Petitioner disagrees with the Magistrate Judge's findings and reiterates his claims and arguments in support thereof. Petitioner's objections, however, are nothing more than an attempt to re-litigate the various arguments raised in his petition and memorandum of law in support. He essentially argues that the Magistrate Judge "sidestep[ped] the constitutional issue presented" in his first claim and "put[] on blinders" in the analysis of Petitioner's second claim. This Court disagrees and finds that the Magistrate Judge thoroughly reviewed each of Petitioner's arguments in the twenty-six page R&R and correctly concluded that Petitioner's claims were without merit. This Court has further reviewed the pertinent portions of the record *de novo* and finds that no error was committed by the Magistrate Judge in the analysis of Petitioner's claims. Accordingly, the R&R is adopted and approved in its entirety, and Petitioner's objections are overruled. Notwithstanding this Court's adoption of the R&R, further analysis is provided with respect to Plaintiff's first *habeas* claim to address Petitioner's contention

that the Magistrate Judge failed to adequately address the Supreme Court precedents on which Petitioner relied in his underlying petition.

As laid out in the R&R, the Antiterrorism and Effective Death Penalty Act ("AEDPA") amended the standards for reviewing state court judgments raised in federal *habeas corpus* petitions filed under 28 U.S.C. § 2254. *Werts v. Vaughn*, 228 F.3d 178, 195 (3d Cir. 2000). AEDPA increased the deference federal courts must give to the legal determinations and factual findings of the state courts. *Id.* at 196. In accordance with § 2254(d), a *habeas corpus* petition may only be granted if the state court's 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 (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).

To establish that the state court decision was "contrary to" federal law, "it is not sufficient for the petitioner to show merely that his interpretation of Supreme Court precedent is more plausible than the state court's; rather, the petitioner must demonstrate that Supreme Court precedent requires the contrary outcome." *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 888 (3d Cir. 1999). The state court judgment must not merely be contrary to law as articulated by *any* federal court; rather "[i]t must contradict 'clearly established' decisions of the United States Supreme Court alone." *Fischetti v. Johnson*, 384 F.3d 140, 147 (3d Cir. 2004) (citations omitted). In determining what is "clearly established," Supreme Court decisions cannot be viewed "at a broad level of generality," but instead must be viewed on a "case-specific level." *Id.* at 148. Further, the "clearly established Federal law" provision requires Supreme Court decisions to be viewed through a "sharply focused lens." *Id.* at 149; *see also Yarborough v. Alvarado*, 541 U.S. 652, 666-67 (2004) (observing that "if a habeas court must extend a rationale before it can apply to the facts at hand then the rationale cannot be clearly established at the time of the state-court decision."). Providing further clarity on this deferential standard, the Supreme Court reiterated that:

> [a] state court decision is "contrary to" our clearly established precedents if it "applies a rule that contradicts the governing law set forth in our cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent."

Early v. Packer, 537 U.S. 3, 8 (2002) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). Similarly, in *Carey v. Musladin*, 549 U.S. 70 (2006), the Supreme Court elaborated on the meaning of "clearly established federal law," holding that the lack of a Supreme Court holding on a specific issue precludes a finding that a state court decision on that issue was contrary to or an unreasonable application of clearly established federal law. *Id.* at 77. Under this heightened standard, therefore, it is Petitioner's burden to show that the Pennsylvania Supreme Court unreasonably applied a clearly-established constitutional principle as set forth by the United States Supreme Court when the state court upheld Petitioner's conviction.

As the underpinnings of his first claim, Petitioner contends that the state court "unquestionably violated Mr. Rosen's rights under the Fifth Amendment," and that the state court decision "was contrary to and involved an unreasonable application of clearly established Federal Law, as determined by the Supreme Court of the United States in *Estelle v. Smith*, 451 U.S. 454 (1981)." [ECF 9 at pp. 33, 38]. As correctly concluded by the Magistrate Judge, however, Petitioner has not identified a single United States Supreme Court decision that directly supports his claim. Instead, Petitioner relies on snippets from several Supreme Court cases and a Third Circuit case, in an attempt to extrapolate "clearly established Federal law" from general principles and materially distinguishable holdings of the Supreme Court. Specifically, in his objections (and in his Petition), Petitioner relies upon the following cases: *Estelle v. Smith*, 451 U.S. 454 (1981); *Buchanan v. Kentucky*, 483 U.S. 402 (1987); *Kansas v. Cheever*, 571 U.S. 87 (2013); and *Gibbs v. Frank*, 387 F.3d 268 (3d Cir. 2004).

None of these cases, however, provides "clearly established Federal law" that was unreasonably applied by the state courts in this matter.

In his objections to the R&R, with respect to his first *habeas* claim, Petitioner essentially contends that the Magistrate Judge's recommendation was erroneous in that it "barely mention[ed]" *Estelle* and "ignor[ed]" *Cheever* and *Gibbs*. [ECF 31 at p. 1]. Petitioner then goes on to argue (actually reargue) that the state court decision was contrary to and involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court in *Estelle*. [*Id.* at p. 14]. As correctly found by the Magistrate Judge, Plaintiff's objection and argument in this regard is misplaced.

In *Estelle*, the Supreme Court held that:

> [a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him.

451 U.S. at 468. In that case, a judge had ordered a psychiatric examination to determine the defendant's competency to stand trial. *Id.* at 456-57. The prosecution then used statements from that examination during the sentencing phase of the trial as evidence of the defendant's future dangerousness. *Id.* at 458-60. Emphasizing that the defendant had neither "introduced" any "psychiatric evidence," nor even "indicated that he might do so," the Supreme Court concluded that the Fifth Amendment precluded the state from using the defendant's statements in this manner. *Id.* at 466. Central to the Court's holding, however, was the involuntariness of the defendant's statements to the court-appointed psychiatrist and the absence of *Miranda* warnings. *Id.* at 468.

> Because respondent did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to Dr. Grigson to establish his future dangerousness . . . 'Volunteered statements . . . are not barred by the Fifth Amendment,' but under *Miranda v. Arizona*, we must conclude that, when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to Dr. Grigson were not 'given freely and voluntarily without any compelling influences' and, as such, could be used as the State did at the penalty phone only if respondent had been apprised of his rights and had knowingly decided to waive them. These safeguards of the Fifth Amendment privilege were not afforded respondent and, thus, his death sentence cannot stand.

Id. at 469-70 (citations omitted). By the Supreme Court's express language, its holding in *Estelle* was limited to the "distinct circumstances" presented there – a situation where the trial judge *sua sponte* ordered the psychiatric examination, even though the defendant neither asserted an insanity defense nor offered psychiatric evidence at trial, and did not voluntarily give statements to the court-appointed psychiatrist. *Id.* at 466. The Supreme Court has subsequently noted that it has "never extended *Estelle*'s Fifth Amendment holding beyond its particular facts." *Penry v. Johnson*, 532 U.S. 782, 794-95 (2001).

While Petitioner is correct as to the Supreme Court's holding in *Estelle*, that holding does not apply to or assess the situation in this case. Rather, *Estelle* was based on materially distinguishable facts. In particular, here, unlike in *Estelle*, Petitioner voluntarily asserted a mental health defense prior to and during his first trial while represented by counsel. Having voluntarily raised this defense, he was required to submit to an evaluation by the Commonwealth's own psychiatrist, Dr. Michals. Petitioner's evaluation by and statements to Dr. Michals cannot be deemed involuntary, coerced, or compelled since he voluntarily raised the mental health defense and subsequently presented his own evidence at his first trial in support of the mental health defense. In addition,

the record shows that Petitioner's trial counsel, Mr. Emmett Fitzpatrick, was present when Petitioner was evaluated by Dr. Michals. [*See* ECF 12-102, Trial Transcript at 137:6-9]. In light of these undisputed facts, this case does not comprise of facts that are "materially indistinguishable" from those presented in *Estelle*. As such, for purposes of the instant *habeas* petition, *Estelle* does not constitute clearly established Federal precedent. Therefore, the state court's decision here cannot be said to have been contrary to clearly established federal precedent in regard to the *Estelle* holding. *See Taylor*, 529 U.S. at 406 (noting that a state court decision will be contrary to clearly established Federal precedent only "if the state court confronts a set of facts that are materially indistinguishable from a decision of this [c]ourt and nevertheless arrives at a result different from our precedent."). By the same token, the state court's decision cannot be said to have been objectively unreasonable. *Cf. Penry*, 532 U.S. at 794-95 (noting that *Estelle*'s holding was limited to the "distinct circumstances" presented there and finding the difference between its case and *Estelle* "substantial;" thus, it was not "objectively unreasonable for the Texas court to conclude that [defendant] is not entitled to relief on his Fifth Amendment claim.").

