NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2048

OSCAR PORTER,
Appellant

v.

ADMINISTRATOR OF THE NEW JERSEY STATE PRISON;
ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 2-17-cv-02796)
District Judge: Honorable Madeline C. Arleo

Submitted under Third Circuit L.A.R. 34.1(a)
May 28, 2021

Before: GREENAWAY, JR., SHWARTZ, Circuit Judges, and ROBRENO, District Judge.*

(Filed: July 12, 2021)

OPINION**

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* The Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

** This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Appendix A

ROBRENO, District Judge.

Oscar Porter appeals the denial by the United States District Court for the District of New Jersey of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. We will affirm the district court's denial.

I. Background

In June 2005, Porter was convicted of, inter alia, robbery, aggravated assault, and attempted murder. Specifically, Porter and two other men were alleged to have dragged the victims, David Veal and Rayfield Ashford, into an alley, robbed them, and shot them. Ashford died. Veal survived and identified Porter as the shooter.

Porter contends that his trial counsel was ineffective for: (1) failing to investigate and present testimony from his girlfriend, Katrina Adams, that he was at home with her at the time of the crimes; and (2) failing to investigate and present testimony from Adams and another woman, Rashana Lundy, that Porter was friends with Ashford, the deceased victim, and that Ashford would have invoked that friendship had Porter threatened him with a gun.

In January 2008, Porter filed a petition for post-conviction relief ("PCR") alleging in part ineffective assistance of trial counsel for failing to investigate and call the two witnesses. The PCR court denied the petition without an evidentiary hearing. The New Jersey Supreme Court ultimately reversed the denial and remanded the case for an evidentiary hearing on Porter's claim that he was denied effective assistance because of counsel's failure to investigate Adams and her alibi evidence. *State v. Porter*, 80 A.3d 732, 735, 740-41 (N.J. 2013). In addition, the New Jersey Supreme Court held that,

although Porter had not made a prima facie showing of entitlement to an evidentiary hearing regarding Lundy's testimony on the friendship between Porter and Ashford, on remand the PCR court could consider whether counsel was ineffective for this reason as well. *Id.* at 740.

In June 2014, the PCR court held the evidentiary hearing but limited it to counsel's failure to investigate Adams's alibi evidence and prohibited Porter from calling Lundy. The PCR court again denied Porter's petition. After the denial was affirmed, *State v. Porter*, No. A-0530-14T4, 2016 WL 4575702, *3 (N.J. Super. Ct. App. Div. Sept. 2, 2016), Porter filed a Section 2254 petition for a writ of habeas corpus in the district court. After the district court denied Porter's petition in April 2020, *Porter v. Johnson*, No. 17-2796, 2020 WL 2079267, at *1 (D.N.J. Apr. 29, 2020), we granted a certificate of appealability on Porter's claims that: (1) he was denied effective assistance of counsel when trial counsel failed to interview and call Adams and Lundy; and (2) the district court should have granted an evidentiary hearing to consider Lundy's proffered testimony. Both parties agree that the last reasoned state court decision on the merits is the PCR court's June 10, 2014 opinion.

II. Discussion

The district court had jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2254. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. When a district court bases its decision on the state court record without holding an evidentiary hearing, as is the case here, we apply a plenary standard of review. *Branch v. Sweeney*, 758 F.3d 226, 232 (3d Cir. 2014).

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a petitioner is entitled to habeas relief only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

A decision is "contrary to" established Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases." *Williams v. Taylor*, 529 U.S. 362, 405 (2000). An application of clearly established law is "unreasonable" if the court identifies the correct governing rule but applies it to the facts of the case in a manner that is not merely erroneous, but "objectively unreasonable." *Id.* at 409-10; *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003). In other words, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

While our review of a district court's decision is plenary, the AEDPA requires us to give considerable deference to the determinations of the state courts. *Palmer v. Hendricks*, 592 F.3d 386, 391-92 (3d Cir. 2010).

Porter claims that the PCR court applied the Supreme Court precedent of *Strickland v. Washington*, 466 U.S. 668 (1984), in an objectively unreasonable manner when analyzing his claims of ineffective assistance for counsel's failure to investigate and call Adams and Lundy. Under *Strickland*, a petitioner alleging ineffective assistance of counsel must first show that counsel's performance was deficient. 466 U.S. at 687.

"This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, a petitioner must show that the deficient performance caused prejudice. *Id.* "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "Judicial scrutiny of counsel's performance must be highly deferential," and "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 689, 690. In light of the deference given to the state court under the AEDPA, as well as the deference given to trial counsel's decisions under *Strickland*, our review is "doubly deferential." *Yarborough*, 540 U.S. at 6.

Porter also claims that the district court abused its discretion by declining to hold an evidentiary hearing regarding Lundy's testimony. *See Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (providing that whether to hold an evidentiary hearing is within the discretion of the district court).

A. The PCR court did not unreasonably apply the performance prong of *Strickland* in determining that trial counsel did not provide ineffective assistance for failing to present the alibi testimony

Porter first argues that the PCR court unreasonably applied the performance prong of *Strickland* by concluding that trial counsel's assistance was not ineffective even though he failed to investigate Adams's alibi claim and call Adams as an alibi witness.[1]

During the PCR court's evidentiary hearing, trial counsel explained his decision not to call Adams at trial, stating that: (1) he typically did not like to use relatives or close friends as alibi witnesses because they could be biased; (2) Adams was Porter's paramour; (3) Adams was young; and (4) after speaking with Porter about what Adams remembered, he concluded that she did not have a good recollection of events. Trial counsel testified that "one of the worst things you can do as a defense attorney in a homicide case . . . is to put on a bad alibi witness." App. 160. Counsel further testified that, instead, he believed it would be prudent to focus on cross-examining Veal on his identification of Porter.

The PCR court concluded that counsel's decision was tactical and sound trial strategy because Adams "was a paramour of Defendant and in his experience, this would

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[1] Porter's argument focuses on trial counsel's failure to explore Adams's alibi evidence, but he also briefly argues that counsel provided ineffective assistance by failing to investigate and call Lundy and Adams regarding the alleged friendship between Porter and Ashford. As discussed in Section II. B., *infra*, trial counsel did not prejudice Porter by failing to investigate or utilize the irrelevant and speculative evidence of the alleged friendship. Therefore, we need not discuss the decision to exclude the testimony of Lundy and Adams on this issue under the first *Strickland* prong. *Strickland*, 466 U.S. at 697 (providing that a court may address the performance and prejudice prongs in any order and need not address both prongs "if the defendant makes an insufficient showing on one").

not be favorable for a defendant," and that Porter had told him "she did not have a good recollection of what happened." App. 85. The PCR court also concluded after hearing Adams's testimony that she was incredible, and it did not believe she was with Porter on the night in question. Porter argues that Adams's evidentiary hearing testimony shows she had a good recollection of the night in question. However, the PCR court's conclusion to the contrary was not unreasonable since Adams's testimony shows that, other than that Porter picked her up from work at around 10 p.m. and they slept together, she did not recall many other details from the time in question.

Based on trial counsel's significant experience, he believed that Adams would have been a poor witness and that attacking Veal's identification of Porter would be more persuasive to the jury. Such a decision is within the realm of reasonableness and does not violate the dictates of *Strickland*. *See Strickland*, 466 U.S. at 691 ("[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."); *Lewis v. Mazurkiewicz*, 915 F.2d 106, 111 (3d Cir. 1990) (providing that counsel "may properly rely on information supplied by the defendant in determining the nature and scope of the needed pretrial investigation"). In concluding that trial counsel's decision not to call Adams as an alibi witness was reasonable and not an error "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," the PCR court did not apply the first prong of *Strickland* in an objectively unreasonable manner. *Strickland*, 466 U.S. at 687. Similarly, after having reviewed the record, and in light of the significant deference due, we cannot say that the PCR court's analysis of the

first *Strickland* prong "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. Because Porter fails to meet the first prong of *Strickland*, we need not reach whether Adams's exclusion also prejudiced Porter. *See Strickland*, 466 U.S. at 697.

B. The PCR court did not unreasonably apply the prejudice prong of *Strickland* in determining that trial counsel did not provide ineffective assistance in failing to present the friendship evidence and the district court did not abuse its discretion by declining to hold an evidentiary hearing on that evidence

Porter contends that the lack of friendship testimony from Lundy and Adams prejudiced him in violation of *Strickland* and that the district court abused its discretion by failing to address his request for an evidentiary hearing thereon.

A district court is required to hold an evidentiary hearing only when the petitioner presents a prima facie showing that "a new hearing would have the potential to advance the petitioner's claim." *Siehl v. Grace*, 561 F.3d 189, 197 (3d Cir. 2009) (quoting *Campbell v. Vaughn*, 209 F.3d 280, 286-87 (3d Cir. 2000)). In other words, the petitioner must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of [his trial] would have been different." *Id.* (alteration in original) (quoting *Hull v. Kyler*, 190 F.3d 88, 110 (3d Cir. 1999)). This is the same inquiry used in the prejudice prong of *Strickland*. 466 U.S. at 694. Thus, if Porter was not prejudiced by the exclusion of the friendship testimony because its inclusion could not have changed the results of an otherwise fair trial, the district court could not have abused its discretion by declining to hold an evidentiary hearing on the same evidence.

Porter claims that trial counsel's failure to call Lundy and Adams at trial regarding the alleged friendship was without justification and that, had counsel produced them, Veal's identification of Porter would have been undermined and there would have been a reasonable probability of a different outcome. Thus, Porter claims that he was prejudiced by the absence of the friendship evidence and argues that he has made a prima facie showing that a new hearing would have the potential to advance his claim.

Regarding the PCR court's refusal to permit Lundy to testify at the evidentiary hearing on the alleged friendship between Porter and Ashford and limiting Adams's testimony to the alibi evidence, the PCR court ruled that "an evidentiary hearing would not be helpful" and that counsel's decision not to proffer Lundy's friendship testimony "was likely sound trial strategy that would not have changed the outcome of the proceedings." App. 87.

Even if Lundy and Adams had testified that the friendship existed, any testimony regarding how Veal might have reacted to Porter if they were in fact friends is pure speculation which would have been inadmissible. Indeed, the PCR court initially concluded that the trial court "would not have allowed the testimony because the fact they were friends is not probative." App. 112. Moreover, the New Jersey Supreme Court specifically found that Porter had not established a prima facie showing that a hearing regarding Lundy and the testimony of friendship was warranted, *Porter*, 80 A.3d at 740, and Porter did not present any evidence on remand that would have changed that conclusion.

Thus, Porter has failed to establish that the PCR court unreasonably applied the prejudice prong of *Strickland* in determining that trial counsel was not ineffective for failing to investigate and call Lundy and Adams to testify regarding the alleged friendship, as this evidence would have been speculative, irrelevant, and inadmissible in nature. *See Strickland*, 466 U.S. at 694 (providing that under the prejudice prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). Counsel's failure to present the irrelevant evidence did not deprive Porter of a fair, reliable trial and, thus, did not prejudice him under *Strickland*. *Id.* at 687.

Given that the friendship evidence could not have changed the outcome of the case, the district court did not abuse its discretion by not holding an evidentiary hearing on this evidence since it had no potential to advance Porter's claims. *Siehl*, 561 F.3d at 197.

Because the PCR court did not apply the prejudice prong of *Strickland* in an objectively unreasonable manner, and the district court did not abuse its discretion by declining to hold an evidentiary hearing on irrelevant information, habeas relief is also not warranted on these grounds.

III. Conclusion

For the foregoing reasons, we will affirm the district court's denial of Porter's Section 2254 petition for a writ of habeas corpus.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

OSCAR PORTER, **Petitioner,** **v.** **STEVEN JOHNSON, *et al.*,** **Respondent.**	**Civil Action No. 17-2796 (MCA)** **OPINION**

APPEARANCES:

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On behalf of Petitioner,

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On behalf of Respondents.

Arleo, United States District Judge

I. INTRODUCTION

Petitioner Oscar Porter ("Petitioner"), a prisoner currently confined at New Jersey State Prison in Trenton, New Jersey, has filed a Petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (D.E. No. 1). For the reasons explained in this Opinion, the Court will deny the Petition and will deny a certificate of appealability.

Appendix B

II. FACTUAL BACKGROUND & PROCEDURAL HISTORY

The factual background and procedural history in this matter were summarized in part by the New Jersey Superior Court, Appellate Division upon Petitioner's direct appeal as well as on appeal of the PCR decision.[1]

> [David] Veal testified that in the very early morning hours of September 11, 2003, he was using a pay telephone outside of his apartment building in Newark when three men approached him. By the time Veal was ready to hang up the telephone, the three men, each with a handgun, had surrounded him and one of them told him, "don't move, don't even look at me like that." According to Veal, "one guy ... [b]oom, hit [him] in [his] face ... with a gun" and knocked him to the ground. Veal subsequently identified that man as defendant. According to Veal, he saw defendant before he came up to him. As defendant approached, defendant "pulled his hoodie up" on his head. Defendant was about eighteen feet from Veal when this happened. The hoodie remained on defendant's head throughout the incident. However, Veal testified that he was able to get a good look at defendant before he had pulled up the hoodie.
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> Veal testified that the other two individuals carried him around the corner into an alleyway on the side of his apartment building. Defendant told him to get on his knees and to put his hands behind his head. Veal gave them forty dollars, and, as ordered to, knelt and interlocked his hands, and placed them on his head underneath his own hoodie.
>
> The other two assailants left for about five minutes and returned with another man, later determined by investigators to be Ashford. According to Veal, neither he nor Ashford knew any of the assailants. The men told Ashford to kneel next to Veal. Defendant was holding a gun to Veal's head, and another assailant was holding a gun to Ashford's head. The third assailant left briefly and returned with a vehicle. The man standing over Ashford shot him in the head, killing him. At the same time, defendant fired a shot at the back of Veal's head. Because Veal's hands were clasped behind his head, the bullet hit his thumbs and grazed his skull. Veal fell to the ground and remained still, pretending to be dead until he heard the three assailants leave. He then ran into his apartment building.