Petitioner's reliance on the Supreme Court's decision in *Buchanan v. Kentucky*, 483 U.S. 402 (1987) is equally unavailing. In *Buchanan*, the Supreme Court held that the prosecution's introduction of a psychological report for rebuttal purposes did not constitute a Fifth Amendment violation where the accused asserted an insanity defense and, thus, placed his mental health in issue. *Id.* at 421-24. The Supreme Court cited to *Estelle*'s admonition against compelling an accused, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, to respond to a psychiatrist if his statements could be used against him at a capital sentencing proceeding, and then noted that the statement "logically leads to another proposition: if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested." *Id.* at 422-23; *see also Kansas v. Cheever*, 571 U.S. 87, 94 (2013) (finding that in *Buchanan*, the Supreme Court held "that where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal.").

As conceded by Petitioner, in *Buchanan*, the Supreme Court held that if a defendant presents a mental-status defense supported by the testimony of a mental health expert, the court may compel the defendant to undergo an examination by a prosecution expert. Here, Petitioner was only required to undergo an examination by a prosecution expert *after* he asserted a mental health defense supported by the testimony of his own mental health expert. As such, the holding in *Buchanan* was not violated here.

Most importantly to Petitioner's underlying *habeas* claim in this case, *Buchanan* does not address the issue presented here: whether the Fifth Amendment waiver continues to apply when a defendant asserts a mental health defense in a first trial, but then withdraws it for a second trial. Indeed, Petitioner conceded as much in his brief to the Pennsylvania Supreme Court, noting that "neither *Buchanan* nor *Sartin* discussed the problem of whether the limited waiver of the privilege, a compelled waiver that in effect placed a price on presenting a mental health defense, applied when mental health was no longer an issue." (*See* Brief for Appellant, 2010 WL 7505903 at *17). Thus, because the *Buchanan* holding does not address the precise issue raised here, it cannot be deemed clearly established Federal law for purposes of Petitioner's *habeas* petition. Necessarily, then, the state court's conclusion in this case cannot be deemed contrary to clearly established Federal law. *See Musladin*, 549 U.S. at 77 (holding that "[g]iven the lack of holdings from this Court regarding [the current issue], it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'"); *Early*, 537 U.S. at 8 (noting that "contrary to" means a state court's arrival at a conclusion opposite to one reached by the Supreme Court on a question of law or facts materially indistinguishable from those of a relevant Supreme Court precedent); *Taylor*, 529 U.S. at 406 (noting that a state court decision will be contrary to clearly established Federal precedent "if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.").

Petitioner's reliance on the Supreme Court's decision in *Kansas v. Cheever,* 571 U.S. 87 (2013) is also misplaced. In *Cheever*, the defendant in a homicide case filed a notice of intent to introduce expert testimony relating to his purported intoxication, which would negate the requisite specific intent. *Id.* at 90. Pursuant to Federal Rule of Criminal Procedure 12.2(b), the trial court ordered the defendant to submit to a psychiatric evaluation. *Id.* at 91. The federal trial was subsequently suspended and then dismissed without prejudice, and a second federal prosecution never occurred. *Id.* State prosecutors then brought equivalent state charges against the defendant. *Id.* At the state trial, the defendant presented a voluntary-intoxication defense. *Id.* In support, the defendant offered testimony of a specialist in psychiatric pharmacy. *Id.* After the defense rested, the state presented the testimony of the expert who had examined the defendant pursuant to the federal court order. *Id.* The defendant was convicted. *Id.* at 92.

On appeal, the defendant challenged the admission of the testimony of the state's expert on the grounds that it violated the Fifth Amendment's prohibition against compelled testimony. *Id.* The Supreme Court rejected the defendant's argument, finding that where a defense expert who examined the defendant in a homicide prosecution testified that the defendant lacked the mental state to commit an offense, the prosecution was permitted to present psychiatric evidence in rebuttal. *Id.* at 94. Relying on *Estelle* and *Buchanan*, the Supreme Court held that the Fifth Amendment does not prohibit the prosecution from introducing a court-ordered mental evaluation of a criminal defendant to rebut that defendant's presentation of expert testimony in support of a defense of voluntary intoxication. *Id.* at 93-94. The *Cheever* Court merely reaffirmed its decisions in *Estelle* and *Buchanan*:

> We hold that where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit a crime, the prosecution may offer evidence from a court-ordered psychological examination for the limited purpose of rebutting the defendant's evidence.

Id. at 98.

The Supreme Court's decision in *Cheever*, like the others discussed above and proffered by Petitioner, does not constitute clearly established Federal law to which the state courts in Petitioner's underlying state court appeals rendered a "contrary" decision, but rather is premised on "materially distinguishable" facts. Here, the prosecution did not use a court-ordered psychological examination for any purpose in Petitioner's second trial. In fact, when ruling on Petitioner's motion *in limine* with respect to the potential use of the evidence, the trial court ruled that the prosecution could not use the evidence in its case-in-chief, but could only use it to impeach Petitioner in the event Petitioner took the stand. As such, *Cheever*, like *Buchanan* and *Estelle*, does not apply. Moreover, *Cheever*, like the other offered Supreme Court cases, does not discuss or address the precise issue presented here: whether a Fifth Amendment waiver continues to apply when a defendant decides in a second trial to not offer evidence of a mental defense. Thus, the state court's decision in this case is not opposite to or contrary to the one reached by the Supreme Court in *Cheever* on a question of law or on facts materially indistinguishable from that case. As such, the state court's decision in Petitioner's case cannot be said to have been contrary to clearly established Federal law, nor can it be an unreasonable application of clearly established Federal law. *See Musladin*, 549 U.S. at 77; *Early*, 537 U.S. at 8; *Taylor,* 529 U.S. at 406.

Though procedurally similar to this case, the United States Court of Appeals for the Third Circuit's decision in *Gibbs v. Frank*, 387 F.3d 268 (3d Cir. 2004) also provides Petitioner no support. As an initial matter, *Gibbs* is not clearly established Federal law for purposes of federal *habeas* review since it is not a decision of the Supreme Court. *See Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) (noting that clearly established Federal law is that determined by the United States Supreme Court); *see also Fischetti*, 384 F.3d at 149 (warning that "cases not decided by the Supreme Court did not serve as a legal benchmark against which to compare the state decision."); *Taylor*, 529 U.S. at 381 (holding that "[i]f [the Supreme] Court has not broken sufficient legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar."). While federal *habeas*

courts are not precluded from considering the decisions of the lower federal courts when evaluating whether the state court's application of Supreme Court precedent was reasonable, "federal courts may not grant habeas corpus relief based on the state court's failure to adhere to the precedent of a lower federal court on an issue that the Supreme Court has not addressed." *Matteo*, 171 F.3d 890.

In any event, contrary to Petitioner's assertion, *Gibbs* does not involve "circumstances precisely mirroring those in Petitioner's trial." In *Gibbs*, the defendant asserted a diminished-capacity defense in his first trial. *Id.* at 271. As a result, the defendant was ordered to submit to an interview by a state doctor. *Id.* The prosecution was then permitted to offer the expert testimony of its own doctor who had examined the defendant to rebut the defendant's defense. *Id.* At the second trial, the defendant withdrew his mental-capacity defense, but the trial court permitted the prosecution to introduce the testimony of its own doctor *in its case-in-chief*, simply to repeat incriminating statements the defendant had made to him. *Id.* at 275. Reversing the district court's denial of the defendant's petition for *habeas corpus*, the Third Circuit held that because the interview was mandated by the state court and because the statement was not simply offered at the second trial in rebuttal, a Fifth Amendment violation occurred. *Id.* Central to the Third Circuit's decision, however, was the fact that the prosecution was permitted to introduce the evidence in *its case-in-chief*, and was not limited to rebuttal. *Id.* at 275. In that regard, the Third Circuit noted:

> the statement was not offered at the second trial after the defense put psychiatry in issue, and it was not limited to rebuttal. In fact, the purpose for which it was offered at Gibb's trial was not even to prove a psychological point, since the second trial presented no psychological issue before [the state doctor] testified. The statement was offered simply for the truth of the admissions of fact.

Id. at 275.

Once again, Petitioner's reliance on *Gibbs* is misplaced since it involved materially distinguishable facts and did not address the precise issue raised here. Unlike in *Gibbs*, none of the evidence subject to Petitioner's underlying claim was ever introduced *for any purpose* at his second trial. Further, though the trial judge determined that the challenged evidence could be introduced at Petitioner's second trial, it limited any potential use of the evidence to impeachment and specifically ruled that the evidence could not be introduced in the prosecution's case-in-chief. As such, this decision is not applicable here.

Simply put, none of the Supreme Court decisions on which Petitioner relies stands for the proposition that a prosecutor is precluded by the Fifth Amendment or any other constitutional protection from using voluntary statements made by a defendant to his own psychiatrist and/or a state's psychiatrist prior to a first trial in which the defendant pursued a mental health defense *to impeach* a defendant in a second trial in which the defendant does not assert a mental-health defense but takes the stand in his own defense. Absent controlling Supreme Court precedent on this issue, it necessarily follows that the Pennsylvania Supreme Court's decision rejecting Petitioner's claim cannot be either "contrary to, or . . . an unreasonable application of clearly established Federal law . . . by the Supreme Court." 28 U.S.C. § 2254(d)(1); *see also Musladin*, 549 U.S. at 76-77 (holding that the state could not have unreasonably applied clearly established Federal law where the issue presented involved an "open question" in Supreme Court jurisprudence). In the absence of "clearly established [f]ederal law as determined by the Supreme Court," there can be no basis for overturning the state courts' adjudication of this claim. Accordingly, the Magistrate Judge's conclusion that Petitioner's *habeas* petition lacked merit is correct. Therefore, Petitioner's objections are overruled, and the *habeas* petition is denied.

As a final point, this Court notes that Petitioner's trial counsel correctly and candidly recognized the absence of governing case law supporting Petitioner's underlying arguments when he argued the motion *in limine* at issue. Specifically, during the oral argument, Petitioner's counsel acknowledged the absence of any case law supporting his argument and that he had an "uphill battle" on the issue. [*See* ECF 12-4 at pp. 8].

3. Petitioner's petition for a writ of *habeas corpus*, [ECF 1], is **DENIED**; and

4. No probable cause exists to issue a certificate of appealability.[2]

The Clerk of Court is directed to mark this matter **CLOSED**.

BY THE COURT:

/s/ Nitza I. Quiñones Alejandro
NITZA I. QUIÑONES ALEJANDRO
Judge, United States District Court

> **Attorney Winters**: And I'm asking in the Motion *in Limine* that the Commonwealth not be allowed to cross-examine my client in the event he testifies as to anything he said to his psychiatrist or to Dr. Michaels; my theory being that if this were the first trial around and I were representing Mr. Rosen, they would not have that information. One, he would not be talking to Dr. Michaels, their witness and, two, they would not have been provided with the reports of his psychiatry; and, therefore, that's information they would not have known and could not have used in the trial. I acknowledge I have an uphill battle on that because obviously my client –
>
> **The Court**: What you're suggesting is that a waiver at one level cannot be used if the defense in a second trial, if it's inconsistent – if the defense is not the same?
>
> **Attorney Winters**: That's what I'm arguing, Judge. And I'll be the first to admit because you know I've never lied to this Court or any Court, I've researched the issue and it's a unique issue, and I haven't found any law that I can stand here and say supports my position. I certainly have to acknowledge that my client, through his first attorney, did waive his privilege with his psychiatrist.

[*Id.* at pp. 8-9].

[2] A district court may issue a certificate of appealability only upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). A petitioner must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Lambert v. Blackwell*, 387 F.3d 210, 230 (3d Cir. 2004). For the reasons set forth, this Court concludes that no probable cause exists to issue such a certificate in this action because Petitioner has not made a substantial showing of the denial of any constitutional right. Petitioner has not demonstrated that reasonable jurists would find this Court's assessment "debatable or wrong." *Slack,* 529 U.S. at 484. Accordingly, there is no basis for the issuance of a certificate of appealability.

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

ADAM ROSEN, Petitioner, v. JOHN KERESTES, SUPERINTENDENT, et al., Respondents.	: : : : : : : :	CIVIL ACTION NO. 15-4539

REPORT AND RECOMMENDATION

DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE October 25, 2017

Before the Court is the counseled petition of Adam Rosen (hereinafter "Rosen" or "Petitioner"), for the issuance of a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Rosen is currently incarcerated at the State Correctional Institute Mahanoy in Frackville, Pennsylvania, serving a sentence of life imprisonment imposed in the Montgomery County Court of Common Pleas for first-degree murder.[1] He seeks relief from his conviction on the ground that a pre-trial evidentiary ruling violated his rights under the Fifth Amendment and precluded him from exercising his right to testify in his own defense. He also contends that counsel performed deficiently at trial in failing to rebut expert witness testimony presented by the Commonwealth. After consideration of the record before us and for the reasons set forth below, we find that his claims were reasonably adjudicated by the state courts and accordingly recommend that the petition be denied.

[1] While Petitioner is in custody at an institution located in Schuylkill County within the Middle District of Pennsylvania, venue is proper here in that he was convicted and sentenced in the Montgomery County Court of Common Pleas, in the Eastern District. *See* 28 U.S.C. § 2241(d).

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

Petitioner fatally stabbed his wife, Hollie Rosen ("Hollie"), in their home on the morning of June 30, 2001. He initially told responding officers that she was killed by two masked intruders. Soon after, however, he acknowledged to detectives that he stabbed her, explaining that it happened during a domestic argument in which Hollie first threatened him with a knife. She suffered stab wounds to the chest, piercing her lung; the neck, piercing her jugular vein and voice box; and four wounds in the back, one of which also pierced a lung.

The Commonwealth has tried Petitioner twice for this murder. At both trials, the defense conceded that Rosen inflicted the fatal wounds but contended that he did not act with the specific intent to kill required for a conviction of first-degree murder. Both cases were tried before the Honorable Paul W. Tressler; the first was a jury trial and the second a bench trial.

Rosen was represented in the first trial, which was held in April and May of 2002, by Attorneys F. Emmett Fitzpatrick, Jr. and F. Emmett Fitzpatrick, III. He did not testify but asserted a diminished capacity defense through a psychiatric expert, Dr. Paul Fink. He testified that Rosen suffered from bipolar disorder that escalated into paranoid psychosis. He opined that the stabbing resulted from a psychotic episode and that the killing was not premeditated. The Commonwealth countered with another expert, Dr. Timothy Michals, who, based upon an examination of Rosen and a review of records in the case, opined that Rosen had no mental

[2] In preparation for this Report, we have reviewed Rosen's habeas corpus petition received on August 13, 2015 (Doc. 1) ("Pet."); the counseled Memorandum of Law in Support of Petition for a Writ of Habeas Corpus filed on December 14, 2015 ("Pet'r Mem."), with appended exhibits (Doc. 9); the Response in Opposition to the Petition for Writ of Habeas Corpus, filed September 12, 2016 by the Montgomery County District Attorney's Office ("Resp."), with appended exhibits (Doc. 24); Petitioner's Reply to the Commonwealth's Response to Petition for a Writ of Habeas Corpus filed October 7, 2016 (Doc. 25) ("Pet'r Reply"); and the various documents in the electronic file received on December 24, 2015 from the Office of the Clerk of Courts of Montgomery County (Doc. 12) ("St. Ct. Rec.").

disorder that would impair his capacity to form the intent to commit this crime. The Commonwealth also argued that Rosen's conduct prior to and following the attack showed that he desired to bring about his wife's death and undermined any notion that the fatal attack was unintentional. The jury returned a verdict of first-degree murder on May 2, 2002, and the court sentenced Rosen to life imprisonment. The Pennsylvania Superior Court affirmed the judgment of conviction, *Commonwealth v. Rosen*, 80 A.2d 1052 (Pa. Super. Ct. June 6, 2003), and the Pennsylvania Supreme Court denied allowance of appeal. *Commonwealth v. Rosen*, 832 A.2d 436 (Pa. Oct. 2, 2003) (table).