[1] The facts found by the Appellate Division are presumed correct pursuant to 28 U.S.C. § 2254(e)(1).

State v. Porter, 80 A.3d 732, 734-35 (N.J. Super. Ct. App. Div. 2013).

> Defendant, Oscar Porter, was charged in a nine-count indictment with second-degree conspiracy, *N.J.S.A.* 2C:5-2, -4, and *N.J.S.A.* 2C:15-1 (first count); two instances of first-degree robbery, *N.J.S.A.* 2C:15-1 (second and fifth counts); first-degree attempted murder, *N.J.S.A.* 2C:5-1 and *N.J.S.A.* 2C:11-3 (third count); second-degree aggravated assault, *N.J.S.A.* 2C:12-1b(1) (fourth count); felony-murder, *N.J.S.A.* 2C:11-3a(3) (sixth count); purposeful and knowing murder, *N.J.S.A.* 2C:11-3a(1), (2) (seventh count); third-degree unlawful possession of a handgun, *N.J.S.A.* 2C:39-5b (eighth count); and second-degree possession of a handgun with purpose to use it unlawfully, *N.J.S.A.* 2C:39-4a (ninth count).
>
> During a three-day trial, the testimony disclosed the existence of two victims, one who died from a gunshot wound to the head, and the other who was wounded and who testified as a witness for the State. Counts Two, Three, and Four dealt with the crimes allegedly committed on the surviving victim. Counts Five, Six, and Seven referred to the deceased victim. Counts One, Eight and Nine contained charges relating to both victims. The central issue in the trial was identification.
>
> Jury deliberations began on the third day, June 14, 2005, at 12:14 p.m. On June 15, at 4:25 p.m., after informing the court that it could not reach a verdict on one of the counts, the jury announced it was prepared to report its verdicts on the remaining charges. The court took the verdicts in the order of the counts charged, the foreperson reporting guilty verdicts on Counts One, Two, Three, Four, Six, Eight, and Nine. The foreperson reported a not-guilty verdict on the first-degree robbery charge in Count Five and the jury's inability to reach a verdict on the murder charge in Count Seven.
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> The court then proceeded to poll the jury. The jurors signified unanimous agreement with the reported guilty verdicts on Counts One, Two, Three, and Four, and with the not-guilty verdict on Count Five. During the poll on Count Six, as the court reached the fourth juror to respond, Juror Number Six, the following colloquy occurred:
>
> THE COURT: [Juror] Six.
> JUROR: Yes. I'm sorry, I have to be honest.
> [DEFENSE COUNSEL]: What did you say, judge?
> THE COURT: You['re] saying no, this is not your verdict?
> JUROR: No. I'm sorry, I have to be honest.

THE COURT: Okay. You're saying no[,] this is not your verdict. All right. You know what we're going to do, ladies and gentlemen, we're going to return tomorrow morning at 9 o'clock to resume deliberations in this case.

The jurors were then excused until the following morning.

When the matter resumed the next morning, the judge, out of the jury's presence, summarized for the record what had occurred during the rendering of the verdict the afternoon before, referring to *State v. Milton*, 178 *N.J.* 421 (2004); *State v. Jenkins*, 349 *N.J.Super.* 464 (App.Div.2002); and *State v. Millett*, 272 *N.J.Super.* 68 (App.Div.1994), and said: "As far as the Court's concerned, we received final verdicts on Count 1, 2, 3, 4, 5. We did not receive final verdicts on Counts 6 and 7. They need to be polled on Counts 8 and 9." The court continued: "it was apparent that [juror six] changed her mind, and she had a right to that because the verdict on Count 6 was not final until each juror gave their as[s]ent thereto."

The judge also commented on the "highly charged atmosphere [the day before] when we took this verdict[,]" noting that when the initial verdict was announced in court as guilty on felony murder, ... a member of the defendant's family ran out of the courtroom screaming and crying. Again, to add to the highly charged emotional atmosphere. * * * I think it did have an effect on what Juror Number 6 did, but ... whether it did or didn't at that point in time at 4:35 in the afternoon, the Court decided to break the proceedings, and ask the jurors to come back today to continue in this matter.

He then described a ruling he had made:

I have indicated to my officers that there's not to be any members of the defendant's family or the victim's family in the courtroom this morning while I take the tally on the final two counts, and I have done that because of what occurred yesterday afternoon because it had the potential to [a]ffect the final votes on the polling of these jurors, and it could just as easily be the victim's family member who could run out and start carrying on, too. I'm doing it for security reasons.

The judge went on to detail his security concerns, including a shortage of sheriff's officers, concluding: "For all those reasons the Court cut short the proceedings, and quite frankly-and another reason the Court didn't know what to do."

Defense counsel then moved for a mistrial, stating that there was no way of knowing whether the difficulty announced by Juror Number Six bore only upon the sixth count charged or whether it related to Counts One through Five, as well. "We just can't be sure without discussing it in further detail with that juror what was meant. * * * I think it's somewhat inappropriate to talk to her about it.... [F]or that reason[,] I believe a mistrial is appropriate in this case." The prosecutor argued in response that the verdict had been flawlessly delivered as to the first five counts, and that the jury should be asked to continue deliberating on the remaining charges and report back on them. The court ruled: "There are final verdicts on Counts 1 through 5. Each juror was given the opportunity to say yes or no to show their final as[s]ent or non [-]as [s]ent to Counts 1 through 5. They all unequivocally unambiguously said yes on Counts 1 through 5."

Defense counsel noted that he had observed the preceding day that Juror Number Six "got more and more upset" as the polling on each of the first five verdicts proceeded, "[s]hook her head, and shook her head, and finally that's it and gave an answer." The judge stated:
She said yes on the first five counts, that's unequivocal, that's established in the record, and it's established she said yes on each of the first five counts. Not Counts 1 through 5[, e]ach one individually. When we got to Count 6, she said no. And I didn't see her shaking her head on either of the counts. I'll accept your representation, but, you know what, doesn't matter if she shook her head or not, she said yes.

Announcing, again, his reliance on *Millet* for the proposition that "each count of the indictment is regarded as if a separate indictment," and on *Milton*, the judge denied defense counsel's application for a stay to allow counsel to file an application with the Appellate Division.

You can appeal my decision. * * * [T]his Court went through no uncertain pains to make sure that no juror had been coerced ... to agree to the verdict [,] that he or she was not fully assented. * * * I'm not going to send them in to resume deliberations on Count 6 and 7 because I think that would be an attempt by this court to coerce a verdict. They have already told us they were hung on 6. On 7[,] we have a hung jury right now, and for the court to have him go in and redeliberate on Count 6 and 7, I think would be viewed as being coerced. * * * I'm going to take the verdicts on Counts 8 and 9 and discharge them.

> The jury returned to the courtroom and the polling on counts eight and nine proceeded. Juror Number Fourteen asserted dissent from the previously reported guilty verdict on count eight; and two jurors, Numbers Eleven and Fourteen, declared their dissent in respect of count nine. After the court announced at sidebar that "I'm going to discharge this jury now, and then after they're gone we'll decide where we're going with the result of the case[,]" defense counsel stated:
>
> I most strenuously seek a repolling of Counts 1 through 5. This has shown us today absolutely positively no doubt that this verdict was not right. That this verdict is not proper. It is not unanimous. * * * [T]hey have shown us today this verdict isn't unanimous from [sic] any of these counts, and it would be an injustice to [defendant] to allow these people to leave this courtroom without being told what in God's name happened.
>
> The court ruled: "I'm not going to repoll the jurors' final verdicts on Counts 1 through 5, and I'm going to discharge the jury." Counsel again requested a recess so he could "go to the Appellate Division and ask them the question." That application was denied.
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> The court proceeded to discharge the jury, noting "you have rendered final verdicts on five of the nine counts of the indictment. The court is declaring a mistrial on the other four counts of the indictment through a hung jury."
>
> Sentencing on Counts One, Two, Three, and Four occurred on September 8, 2005. After noting the applicability of the No Early Release Act, *N.J.S.A.* 2C:43-7.2, and the Graves Act, *N.J.S.A.* 2C:43-6c, to each of the convictions, the court sentenced defendant to an aggregate prison term of forty years, with parole ineligibility for eighty-five percent of the term. The aggregate sentence was comprised of a twenty-year term for the first-degree robbery conviction into which the conspiracy conviction was merged; a consecutive twenty-year term for attempted murder; and a concurrent ten-year term for aggravated assault. A previous commitment to probation was terminated without improvement, and the court ordered appropriate monetary assessments pursuant to law.

State v. Porter, Indictment No. 04-12-3785, 2007 WL 2460179, *2-4 (N.J. Super. Ct. App. Div. Aug. 31, 2007).

The Appellate Division affirmed Petitioner's conviction and sentence but remanded the case to the trial court for the limited purpose of modifying the judgment to reflect a merger of the conviction on count four with the convictions on counts two and three. *Porter*, 2007 WL 2460179 at *6. The New Jersey Supreme Court denied certification on December 6, 2007. *State v. Porter*, 937 A.2d 978 (N.J. 2007).

After Petitioner's petition for post-conviction relief ("PCR") was denied without an evidentiary hearing, the Appellate Division affirmed the denial. *State v. Porter*, Indictment No. 04-12-3785, 2011 WL 3759644 (N.J. Super. Ct. App. Div. Aug. 26, 2011). The Supreme Court of New Jersey granted a petition for certification limited to the issue of whether defendant was entitled to an evidentiary hearing. *State v. Porter*, 41 A.3d 738 (N.J. 2012). The Supreme Court of New Jersey reversed the Appellate Division's decision and remanded to the Law Division for further proceedings related to Petitioner's ineffective assistance of counsel for failing to investigate an alibi defense and directed that the PCR hearing be assigned to a judge that had not previously decided the issues. *State v. Porter*, 80 A.3d 732, 740 (N.J. 2013). On remand, the PCR Court convened an evidentiary hearing (D.E. No. 6-7), and subsequently denied Petitioner's petition. (D.E. No. 1-6). The Appellate Division affirmed the PCR Court's denial. *State v. Porter*, Indictment No. 04-12-3785, 2016 WL 4575702 (N.J. Super. Ct. App. Div. Sept. 2, 2016). On January 20, 2017, the New Jersey Supreme Court denied Petitioner's petition for certification. *State v. Porter*, 158 A.3d 585 (N.J. 2017).

Petitioner filed the instant petition for habeas relief under § 2254 on April 24, 2017. (D.E. No. 1). Respondents filed their Answer on September 1, 2017. (D.E. No. 6). Petitioner filed a reply on November 15, 2017. (D.E. No. 9). The matter is fully briefed and ready for disposition.

Petitioner raises the following claims in his federal habeas petition:

1. Ineffective assistance of trial counsel for failing to investigate and call alibi witnesses. (D.E. No. 1-1 at 14-21).
2. Ineffective assistance of trial counsel for failing to move for a voir dire of juror number six. (D.E. No. 1-1 at 21).
3. Ineffective assistance of trial counsel for failing to challenge the sufficiency of the state's evidence with respect to the robbery charge related to David Veal. (D.E. No. 1-1 at 21).
4. The trial court erroneously closed the courtroom to the public. (D.E. No. 1-1 at 23).
5. The trial court erroneously failed to conduct further inquiry of juror number six after she made a comment that suggested she was uncomfortable with one of the verdicts. (D.E. No. 1-1 at 23-29).

III. STANDARD OF REVIEW

Section 2254(a) permits a court to entertain only claims alleging that a person is in state custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Petitioner has the burden of establishing each claim in the petition. *See Eley v. Erickson*, 712 F.3d 837, 846 (3d Cir. 2013). Under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), federal courts in habeas corpus cases must give considerable deference to determinations of state trial and appellate courts. *See Renico v. Lett*, 559 U.S. 766, 773 (2010).

Where a state court adjudicated a petitioner's federal claim on the merits, a federal court has "no authority to issue the writ of habeas corpus unless the [state c]ourt's decision 'was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States,' or 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Parker v. Matthews*, 567

U.S. 37, 40 (2012) (quoting 28 U.S.C. § 2254(d)). Clearly established law for purposes of § 2254(d)(1) includes only "the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Moreover, a federal court reviewing the state court's adjudication under § 2254 (d)(1) must confine its examination to evidence in the record. *Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011). Finally, "a determination of a factual issue made by a State court shall be presumed to be correct [and] [t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).

IV. ANALYSIS

For the reasons explained in this section, the Court finds that Petitioner's claims do not warrant federal habeas relief.