With the assistance of retained counsel, Rosen filed a petition on September 27, 2004 seeking collateral relief under the Post Conviction Relief Act, 42 Pa. Cons. Stat. § 9541, *et seq.* ("PCRA"), for several claims of ineffective assistance of counsel. The PCRA Court convened an evidentiary hearing but denied the petition on March 1, 2005. The Superior Court, however, determined that trial counsel had been ineffective for failing to call character witnesses to testify to Rosen's reputation for non-violence, as this evidence aligned with the defense that Rosen did not plan nor intend to kill Hollie and that he was mentally unstable when he did so. It reversed the PCRA Court and remanded the case for a new trial. *Commonwealth v. Rosen*, No. 753 EDA 2005, 890 A.2d 1105 (Pa. Super. Ct. Nov. 23, 2005). The Pennsylvania Supreme Court denied further review. *See Commonwealth v. Rosen*, No. 1090 MAL 2005, 906 A.2d 542 (Pa. Aug. 31, 2006).

Rosen was appointed new counsel, Richard D. Winters, Esquire, for the re-trial in the Court of Common Pleas, over which Judge Tressler would again preside. In advance of trial, the defense filed a motion *in limine* seeking the preclusion of psychiatric evidence introduced in the first trial, as Rosen did not intend to present a mental capacity defense again but rather planned

to testify himself concerning his actions and intentions.[3] The Commonwealth filed a counter-motion affirmatively seeking to use this material at the re-trial. The court granted the defense motion to preclude the Commonwealth from presenting expert psychiatric testimony in its case-in-chief. At the same time, the court also ruled that Rosen's prior statements to a treating psychiatrist and the mental health experts that were introduced at the first trial could be used by the Commonwealth as impeachment evidence if Rosen gave inconsistent testimony at trial.[4] *See Commonwealth v. Rosen*, 1925(a) opinion, No. 5182-01, slip op. at 1-3 (Montg. Comm. Pl. Ct. May 15, 2009) (recounting history and describing oral ruling on motion *in limine*) [Doc. 12-36].

Rosen waived his right to a jury trial and proceeded to a bench trial before Judge Tressler. Much of the testimony from the first trial was incorporated by stipulation, although some witnesses testified again live and some additional witnesses were called. The Commonwealth again called Ian Hood, M.D., one of two medical experts from the first trial, and asked him about whether or not the wounds documented in the post-mortem examination of Hollie suggested "overkill," which Petitioner now argues reflected a surprise line of questioning that improperly sought to undermine his defense regarding his state of mind. On cross-examination, Attorney Winters elicited testimony that the stab wounds were consistent with a

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[3] As Attorney Winters later explained, the defense hoped for a conviction of no more than third-degree murder by conceding the stabbing but arguing that Rosen lacked the specific intent to kill. He did not pursue a voluntary manslaughter conviction or employ a "heat of passion" defense because that would have required the defense to concede that he acted with a specific intent to kill, which Rosen appeared unwilling to acknowledge. *See, e.g.,* N.T. (PCRA) 3/3/14 at 4, 20-21 [Doc. 12-29].

[4] As part of his mental health defense, Rosen waived privilege and permitted the expert witnesses to review records of visits he had with a psychologist and a psychiatrist in the spring of 2001, prior to Hollie's death. The experts' testimony touches upon statements Rosen made to those providers about his relationship with Hollie (including prior bad acts), his psychiatric symptoms, and their diagnoses. Neither the treating psychiatrist nor the treating psychologist testified.

struggle and that Hollie was not stabbed while she slept. This concession supported the defense narrative that Hollie started a fight by swinging a knife at Petitioner, to which he claimed that he responded spontaneously.

The defense called character witnesses in Rosen's behalf but Rosen ultimately did not testify in his own defense. He now attributes his decision not to testify to the court's pre-trial ruling on the motions *in limine* that exposed him to potential impeachment with statements made to his treating psychiatrist and the psychiatric experts that were utilized in the first trial when the experts were called. Following the relatively brief presentation of evidence, Attorney Winters focused his closing argument on the evidence showing that Rosen lacked a plan to commit and to disguise his role in the commission of this homicide that morning. He argued that these circumstances demonstrated that Rosen did not act with the specific intention to kill Hollie when he stabbed her. (N.T. Tr. II, Vol. 2 (7/22/08) at 10-14, 18.) [Doc. 9-2.]

At the conclusion of the bench trial on July 22, 2008, Judge Tressler convicted Rosen of first-degree murder, the same verdict returned by the jury six years earlier. The Superior Court affirmed the conviction on December 28, 2009. *Commonwealth v. Rosen*, 988 A.2d 146 (Pa. Super. Ct. 2009). The Pennsylvania Supreme Court granted Rosen's petition for allowance of appeal to consider whether the trial court properly ruled that the Commonwealth was permitted to use Rosen's statements to the psychiatrists — obtained pursuant to a limited Fifth Amendment waiver occasioned by the mental health defense asserted in the first trial — in the subsequent trial where no mental health defense was presented. The court ultimately, however, affirmed the conviction on April 25, 2012. *Commonwealth v. Rosen*, 42 A.3d 988 (Pa. 2012). [Pet'r Mem. at Ex. A.]

With his direct appeal process on the second conviction final, Rosen again pursued PCRA relief, this time asserting ineffective assistance of Attorney Winters in the 2008 trial. Rosen retained new counsel for the PCRA review, who also represents him in the present habeas action. Following the retirement of Judge Tressler, the Honorable Wendy Demchick Alloy was assigned the petition and convened a hearing at which Attorney Winters testified about his role in the second trial. One of the subjects of the hearing was his "failure" to call an expert witness to rebut the testimony of Dr. Hood concerning the absence of evidence of "overkill" in the stab wounds. Attorney Winters acknowledged that he had not considered retaining an expert in response but that he did not think that one was warranted. The PCRA Court agreed, finding that counsel had a reasonable basis for not calling an expert witness on this issue and that Rosen did not suffer prejudice where his defense was not that he killed Hollie while in the heat of passion but rather that he never specifically intended to kill Hollie. *Commonwealth v. Rosen*, No. CP-46-CR-5182-2001, slip op. at 17-23 (Montg. Comm. Pl. Ct. June 16, 2014) [Doc. 9-1] (1925(b) Opinion). The Superior Court affirmed the denial of PCRA relief. *Commonwealth v. Rosen*, No. 1260 EDA 2014, 122 A.3d 444 (Pa. Super. Ct. May 11, 2015) (table) [Doc. 24-7]. The Pennsylvania Supreme Court denied review. *Commonwealth v. Rosen*, No. 488 MAL 2015, 125 A.3d 1201 (Oct. 7, 2015) (table).

Rosen filed his habeas petition on August 13, 2015, while his petition for review was still pending in the Pennsylvania Supreme Court. Once state review concluded, the parties completed their briefing on this petition. In his first ground for habeas relief, Rosen presents the issue considered in the direct appeal of his second conviction: that the court's pre-trial ruling, permitting the Commonwealth to cross-examine him using statements he made to psychiatrists before his first trial, violated his rights under the Fifth Amendment and compromised his

fundamental right to testify in his own defense when he was re-tried. His second ground presents the issue addressed in the appeal of the dismissal of his PCRA petition following the second conviction: the allegedly inadequate response of Attorney Winters when the Commonwealth elicited testimony from Dr. Hood regarding Hollie's injuries in relation to "overkill." He contends that the state courts' adjudications of these claims on the direct appeal and PCRA review following his second conviction were contrary to clearly established federal law or involved unreasonable applications of clearly established federal law. (Pet'r Mem. at 32, 46.) The District Attorney of Montgomery County, on behalf of the Respondents, opposes the petition on the grounds that both claims were properly rejected by the state courts. (Doc. 24.) In his subsequent reply brief, Petitioner continues to advance his arguments on the merits. (Doc. 25.)

II. LEGAL STANDARDS

The writ of habeas corpus extends to prisoners in state custody under the judgment and sentence of a state court only if the petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(c)(3), 2254(a). Where a claim presented in the federal habeas petition was adjudicated on the merits in the state courts, however, the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") limits relief to those cases where the state court adjudication:

> (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 proceeding.