A. Ineffective Assistance of Counsel

The Supreme Court set forth the standard by which courts must evaluate claims of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the defendant must show that counsel's performance was deficient. This requirement involves demonstrating that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 687. Second, the defendant must show that he was prejudiced by the deficient performance. *Id.* This requires showing that counsel's errors deprived the defendant of a fair trial. *Id.*

Counsel's performance is deficient if his representation falls "below an objective standard of reasonableness" or outside of the "wide range of professionally competent assistance." *Id.* at 690. In examining the question of deficiency, "[j]udicial scrutiny of counsel's performance must

be highly deferential." *Id.* at 689. In addition, judges must consider the facts of the case at the time of counsel's conduct, and must make every effort to escape what the *Strickland* court referred to as the "distorting effects of hindsight." *Id.* The petitioner bears the burden of showing that counsel's challenged action was not sound strategy. *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986). Furthermore, a defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 694.

When assessing an ineffective assistance of counsel claim in the federal habeas context, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable," which "is different from asking whether defense counsel's performance fell below Strickland's standard." *Grant v. Lockett*, 709 F.3d 224, 232 (3d Cir. 2013) (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)). "A state court must be granted a deference and latitude that are not in operation when the case involves [direct] review under the Strickland standard itself." *Id.* Federal habeas review of ineffective assistance of counsel claims is thus "doubly deferential." *Id.* (quoting *Cullen v. Pinholster*, 131 S.Ct. at 1403). Federal habeas courts must "take a highly deferential look at counsel's performance" under *Strickland*, "through the deferential lens of § 2254(d)." *Id.* (internal quotation marks and citations omitted). "With respect to the sequence of the two prongs, the *Strickland* Court held that 'a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. ... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" *Rainey v. Varner*, 603 F.3d 189, 201 (3d. Cir. 2010) (quoting *Strickland*, 466 U.S. at 697)).

1. Ineffective assistance of trial counsel for failing to investigate and call witnesses.

The Court will first address Petitioner's claim that counsel was ineffective for failing to investigate and call witnesses, particularly an alibi witness. (D.E. No. 1-1 at 14-21). Petitioner was represented at trial by Mr. Gerald Saluti, Esq.

Petitioner submits that his counsel was ineffective for failing to investigate and call Katrina Adams and Rashana Lundy as defense witnesses. (D.E. No. 1-1 at 14-21). Petitioner alleges that Katrina Adams could have served as an alibi witness because she was at home with Petitioner at the time the offenses in question occurred. (D.E. No. 1-1 at 14-15). He further alleges that Rashana Lundy could have provided testimony about the nature of his relationship with victim, Rayfield Ashford. (*Id.* at 15).

On habeas review, the district court must review the last reasoned state court decision on each claim. *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). Petitioner raised this very claim on PCR and was granted an evidentiary hearing on this issue after the matter was remanded by the Supreme Court of New Jersey to the PCR Court for further proceedings. *See Porter*, 2016 WL 4575702 at *2-4. The Appellate Division affirmed the second PCR Court's denial citing New Jersey Rule 2:11-3(e)(2) adding the following limited comments.[2]

> As noted, our standard of review requires deference to the PCR judge's fact findings based on witness testimony. *Nash, supra*, 212 *N.J.* at 540. "In such circumstances we will uphold the PCR court's findings that are supported by sufficient credible evidence in the record." *Ibid.* Here, defendant has not shown that the judge's credibility findings were "so wide of the mark as to result in a manifest injustice." *State v. J.D.*, 211 *N.J.* 344, 354 (2012) (quoting *State v. Brown*, 170 *N.J.* 138, 147 (2001)). Based on his credibility findings, Judge Ravin properly determined that trial counsel's decision not to have the alibi witness testify "was based on sound trial strategy and that this decision did not fall below the standard of

[2] This rule authorizes an affirmance when in an appeal of a criminal, quasi-criminal or juvenile matter, the Appellate Division determines that some or all of the arguments made are without sufficient merit to warrant discussion in a written opinion.

> reasonableness." Further, the judge found the alibi witness to be incredible and not to be believed that she was with defendant at the time of the murder.
>
> As to the denial of an evidentiary hearing with regard to Lundy's proffered testimony, Judge Ravin found an evidentiary hearing would not be helpful, and counsel's decision "was likely sound trial strategy that would not have changed the outcome of the proceeding had it been proffered." We concur and are satisfied that Judge Ravin did not abuse his discretion in denying defendant's petition without an evidentiary hearing.

Id. at *3.

"[F]ederal habeas law employs a 'look through' presumption." *Wilson v. Sellers*, 138 S. Ct. 1188, 1194 (2018). In cases in which the last reasoned decision is unexplained, the federal court should "'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale." *Id.* at 1192.

The PCR Court denied the claim as follows-

> In this case, there is no evidence that trial counsel performed in a constitutionally impermissible manner. Even though Mr. Saluti stated that he did not use Ms. Adams as a witness during the trial, he stated that he did not do so for tactical reasons. Specifically, Mr. Saluti stated that he did not believe it would be prudent to put Ms. Adams on the stand because she was a paramour of Defendant and in his experience, this would not be favorable for a defendant. Additionally, Mr. Saluti stated that when he spoke to Petitioner about what Ms. Adams remembered about the events, he said that he recalled that she did not have a good recollection of what happened. Therefore, unlike the trial attorney in *Gray*, Mr. Saluti specifically discussed his tactical reasons at the evidentiary hearing for not eliciting Ms. Adam's testimony. This Court finds that his decision was based on sound trial strategy and that this decision did not fall below the standard of reasonableness. *See Bilal*, *supra*, at *6.
>
> More importantly, this Court did not find Ms. Adams credible. The Court does not believe that she was with Petitioner at the time of the murder because the Court did not believe that she would have been frightened by the police knocking on her door; she was not present when that occurred. The Court also does not believe that she was

> with Petitioner because the Court does not believe that her alleged fright would have prevented her from informing the police or Mr. Saluti. She knew Petitioner from elementary school and had dated him for approximately 10 years at the time of the murder. Surely someone in such a relationship would have felt compelled to exonerate her loved one from unnecessary punishment if the circumstances were such as she presented them at the hearing.
>
> Even if Mr. Saluti's performance did fall below the standard of reasonableness, Petitioner did not show how he was prejudiced by this performance. During oral argument, Petitioner asserted that his conviction was only based on circumstantial evidence and that this alibi witness would have made a good impression on the jury. Again, because the Court did not find Ms. Adams credible, the Court does not believe that Petitioner was prejudiced by Mr. Saluti's decision to not use Ms. Adams as a witness.
>
> ***
>
> Additionally, the Court finds that Mr. Saluti's decision not to proffer Lundy's testimony that Petitioner and Mr. Ashford were friends was likely sound strategy that would not have changed the outcome of the proceeding had it been proffered.