28 U.S.C. § 2254(d).

A writ may issue under the "contrary to" clause of Section 2254(d)(1) only if the "state court applies a rule different from the governing rule set forth in [United States Supreme Court] cases or if [the state court] decides a case differently than [the United States Supreme Court has] done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002). A writ may issue under the "unreasonable application" clause only where there has been a correct identification of a legal principle from the Supreme Court but the state court "unreasonably applies it to the facts of the particular case." *Williams v. Taylor*, 529 U.S. 362, 365 (2000). This requires the petitioner to demonstrate that the state court's analysis was "objectively unreasonable." *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002). In addition, this standard obligates the federal courts to presume that the "state courts know and follow the law," and precludes the federal court from determining the result of the case without according all proper deference to the state court's prior determinations. *Id.* at 24. The term "clearly established federal law" means governing legal principles set forth by the Supreme Court at the time of the state court rendered its decision. *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).

III. DISCUSSION

Citing the standards of 28 U.S.C. § 2254(d), Respondents contend that neither of Rosen's claims warrant relief, as the state courts' adjudication of them did not result from an unreasonable application of clearly established federal law as determined by the United States Supreme Court, nor were the state court decisions contrary to any clearly established law. As we explain below, we agree.

A. Ground One: Deprivation of right to testify

Petitioner's first claim concerns what he believes was an abrogation of his right to testify in his own behalf at his re-trial. He sets out in his petition his belief that "[t]he trial court deprived Petitioner of his constitutional right to testify at his second trial, when it ruled that, at

his second trial, he could be impeached with statements made to mental health professionals that were presented at his first trial, even if he did not raise a mental health defense at his second trial." (Pet. at 8) Addressing this claim in the framework of 28 U.S.C. § 2254(d)(1), he contends in his supporting brief that "[t]he state court's decision, permitting the Commonwealth to introduce testimony from mental health experts in a case where Petitioner did not assert a mental health defense, was contrary to clearly established Federal law and involved an unreasonable application of clearly established Federal law." (Pet'r Mem. at 32.) He contends that the ruling on the motion *in limine* "unquestionably violated [his] rights under the Fifth Amendment, under which the compelled disclosure of evidence resulting from a psychiatric defense remains a limited one," which he believes "may *only* be used to rebut a mental health defense." (*Id.* at 33.) Identifying the specific action that deprived him of constitutional rights, he contends that "the trial court's erroneous *in limine* ruling violated [his] Fifth Amendment rights and compromised his fundamental right to testify." (*Id.*) He similarly asserts in his reply brief that "he simply sought to testify regarding the event in question, without triggering the admission of inadmissible bad act evidence — or evidence of acts that might be misapprehended as bad acts evidence." (Pet'r Reply at 4.)[5] He claims that the ruling on the motion *in limine* "operated as a denial of Petitioner's right to testify regarding the pivotal question of his state of mind at the time of the offense." (*Id.* at 5.)

[5] The feared bad act evidence apparently included that he drew a gun when involved in a fight with another man over a former girlfriend and an admission to his treating psychiatrist that he had once pulled his wife's hair in anger and tried to force sex on her. He also was concerned about a conclusion reached by the Commonwealth psychiatrist that he had lied during his evaluations. *See* Pet'r Mem. at 33; Pet'r Reply at 4 n.2.

1. Denial of the constitutional right to testify

In *Rock v. Arkansas*, 483 U.S. 44 (1987), the Supreme Court noted three provisions of the Constitution that give rise to a right to testify in one's own behalf at a criminal trial. First, the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law "include[s] a right to be heard and to offer testimony." *Rock*, 483 U.S. at 51. Second, the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call witnesses in his favor, also justifies this right. *Id.* at 52. Finally, the Court found support for the right to testify in the Fifth Amendment's guarantee against compelled testimony, viewing the opportunity to testify if one wishes to do so as "a necessary corollary" to the opportunity to refuse to testify and "remain silent unless he chooses to speak in the unfettered exercise of his own will." *Id.* at 53 (quoting *Harris v. New York*, 401 U.S. 222, 230 (1971)). It is the alleged denial of the right to testify that we consider implicated by Ground One. *See* Pet'r Mem. at 24 (identifying claim as "Denial of Constitutional right to testify"); *id.* at 32 (citing *Rock v. Arkansas* in opening of argument concerning Ground One).

2. State court presentation and adjudication

Prior to the second trial, Rosen filed a motion *in limine*, seeking to prevent the Commonwealth from employing statements he had made to his own psychiatrist in therapy prior to the homicide and to the mental health experts in advance of his first trial. He explained that he would not be presenting a diminished capacity defense, although he did expect to testify at the second trial, unlike the first. The court heard oral argument and later ruled that the Commonwealth could not use this information in its case-in-chief but could impeach Rosen with these statements if he testified. *See* N.T. 12/27/07 (oral argument) [Doc. 12-4]; *Commonwealth v. Rosen*, 1925(a) opinion, No. 5182-01, slip op. at 3 & n.1 (Montg. Comm. Pl. Ct. May 15,

2009) (noting subsequent oral ruling and that it was not transcribed) [Doc. 12-36]. Rosen did not ultimately testify.

Following his conviction and denial of post-sentence motions, he appealed to the Superior Court and asserted in his 1925(b) Statement that the trial court's ruling permitting the Commonwealth to impeach him if he testified at trial with his statements made to the mental health experts violated his "privilege against self-incrimination" and unconstitutionally deprived him of his right to testify, in violation of the Fifth and Fourteenth Amendments. *See id.*, slip op. at 14-15 (describing claims of error raised post-trial). The trial court explained its determination that Rosen had waived his Fifth Amendment privilege as to statements he made to experts and that those statements were "just as admissible at the second trial as testimony Rosen himself might have given." *Id.* at 13. The court also explained that it found "untenable" Petitioner's argument that the court essentially "constructively" denied him his right to testify at trial, as the court "did not directly forbid Rosen to testify" and the responsibility to choose to testify lies with a defendant alone. *Id.* at 13-14.

The Superior Court affirmed. *See Commonwealth v. Rosen*, 988 A.2d 146 (Pa. Super. Ct. 2009). It recognized that in one of its prior cases, it had concluded that a defendant had "suffered undue prejudice to his defense" from an "erroneous evidentiary ruling" of the trial court that "deprived [him] of the ability to tell the jury his version of events." *Id.* at 148. Accordingly, it considered whether the trial court's *in limine* ruling here was "erroneous" but ultimately concluded that it was not. It found that Rosen's waiver of his privilege against self-incrimination when he spoke with the psychiatrists to prepare his mental status defense at the first trial could not "be undone" even if he did not present that defense at the second trial. *Id.* at 149. The Superior Court was thus "satisfied that the trial court's conditional admission of the

psychiatric expert witness testimony from Appellant's trial was not erroneous" and that it therefore "need not consider whether [Rosen's] right to choose to testify ... was vitiated by an evidentiary error." *Id.* at 150.

The Pennsylvania Supreme Court granted review on the question of "[w]hether the limited Fifth Amendment waiver occasioned by a mental health defense in a defendant's first trial allows the Commonwealth to use the evidence obtained pursuant to such waiver as rebuttal in a subsequent trial where no mental health defense is presented." *Commonwealth v. Rosen*, 42 A.3d 988, 993 (Pa. 2012). It perceived its role as "reviewing the denial of a motion *in limine*[.]" *Id.* It examined the arguments and authorities concerning the Fifth Amendment and the compelled disclosure of evidence resulting from a psychiatric defense. *See id.* at 993-95. Much of the focus of the court's discussion was on the appropriate interpretation of one of its precedents discussed extensively by the lower courts, *Commonwealth v. Santiago*, 662 A.2d 610 (Pa. 1995), and what that case dictated in terms of the admissibility of the psychiatric testimony at the retrial. *See id.* at 991-97. The court agreed that Petitioner's statements to his own expert were not compelled and therefore admission at retrial was not barred by the Fifth Amendment. *Id.* at 996. It also concluded that the statements to the Commonwealth's rebuttal expert would be similarly admissible at retrial as to the issues implicated by Rosen's own expert. *Id.* at 996-97. The court affirmed the Superior Court decision without discussing the question of any infringement upon Rosen's right to testify at trial.