(D.E. No. 1-6 at 12-13).

This Court has reviewed the PCR evidentiary hearing testimony which includes that of trial counsel, Gerald Saluti, and Petitioner's long-time acquaintance, Katrina Adams. (D.E. No. 6-7). Mr. Saluti testified that his trial strategy was to attack the victim's ability to identify his assailant. (*Id.* at 35). The defense's case was that the sole surviving victim could not identify the suspect. (*Id.*) Saluti further testified that it was a strategic decision not to pursue the alibi because he generally considered alibi testimony from individuals close to the defendant as being very biased. (*Id.* at 35, 38).

In light of counsel's testimony that it was his informed strategy to pursue a misidentification defense, Petitioner has not established how counsel was deficient. *See Strickland*, 466 U.S. at 691 ("counsel has a duty to make reasonable investigations or to make a

reasonable decision that makes particular investigations unnecessary."). Neither has Petitioner established how he was prejudiced by his counsel's decision not to call Adams because the PCR court found Adams' alibi-related testimony incredible. *See* 28 U.S.C. § 2254(e)(1). Moreover, the state court's ruling that Petitioner was not prejudiced by counsel's failure to proffer Rashana Lundy's testimony was not unreasonable.[3] Petitioner speculates that Lundy's testimony that Petitioner and Ashford were friends would have, *inter alia*, established that Ashford would have "called on that friendship upon being put on the ground and having a gun placed to his head prior to being shot." (D.E. No. 9 at 47). Petitioner also argues that Lundy's testimony could have corroborated Ms. Adams' testimony that the Petitioner and Ashford were friends and strengthened Adams' alibi testimony, even though Petitioner has never alleged that Lundy was with Petitioner and Adams or was aware of Petitioner's whereabouts during the time period which the offense occurred. (*Id.*)

Petitioner has not established how he was prejudiced by Lundy not being called as a defense witness. Lundy's potential testimony of what the victim would have done prior to being shot, is purely speculative. The state court's decision is not an unreasonable application of clearly established federal law. Habeas relief is thus denied.

2. Ineffective assistance of trial counsel for failing to move for a voir dire of juror number six.

Petitioner next submits that his trial counsel was ineffective for failing to move to voir dire juror number six after that particular juror articulated during jury polling that she disagreed with the guilty verdict with respect to count six- felony murder. (D.E. No. 1-1 at 21). More specifically,

[3] Petitioner's reliance on *Abdul-Salaam v. Sec'y Pa. Dep't of Corr.*, 895 F.3d 254 (3d Cir. 2018), is misplaced. (D.E. No. 10). There, the United States Courts of Appeals for the Third Circuit held that Petitioner was prejudiced by his counsel's failure to investigate mitigating evidence in preparation for penalty phase of capital trial.

Petitioner submits that the court should have inquired what juror number six meant when she told the court: "No. I'm sorry. I have to be honest." While Petitioner unsuccessfully raised a similar version of this claim, albeit within the context of a trial court error claim on direct appeal, it appears that he has not previously raised this particular ineffective assistance of counsel claim. Nonetheless, the Court will reach the merits of the claim. *See* 28 U.S.C. § 2254(a)(2).

As previously outlined in the fact section of this opinion, once juror number six expressed her disagreement with the guilty verdict as to count six, the trial court noted its concern and ordered a recess. (D.E. No. 6-5 at 20). The following day the court continued to poll the jury as to the rest of the counts. The jury was not unanimous in its guilty verdicts on counts eight and nine. After the trial judge denied defense counsel's motion for a mistrial, the court declared a mistrial on counts six, seven, eight, and nine. (D.E. No. 6-6 at 5-9, 12). Defense counsel also presented the court with the option of further examination of juror number six. (*Id.* at 7). Specifically counsel stated- "at the very least I think we need to talk to the juror, so we can clarify whether or not Counts 1 through 5 has to stand." (*Id.*) The Court denied the request. (*Id.* at 9).

Petitioner's claim is belied by the record. Counsel did in fact ask the court to conduct further inquiry of juror number six after he made his application for a mistrial. Petitioner has not raised a viable ineffective assistance claim, in light of his counsel's actions. Habeas relief is thus denied.

3. Ineffective assistance of trial counsel for failing to challenge the sufficiency of the state's evidence with respect to the robbery charge related to David Veal.

Petitioner next submits that counsel was ineffective for failing to challenge the sufficiency of the state's evidence with respect to the robbery charge related to victim David Veal. (D.E. No. 1-1 at 21). More specifically, Petitioner argues that because the evidence showed that Veal's money was returned to him at some point shortly after the robbery and because the jury sent a note

asking whether a robbery had occurred if the victim's money is returned, trial counsel should have raised the issue of insufficient evidence either in an application to the court or in his closing arguments to the jury. (*Id.* at 22-23). It appears that Petitioner has not previously raised this particular ineffective assistance of counsel claim. Nonetheless, the Court will reach the merits of the claim. *See* 28 U.S.C. § 2254(a)(2).

At Petitioner's trial, the surviving victim, David Veal testified for the state. (D.E. No. 6-3 at 20-55). Veal testified in relevant part as follows-

> Q: Then, what happened when they got to you?
> A: Once they got to Avon Avenue and 18th Street, well, didn't get directly to 18th Street yet, just about there - - two of the guys that was across the street. One about to cross inside the street, but the - - I don't know it was like one of the guys just like started - - he was about to come on an angle straight at me. One was crossing the street like he was going to keep going. By the time I got ready to hang up the phone was like right there.
> They all just had a gun drew, that's all I saw, like a bunch of guns. I'm looking around like, oh - - it's nowhere for me to run or stuff. Hey, deal with it. So, they like don't move. Don't fucking move. Don't move, don't even look at me like that.
> Q: All three had guns?
> A: All three of them had guns.
> Q: And they surround you?
> A: Yeah, They had me like - - like when you go to the carnival, and just shooting and stuff. It was like - - there was nothing I could do. No way to run. Nothing to hide behind. It was just right there in the middle. Like that there stopped. I did like you said, don't move. By the time I turned back around, it was one guy just came. Boom, hit me in my face. That's how I got these marks and stuff up in here. Once he hit me in my face. I fell to the ground.
> Q: What he hit you in the face with?
> A: He hit me with a gun - - like pistol whipped me. Had me at that corner.
>
> ...
>
> A: No, just one individual kicking me. Other guy with him: Yo, yo, no need for that. I had already gave them all my papers and stuff out of my pocket. ATM cards - - it was a ATM card holder. I had $40 and a ripped 20 in there with a number on it and gave them that.

Q: Gave them $40?
A: I gave them everything he [sic] had. I took the money and threw it to the ground and then I started begging.