3. The state court did not unreasonably reject Petitioner's claim that the Commonwealth violated his right to testify.

Petitioner's legal analysis regarding the state court ruling on the issue presented in this ground for relief focuses upon the *in limine* ruling permitting the Commonwealth to impeach him with statements made to both his own expert and the Commonwealth's expert. Attempting to

use the language of 28 U.S.C. § 2254(d), he contends that the state court "unquestionably violated Mr. Rosen's rights under the Fifth Amendment," (Pet'r Mem. at 33), and that the state court decision justifying this ruling "was contrary to and involved an unreasonable application of clearly established Federal Law, as determined by the Supreme Court of the United States in *Estelle v. Smith*, 451 U.S. 454 (1981)." (Pet'r Mem. at 38.) In an effort to link this allegedly improper ruling concerning a Fifth Amendment question with his right to testify claim, he contends that "[t]he introduction of such testimony ... violated Petitioner's rights under the Fifth and Fourteenth Amendments and operated as a denial of Petitioner's right to testify in his own defense." (*Id.* at 45.) The Commonwealth, of course, *never introduced* any of these statements at trial.

We see no merit in Petitioner's contention that he was deprived of his right to testify in his own defense. The state court did not infringe upon that right. All it did was rule that, as a testifying witness, Rosen could be impeached with prior inconsistent statements, including statements made to the psychiatrists as to which he had waived doctor-patient confidentiality previously (i.e., his treating psychiatrist) and the experts who examined him in a context in which no privilege attached (i.e., for purposes of the mental capacity defense). Rosen was never compelled to be a witness against himself as described in the Fifth Amendment. Nor was his right to testify in his own defense infringed: rather, he expressly waived that right, as reflected in a short colloquy on the record prior to closing arguments. *See* N.T. 7/21/08 at 233-47 (defense case) [Doc. 12-59]; N.T. 7/[22]/08 at 5-8 (colloquy) [Doc. 9-2]. He was no neither precluded nor restricted from testifying.

Instead of focusing directly on the question of whether the state impeded him from testifying in violation of his rights under the Fifth, Sixth and Fourteenth Amendments as

recognized in *Rock v. Arkansas*, 483 U.S. 44, 49-53 (1987), Petitioner fixates on the pre-trial ruling, the scope of which he appears to have misunderstood. The Commonwealth was not being permitted to present the psychiatrists' conclusions about whether Rosen was capable of forming the specific intent to kill his wife or whether they believed he was being truthful. Rather, the trial court's ruling permitted only for his account of events to them to be introduced to impeach any materially inconsistent testimony he might offer at trial. Rosen's conviction certainly was not brought about by the state's unlawful use at trial of compelled statements in violation of the Fifth Amendment, as no such statements were introduced against him. We cannot accept Rosen's arguments that his current detention is attributable to this evidentiary ruling by the state court or that this ruling gives rise to a Fifth Amendment claim for habeas relief. It does not.

Looking at Rosen's claim involving his right to testify at trial, the trial court rejected the notion that its pre-trial ruling effectively denied him his right to testify at trial, and the Superior Court on appeal found that it was not necessary for it to consider whether Rosen's "right to choose to testify ... was vitiated by an evidentiary error" because it found no error in the pre-trial ruling. *See Rosen*, 988 A.2d at 150.[6] It is Petitioner's burden to show that the state court unreasonably applied a clearly-established constitutional principle when it upheld his conviction. He points to no United States Supreme Court precedents, however, that have held that a defendant's fundamental right to testify is violated by an evidentiary ruling that merely exposes him to potential impeachment. In this posture, the state courts could not be said to have unreasonably adjudicated his claims on direct appeal and we cannot say that he is currently being detained due to a deprivation of his right to testify, as it was his choice to waive that right. We

[6] The Pennsylvania Supreme Court limited its review to the question of the alleged evidentiary error. *See Rosen*, 42 A.3d at 993.

conclude that the Pennsylvania state courts did not unreasonably apply any United States Supreme Court precedents concerning the Fifth, Sixth, or Fourteenth Amendments when it denied relief to his challenge on direct appeal concerning his failure to testify in his own defense.

B. Ground Two: Ineffective assistance of trial counsel

The other claim upon which Petitioner seeks relief is his assertion from his 2013 PCRA petition that Attorney Winters performed in a constitutionally deficient manner when, in the second trial, he did not call a forensic pathologist to rebut "surprise" expert testimony of Dr. Hood about the type of wounds indicative of a "tremendous amount of emotion" on the part of the perpetrator of a stabbing. Petitioner contends that the absence of such wounds was utilized by the trial court as the deciding factor in its finding that Rosen formed the specific intent to kill Hollie. *See* Pet'r Mem. at 46-48.

We first address the contours of the right to the assistance of effective counsel and then describe how this issue arose in Rosen's trial and how the state court addressed his concerns.

1. Ineffective assistance of counsel: The *Strickland* standard

The Supreme Court employs the two-prong test announced in *Strickland v. Washington*, 466 U.S. 668 (1984), to determine if the defendant was deprived of his right to counsel as guaranteed by the Sixth Amendment. Pursuant to *Strickland*, a defendant who raises claims based on the ineffective assistance of his counsel must prove that 1) "counsel's representation fell below an objective standard of reasonableness," and 2) there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694.

To satisfy the first prong of the *Strickland* test, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. In evaluating counsel's performance, a

reviewing court should be "highly deferential" and must 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.* at 689. Moreover, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.*

To satisfy the second prong of the *Strickland* test, the defendant must show "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" of the proceeding. *Id.* It follows that counsel cannot be ineffective for failing to pursue meritless claims or objections. *See, e.g., United States v. Sanders,* 165 F.3d 248, 253 (3d Cir. 1999); *United States v. Fulford,* 825 F.2d 3, 9 (3d Cir. 1987).

2. State court presentation and adjudication

Rosen's claim arises from testimony given at his second trial by the medical examiner called by the Commonwealth. At the first trial, Dr. Halbert Fillinger, the pathologist who conducted the post-mortem examination of Hollie's body, described the location and size of wounds and the path the knife traveled through her body, offering his opinion that she bled to death from her injuries. He did not offer an opinion regarding the state of mind of the person who inflicted the stab wounds. *See* N.T. Trial I, 5/1/02 at 58-75 [Doc. 9-2 at 449, *et seq.*] The Commonwealth also called Dr. Ian Hood, another medical examiner, regarding *Petitioner's* injuries, almost all of which Dr. Hood concluded were self-inflicted. *See id.* at 18-29 [Doc. 9-2 at 437 *et seq.*]. By the time of the second trial, Dr. Fillinger was deceased, and the Commonwealth introduced the transcript of his prior testimony. The only medical expert the

Commonwealth called at the second trial was Dr. Hood, who now also offered testimony regarding Hollie's injuries — the six significant stab wounds and other smaller or superficial injuries — based on his review of photographs and Dr. Fillinger's post-mortem examination, even though he had previously testified only concerning *Rosen's* own injuries. N.T. Trial II, 7/21/08, at 85-110 [Doc. 12-59]. The testimony then reached new territory:

> Q. [PROSECUTOR] Doctor, when we spoke, you had mentioned something about this not being an overkill?
>
> A. [IAN HOOD] Yes. That's really a term of art. It has no particular scientific basis.
>
> It's a matter of experience, in that – where there's a lot of emotion involved. You see it a lot in domestic cases, particularly homosexual males is where it was first described. Then the person who's doing the killing just continues to flail away with whatever weapon they're using at the victim, long after the victim has ceased to struggle.
>
> We call that overkill. It is often characterized by a multiplicity of wounds, much more than you see here. And clear evidence of the wounds being inflicted on somebody. There is no bruising anymore. So you have a couple of dozen wounds that are clustered in one area, all going the same way, indicating that the individual is no longer moving, and that we would call overkill.
>
> Q. Are the injuries to Hollie consistent with an overkill, in your opinion?
>
> A. Not in number and not in their distribution, either. She's clearly moved while being – while sustaining these wounds. She's clearly struggled against them, hence the damage to her hands.
>
> But she's got an injury to her neck, her left chest and four to her back.
>
> That doesn't necessarily mean that she turned around and got her back to the attacker. Having seen pictures that you've seen, where there is very little cast-off blood or blood from anywhere except the edge of it being on the floor right next to it, where she fell.

> It may well be that she is stabbed from the front first and then collapses forward onto her knees, with her back now below the level of the attacker, who remains in front of her all of the time. So just because she has knife wounds in the back, you don't have to touch them like that.
>
> Either she or her attacker changed their relationship to one another. All she has to do is lean forward at the waist.

Id. at 110-12.

Attorney Winters testified at the 2014 PCRA hearing that he had not been advised by the prosecutor that Dr. Hood's live testimony would touch upon any sort of description of the encounter between the Rosens or whether the wounds were consistent with the perpetrator "losing it." *See* N.T. PCRA 3/3/14 at 8-10 [Doc. 12-29].[7] His theory, however, was that Rosen stabbed Hollie when he "snapped" following an argument in which she attacked him and that he stopped stabbing when he recovered himself. He acknowledged that he did not consider consulting with or calling an expert to testify that the number and distribution of injuries sustained by Hollie Rosen was typical for an emotionally charged domestic homicide or that the injuries might somehow raise doubt that Rosen possessed the specific intent to kill his wife when he stabbed her. *See id.*

The record reflects that after this testimony of Dr. Hood regarding "overkill" was given, Attorney Winters used his closing argument at trial to seek to portray Dr. Hood's testimony as supportive of and fitting in with an account that Rosen had given to police, in which "he admits

[7] Attorney Winters and the Commonwealth attorney at the PCRA hearing took issue with PCRA counsel's characterization of Dr. Hood's trial testimony and whether Dr. Hood described what the wound profile would need to be for the killing to have been, in counsel's words, a "rage killing." Attorney Winters confirmed that a "rage killing" was not what he sought to portray. His theory was that Rosen did not act with specific intent to kill and was involved in a fight that went wrong: Rosen "snapped," stabbed Hollie multiple times, and then recovered himself. In Winters's view, "it wasn't a maniac kind of thing." N.T. PCRA 3/3/14 at 27-28 [Doc. 12-29].

stabbing his wife[,] ... [that] she had a knife[,] [that] it started in the kitchen[,] [and] it led upstairs[,] [that] he got the knife away[,] [that] he snapped, and he stabbed[.]" (N.T. Trial II, Vol. 2 at 13) (defense closing) [Doc. 9-2 at 389, *et seq.*].[8] He continued:

> We have the testimony of Doctor Hood. I thought some of the testimony of Doctor Hood yesterday was very enlightening in that he did not believe that the first wounds inflicted were the deadly wounds, the stabbing in the neck, the stabbing in heart. If you recall, she had, according to Doctor Hood, over a dozen superficial cuts. We even saw some of those on the neck and other parts of her body, which suggests to me, Your Honor, the evidence is that there was some type of struggle. She had defensive wounds.
>
> ...
>
> The other thing that the doctor suggested is that she was not lying in bed when the fatal wounds were inflicted.
>
> The other thing that Doctor Hood, I believe, testified that I think is beneficial to our point of view is that this was not an overkill.
>
> The Commonwealth is going to argue to you that Adam Rosen wanted out of this marriage; he wanted to kill his wife and get out, because she was going to take his money and his kids.
>
> What more of a reason for an overkill would that be?
>
> And I suggest to you Doctor Hood's testimony that it is not an overkill. It is an indication that this happened exactly as Adam said. He got the knife. He snapped. He started swinging it, and he eventually stabbed her.

---

[8] The transcript of the second and final day of trial — consisting of a colloquy, closing arguments, and the verdict — does not appear to be included among the 115 separate PDF files that comprise the state court record we received from the Court of Common Pleas, Doc. 12. Petitioner attached a copy of this transcript to his briefing, Doc. 9. Inasmuch as we do not recommend habeas relief, we did not find it necessary to ascertain whether Rosen, as the appellant in the various proceedings following his second conviction, failed in any way to ensure that the trial court record contained this transcript when the record was certified for appeal and transmitted from the Court of Common Pleas to the Superior Court. *See* Pa. R.A.P. 1921.

Id. at 14-16.[9]

On PCRA review, Rosen presented a report of a forensic pathologist and medical examiner, Dr. Charles Wetli, who could have testified that the number and distribution of Hollie's wounds were "typical for an emotionally charged domestic homicide and does not reflect any malice aforethought or intent to kill." *Rosen,* No. CP-46-CR-0005182-2001, slip op. at 12 [Doc. 12-44] (quoting Dr. Wetli Report). The PCRA Court, however, denied relief because the claim "rests on [a faulty] premise" that Dr. Hood, the Commonwealth witness, opined that Rosen did not act in a heat of passion. *Id.* at 16-17. The court also denied relief based upon its conclusion that Dr. Hood's testimony regarding "overkill" was "relatively unimportant" in light of other evidence supporting the notion that Petitioner intended to kill Hollie and which Judge Tressler cited when explaining his verdict. *Id.* at 17-18, 20. The PCRA Court also concluded that Rosen had not established the prejudice component of his ineffectiveness claim, as there was

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[9] In his closing argument that followed, the prosecutor argued that either the chest wound, the neck wound, or the wound to the back that pierced Hollie's lung could provide proof of specific intent to kill standing alone. He continued, adding his interpretation of what Dr. Hood's testimony meant:

> And certainly all of the circumstantial evidence that we've shown, when you put them all together, when you look at all of them, though, both the chest wound and the neck wound and the wound to the back, it is clear what the Defendant wanted to do.
>
> And if you look back at Doctor Hood's testimony, he said it was not an overkill, meaning not a case where rage had taken over, and they just kept stabbing and stabbing and stabbing a lifeless body.
>
> The Defendant did not flip out that morning. He made a decision, some time that morning, to kill his wife. And he stabbed her until she was dead.

(N.T. Trial II, Vol. 2 at 34).

no reasonable basis to believe that testimony of Dr. Wetli in response to that of Dr. Hood would have prevented Judge Tressler from convicting on first-degree murder. As Judge Demchick Alloy explained:

> Petitioner cannot prevail merely by showing that expert testimony consistent with Dr. Wetli's report would have caused a hypothetical, "reasonable person" or "reasonable jury" to have found that petitioner acted under the influence of a sudden, intense passion. Petitioner, with the assistance of counsel, deliberately chose Judge Tressler to decide the question of intent, hence petitioner must show a reasonable probability that Judge Tressler, specifically, would not have reached a verdict of first degree murder if Mr. Winters had produced expert witness testimony consistent with Dr. Wetli's report. The evidence of record does not indicate that Judge Tressler gave any weight to the testimony regarding "overkill," as one might expect, given that Dr. Hood called it a term of art with no scientific basis. Judge Tressler never used the term "overkill" when he announced the verdict. He never stated or implied that Hollie's wounds were not sufficiently numerous to preclude him from inferring a specific intent to kill. He never stated or implied that the lack of evidence that petitioner continued to stab Hollie after she ceased struggling led him to infer that petitioner had formed a specific intent to kill. To the extent that the medical evidence influenced the verdict, the record indicates that Judge Tressler was persuaded by the length, depth, width, shape and sequence of the wounds, not their number or whether they were inflicted after death. Dr. Hood's testimony regarding overkill was ambiguous as to petitioner's state of mind, the record gives no reason to believe Judge Tressler did not understand that, and thus there is no reason to believe that he would have interpreted the medical evidence more favorably to petitioner if Dr. Wetli had told him so.
>
> Moreover Dr. Wetli's report makes nothing more than a conclusory statement that Hollie's wounds did not indicate that petitioner acted with a specific intent to kill. Dr. Wetli focused narrowly on rebutting the prosecutor's closing argument regarding overkill, but Judge Tressler adopted a broad focus, considering not only the wounds but petitioner's losing battle against his propensity to dissipation in the months leading to the murder. Petitioner's behavior over that extended period of time provided the context for the deductions Judge Tressler drew from the medical evidence, and they constituted the majority of Judge Tressler's statement of his verdict. Dr. Wetli's expert opinion was based on less evidence than

> Judge Tressler's, thus there is little reason to believe it would have had [sic] caused the judge to reach a more favorable verdict.
>
> Because the record shows no evidence that Judge Tressler ascribed any weight to Dr. Hood's testimony regarding overkill, and because Judge Tressler interpreted the evidence of Hollie's wounds in the context of petitioner's trend toward dissipation, petitioner has failed to establish, by a preponderance of the evidence, a reasonable probability that the judge would not have reached a verdict of first degree murder if Mr. Winters had produced expert opinion evidence consistent with that of Dr. Wetli.

Id. at 22-23.