Q: Now, you said you had $40 taken from you. Was that returned to you?
A: I had got everything back that was taken from me.
Q: When did you get that back?
A: I believe that night.

THE COURT: I have a couple questions, Mr. Veal. The three individuals who were with you, and approached you that night, did any of them ask you for money.
THE WITNESS: Yes.
THE COURT: They say turnover your money?
THE WITNESS: Yes. They said, you know, what time it is, give it up. So, I gave my - - I got my ATM holder, got all my stuff in it. I gave him that. Money and stuff is in there. They took the money and everything I had. Threw it to the ground.
THE COURT: Okay.

(D.E. No. 6-3 at 21-23, 30, 54).

Under New Jersey law, a person is guilty of robbery "if in the course of committing a theft he inflicts bodily injury or uses force upon another." N.J. Stat. Ann. § 2C:15-1. The United States Supreme Court articulated the standard governing a challenge to the sufficiency of the evidence in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The Court held that a reviewing court must ask itself "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (emphasis original). This standard must be applied "with explicit reference to the substantive elements of the criminal offense as defined by state law." *Id.* at 324 n.16; *see also Orban v. Vaughn*, 123 F.3d 727, 731 (3d Cir. 1997).

Petitioner has not established how when the evidence is viewed in the light most favorable

to the prosecution, any rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt. Petitioner presumes that Veal's testimony that his assailants told him "you know what time it is, give it up" did not mean that they were asking for his money. Veal was punched, kicked and shot in the midst of him giving his money to his assailants. The record reflects that the jury considered the fact that Veal obtained his money back and asked the court for guidance on that particular issue, before returning a guilty verdict on that particular charge. The fact that Veal's money was returned to him does not undermine the fact that his money was taken from him with the use of force as required by the state's robbery statute. Therefore, Petitioner has not shown a reasonable probability that the outcome of the trial would have been different had trial counsel addressed the sufficiency of the evidence with respect to the robbery of David Veal. Habeas relief is thus denied.

B. Trial Court Errors

1. Trial Court Erroneously Closed the Courtroom to the Public

Petitioner next submits that the trial court erroneously closed the courtroom to the public, thereby violating his right to a public trial and the public's right to attend the trial. (D.E. No. 1-1 at 23). Petitioner raised this very claim on direct appeal. *See Porter*, 2007 WL 2460179 at *5. The Appellate Division denied the claim as follows-

> We need not address the issues relating to the closing of the courtroom on the morning the jury returned to complete delivery of the verdict. As we have observed, the only issues before us in this appeal bear upon the guilty verdicts on the first four counts. Since we have concluded there is no basis for a reversal of the convictions as to those charges, it is of no consequence whether or not the trial court's stated reasons for closing the courtroom to receive the complete verdicts on the remaining counts withstand scrutiny by the standards of *State v. Cuccio, 350 N.J. Super. 248 (App. Div.), certif. denied, 174 N.J. 43 (2002).*

Id.

As previously outlined in the background section of this opinion, after the jury gave its verdict on count six, the felony murder charge, a spectator ran out of the courtroom after making an audible outburst. *See Porter*, 2007 WL 2460179. The next day, the trial court made the decision to close the courtroom to the public before the jury was brought in to deliver its verdicts on two remaining counts. The trial court gave the following explanation for its reasons to close the courtroom:

> There were representatives of the defendant's family here. There were representatives of the victim's family here. You could see on the faces of the jurors the strain of the day. It was late in the day, and when the initial verdict was announced in court as guilty on felony murder, the defendant – a member of the defendant's family ran out of the courtroom screaming and crying. Again, to add to the highly charged emotional atmosphere. It's not to criticize one way or another. When a family member is found guilty of a felony murder, certainly the Court could understand why a family member would react that way, but at that point in time it was a highly charged atmosphere. I think it did have an effect on what Juror Number 6 did, but whatever- - whether it did or didn't at that point in time at 4:35 in the afternoon, the Court decided to break the proceedings, and ask the jurors to come back today to continue in this matter.
>
> I have indicated to my officers that there's not to be any members of the defendant's family or the victim's family in the courtroom this morning while I take the tally on the final two counts, and I have done that because of what occurred yesterday afternoon because it had the potential to effect the final votes on the polling of these jurors, and it could just as easily be the victim's family member who could run out, and start carrying on, too. I'm doing it for security reasons. I must say that, you know, it is a concern of this Court, you know in such a case like this where stakes are so high there are security issues. I was concerned about security issues yesterday afternoon when the Sheriff's Department could send no more than three officers on a case like this. They had no more manpower to send us at 4:35 in the afternoon, and this Court felt that we needed, at least, six officers here. We have a defendant in custody. We have 13 jurors. We have a defense counsel, assistant to defense counsel. We have a prosecutor, we have personnel. We have the defendant's family and victim's family. For all those reasons the Court cut short the proceedings, and quite frankly - - and another reason the Court didn't know what to do. I wanted to give the opportunity to all of

> the parties, counsel to research it, the Court to research it. And my research reveals, and this is the way we should go.

(D.E. No. 6-6 at 5-6).

In *Waller v. Georgia*, 467 U.S. 39, 48 (1984), the United States Supreme Court articulated the following test to determine whether a courtroom closure violates a defendant's Sixth Amendment right to a public trial. "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, it must make findings adequate to support the closure." *Id.*

At the outset, the Court notes that while the trial court did prohibit the defendant's and the victims' families from attending the remainder of the trial, the record does not reflect that the courtroom was closed entirely to the public. Nonetheless, Petitioner has not established how the trial court's decision was inconsistent with *Waller*. By the time the court made the decision to limit members of the public from being present in the courtroom, the jury had returned its verdicts on the majority of the charges against Petitioner. The Court stated that its decision to close the courtroom was in response to an outburst by the defendant's family member after the felony murder verdict was read and juror number six expressed concern about the verdict related to that charge, as well as a security measure taken in light of the limited court security personnel and the number of people in the courtroom on the prior day. The trial judge sought to protect the sanctity of the proceeding and the jury's ability to render a verdict without interference or influence from either the victims' or the defendant's family members and supporters. *United States v. Flanders*, 845 F. Supp. 2d 1298, 1303 (S.D. Fl. 2012) ("Allowing members of the public to freely come and go during the parties' closing arguments would have distracted members of the jury and inhibited their ability to perform their important function.") Second, based on the Court's response to an

outburst by the defendant's family member, the trial judge limited the victims' and defendant's family members, but not necessarily all members of the public. *See Flanders*, 845 F. Supp. 2d at 1302 ("To the extent that a substantial reason for partial closure is needed, however, appears to be tempered by the recognition of a trial judge's ability, in the interest of justice, to impose reasonable limitations on access to a trial" (internal citations and quotation marks omitted)). Additionally, the limitation on spectators was limited to the final phase of the trial, specifically the jury's verdict on the last two counts. *Id.* (The courtroom was open to the public at every stage of the proceeding except for the time during which the parties gave their closing arguments to the jury.") Third, the trial court's decision to limit family members from observing the proceeding was a reasonable alternative to closing the proceeding to the public altogether. Finally, the Court articulated its findings to support why the limitation on spectators was necessary.