The Pennsylvania Superior Court affirmed, adopting the lower court's opinion but also providing additional analysis of the rationale articulated by Judge Tressler as the finder of fact. It noted that the trial court "clearly based its finding of a specific intent to kill on the lethal nature of the chest and neck wounds," and that the stab wounds in the back were consistent with Rosen stabbing her further to insure that she had, in fact, died. *Commonwealth v. Rosen*, No. 1260 EDA 2014, slip op. at 6-7 (Pa. Super. Ct. May 11, 2015) [Doc. 24-7]. As to the question of the alleged ineffectiveness of Attorney Winters to present expert testimony in rebuttal of Dr. Hood's comment about the stab wounds and "overkill," the Superior Court determined that:

> Since the trial court relied upon the utterly lethal nature of the chest and neck wounds to find a specific intent to kill, and not upon any implication by Dr. Hood's testimony that this was not a rage or heat of passion killing, we find that expert medical testimony countering Dr. Hood would not have changed the result at trial; hence, we find no prejudice and no ineffectiveness.

Id. at 7. The Superior Court thus agreed with the lower court that Rosen had not met his burden on this *Strickland* claim.

3. The state court did not unreasonably reject Petitioner's claim that Attorney Winters was ineffective when he failed to present expert testimony to rebut Dr. Hood's testimony concerning any relationship between the number or type of stab wounds and Petitioner's intent.

We do not find the Superior Court to have unreasonably applied *Strickland* when it rejected on PCRA appeal this claim of trial counsel ineffectiveness for failure to present rebuttal expert testimony in response to Dr. Hood's comments about how a large number of stab wounds to a dead body can establish "overkill." Petitioner contends that there is a reasonable likelihood of a different outcome if trial counsel had presented the testimony of a witness such as Dr. Wetli that the stab wounds on Hollie were *not* consistent with "overkill," as the prosecutor then would not have been able to argue in his closing that this was "not a case where rage had taken over." *See* N.T. Trial II, Vol. 2 at 34 [Doc. 9-2 at 388, *et seq.*]. He contends that a continuance of trial would have been available to allow Attorney Winters to seek an expert opinion following the introduction of this "new opinion" of Dr. Hood, and that there was no strategic reason for trial counsel's decision not to pursue this. He argues that there is a reasonable probability of a different outcome because the trial judge referenced Hollie's "wounds" in his explanation of his decision and "plainly concluded that the decedent's specific wounds were not consistent with the actions of someone who had 'snapped' and who did not act with specific intent," which had been the defense theory of the case. (Pet'r Mem. at 58.)

Petitioner contends that the state court "misinterpreted both the facts and the applicable law" when it denied PCRA relief, pointing to various allegedly "inaccurate statements of fact" in the PCRA Court's opinion that he argues "underlie its erroneous legal conclusions," which were then adopted by the Superior Court. (Pet'r Mem. at 59.) We have considered his arguments that: "The Commonwealth's expert did, in fact, offer an opinion regarding Petitioner's state of mind at the time of the confrontation" (*id.* at 60, § 1.a heading); that "Petitioner has not offered an

'incomplete and oversimplified' description of the trial court's verdict" (*id.* at 61, § 1.b heading); that "the PCRA court has mischaracterized the conclusions in Petitioner's expert report" (*id.* at 65, § 1.c heading); and that "the [PCRA Court's] opinion mistakenly asserts that Petitioner waived certain claims (*id.* at 66, § 1.d heading). We have found little utility in Petitioner's approach of quibbling with how the PCRA Court characterized the trial evidence and the proffered opinion of Dr. Wetli.[10] It is not this Court's task to re-weigh evidence but rather to determine whether the Superior Court's resolution of this ineffectiveness claim concerning Attorney Winters is reasonable under *Strickland*. *See, e.g., Harrington v. Richter*, 562 U.S. 86, 103 (2011) (emphasizing that petitioner must show that the state court's ruling on the claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement").

Here the state court clearly and reasonably explained that the verdict turned on "the utterly lethal nature of the chest and neck wounds to find a specific intent to kill, and not upon any implication by Dr. Hood's testimony that this was not a rage or heat of passion killing[.]" *Rosen*, No. 1260 EDA 2014, slip op. at 7 (Pa. Super. Ct. May 11, 2015) [Doc. 24-7]. We find none of the arguments in Petitioner's brief to alter our conclusion that the Superior Court's analysis of Petitioner's *Strickland* claim was neither factually nor legally unreasonable. In that the Superior Court did not unreasonably adjudicate the *Strickland* claim when it concluded that Petitioner was not prejudiced by trial counsel's failure to call a rebuttal pathologist regarding the

[10] Nor do we agree with Petitioner's suggestion that the state court decision on this ineffectiveness claim cannot stand because either "the [PCRA Court's] opinion erroneously concludes that it is 'irrelevant' whether Petitioner acted under a sudden and intense passion" (Pet'r Mem. at 67, § 2.a heading), or "the [PCRA Court's] opinion erroneously concludes that 'overkill' was 'relatively unimportant' to the outcome of Petitioner's trial" (*id.* at 72, § 2.b).

forensic conclusions that could be derived from the injuries to the decedent, habeas relief is not available to Petitioner on this claim.

IV. CONCLUSION

We have thoroughly considered Petitioner's submissions and the state court record. We are unable to accept that he was convicted in violation of the Constitution, *see* 28 U.S.C. § 2254(a), and that the state court's rejection of his claim concerning the *in limine* ruling reflected an unreasonable application of clearly established law determined by the United States Supreme Court. Petitioner has not demonstrated that any Supreme Court authority held that a trial court could deprive a defendant of his right to testify when the record shows that he waived this right following a colloquy. In that the state court's adjudication of this claim in the direct appeal did not unreasonably apply constitutional principles, relief is not due on his first claim. We also find nothing unreasonable in the state court's conclusion on PCRA review that his *Strickland* claim was without merit. Neither trial counsel nor the trial court, sitting as factfinder, considered the "overkill" line of questioning to have elicited particularly pertinent testimony of Dr. Hood. Both found other aspects of the case more significant to the question of what evidence supported or undermined the Commonwealth's contention that at least one of the fatal wounds was inflicted with the specific intent to kill. In light of the "doubly deferential" approach we must take under 28 U.S.C. § 2254(d) as to questions of counsel's strategy that were already considered on the merits by the state court, *see Harrington v. Richter*, 562 U.S. 86, 105 (2011), we have no trouble concluding that relief is not warranted on Ground Two.

Pursuant to Local Appellate Rule 22.2 of the Rules of the United States Court of Appeals for the Third Circuit, at the time a final order denying a habeas petition is issued, the District Court judge is required to make a determination as to whether a certificate of appealability ("COA") should issue. A COA should issue "only if the applicant has made a substantial

showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). As further explained by the Supreme Court, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Here, for the reasons set forth above, we do not believe that reasonable jurists would debate our conclusions that the claims raised in the petition do not give rise to relief. Accordingly, we do not believe a COA should issue. Our Recommendation follows.

RECOMMENDATION

AND NOW, this 25th day of October, 2017, it is respectfully **RECOMMENDED** that the petition for a writ of habeas corpus be **DENIED WITHOUT AN EVIDENTIARY HEARING.** It is **FURTHER RECOMMENDED** that a certificate of appealability should **NOT ISSUE**, as we do not believe that Petitioner has made a substantial showing of the denial of a constitutional right.

Petitioner may file objections to this Report and Recommendation. *See* Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

/s/ David R. Strawbridge, USMJ
DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-3111

ADAM ROSEN,
Appellant

v.

SUPERINTEDENT MAHANOY SCI;
ATTORNEY GENERAL OF THE
COMMONWEALTH OF PENNSYLVANIA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(2-15-cv-04539)

SUR PETITION FOR REHEARING

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

BY THE COURT,

s/ Theodore A. McKee
Circuit Judge

Dated: September 22, 2020
Lmr/cc: Jonathan D. Cioschi
Karl D. Schwartz
Robert M. Falin
Adrienne D. Jappe

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

ADAM ROSEN — PETITIONER
(Your Name)

VS.

SCI MAHANOY / SUPERINTENDENT — RESPONDENT(S)

PROOF OF SERVICE

I, ADAM H. ROSEN, do swear or declare that on this date, FEB 11, 2021, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

1. THE US (UNITED STATES) SUPREME COURT
1 FIRST STREET, N.E.
WASHINGTON, D.C. 20543

2. OFFICE OF DIST. ATTY
COUNTY OF MONTGOMERY,
E. AIRY STR (4TH FL)
NORRISTOWN, PA. 19401

3. A.G OF PENNSYLVANIA (ATTORNEY GENERAL)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 2-11-2021, 2021

(Signature)

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