In light of this, Petitioner has not established how the trial court's decision to limit spectators in the courtroom after the jury had returned a verdict on all but two remaining counts violated his right to a fair trial. The state court's decision was not an unreasonable application of the facts nor was it in violation of clearly established federal law. Habeas relief is thus denied.

2. The trial court erroneously failed to conduct further inquiry of juror number six after she made a comment that suggested she was uncomfortable with one of the verdicts.

Petitioner next submits that the trial court erroneously failed to conduct further inquiry of juror number six after she articulated during jury polling that she disagreed with the guilty verdict with respect to count six which charged him with felony murder. (D.E. No. 1-1 at 23-29). More specifically, Petitioner submits that the court should have inquired what juror number six meant when she told the court: "No. I'm sorry. I have to be honest." Petitioner unsuccessfully raised this claim on direct appeal.

The Appellate Division denied the claim as follows-

> The trial judge was correct in ruling that the difficulties that occurred when the jury was polled on Count Six and thereafter had no bearing on the validity of the jury's verdict on Counts One through Five.
>
> In *Milton, supra,* 178 *N.J.* 421, a three-count indictment was at issue: possession of a controlled dangerous substance (CDS), possession of the CDS with intent to distribute, and distribution or intent to distribute the CDS within 500 feet of public housing. The jury foreperson announced guilty verdicts as to all three counts. When the jury was polled, "[t]he poll on Count One was uneventful, with each juror clearly stating 'guilty.' " *Id.* at 427. One juror hesitated in response to the poll on Count Two, however; and, when the trial court inquired of that juror, she responded, following another hesitation and prompting by the court: "Um guilty. That was the verdict I gave." *See id.* at 427-28. The Supreme Court held, with three justices dissenting, that the trial court, in the circumstances developed, should not have accepted this response as a conclusive indication of the juror's vote, but should, rather, have inquired further, even to "interview[ ] the juror *in camera* to provide her an opportunity to explain her hesitation, unhampered by the pressure that may have undermined the deliberation process." *Id.* at 442. "[T]he circumstances required clarification." *Id.* at 440. The Court, therefore, reversed the conviction on Count Two. The Court also reversed the conviction on Count Three because of its factually overlapping relationship with Count Two. The matter was remanded for a new trial on Counts Two and Three, but the decision had no effect on the conviction for possession of CDS in Count One.
>
> In a similar vein, in this matter, we discern no reason to disregard the verdict on the first five counts in this matter, validly rendered in every way, because of the problems that occurred when the jury was polled regarding subsequent counts. And, we see no relationship between the guilty verdicts, especially those on Counts Two, Three and Four, which bore upon defendant's conduct regarding the surviving victim, and the handling of charges relating to the deceased victim and, generally, to both victims that eventuated in the problems we have described. *Cf. State v. Schmelz,* 17 *N.J.* 227, 232-37 (1955); *State v. Jenkins,* 349 *N.J.Super.* 464, 474-76 (App.Div.2002); *State v. Millett,* 272 *N.J.Super.* 68, 92-98 (App.Div.1994).
>
> We reject defendant's argument, based on *Rugura v. Lau,* 119 *N.J.* 276, 281 (1990), of a deficiency in the form of the questions asked by the court in polling the jury on Counts One through Five. In

> inquiring about Counts One and Two, the court stated the reported verdict and instructed: "Please state yes if this is your verdict[.] State no if this is not your verdict." This form of inquiry is proper. *See ibid.* To be sure, as to Counts Three and Four, the court incorrectly, *see ibid.*, abbreviated its inquiry regarding Count Three: "have you reported the defendant guilty of attempted murder?" and in respect of Count Four: "have you reported the defendant guilty of aggravated assault?" These were deviations from accepted form, which "is intended to determine whether each juror *still assents* to the verdict[.]" *Milton, supra*, 178 *N.J.* at 441. In polling the jury on Counts Five and Six, however, the court reverted to the form of inquiry used in respect of Counts One and Two. The deviation from the appropriate form regarding Counts Three and Four is inconsequential, for the jury clearly knew from the form of inquiry as to Counts One and Two what information the court was seeking.

Porter, 2007 WL 2460179 at *4-5.

As previously outlined in the background section of this opinion, once juror number six expressed her disagreement with the guilty verdict as to count six, the trial court noted her concern and ordered a recess. (D.E. No. 6-5 at 20). In addition to moving for a mistrial, defense counsel also presented the court with the option of further examination of juror six. (D.E. No. 6-6 at 7). Trial counsel argued that although juror six explicitly articulated dissent when polled on her verdict with respect to count six, counsel observed her shaking her head, as if she was in disagreement, while the foreperson was providing the first five guilty verdicts. The trial court accepted counsel's representation but declined to conduct further inquiry. The trial court ruled that further inquiry was not necessary because she only expressed hesitation about her verdict with respect to count six, the felony murder charge. (*Id.* at 8-9). After the trial judge denied defense counsel's motion for a mistrial, the jury gave its verdict on the two remaining counts. The jury was not unanimous in its guilty verdicts on counts eight and nine. Ultimately, the court declared a mistrial on counts six, seven, eight, and nine. (*Id.* at 5-9, 12).

Petitioner has not established how the trial court's decision not to inquire further of juror six implicated his right to a trial by an impartial jury. Petitioner argues that the state court's decision runs afoul of the Supreme Court's opinion in *Pointer v. Texas*, 380 U.S. 400 (1965), as well as non-binding precedent from other circuit courts of appeals. The Court notes that the *Pointer* Court's holding applied to the accused's Sixth Amendment right to confront witnesses. *Id.* at 406-408. Not only has Petitioner not cited to any relevant controlling case law to support his claim, but his argument rests on the premise that although juror number six voiced her concern about the guilty verdict with respect to count six, she may have actually been conflicted with the guilty verdicts in the preceding five counts as well. Counsel's speculation was considered by the trial court before it was rejected. As for juror number six's comments suggesting her hesitation about the guilty verdict in count six, the trial court responded by declaring a mistrial. Petitioner has not established how his right to a jury trial was violated by the trial court's manner of handling juror number six's reservations. *See United States v. Fiorella*, 850 F.2d 172 (3d Cir. 1988) (upholding a conviction where the trial court continued to poll the jury after a juror indicated he disagreed with the verdict, and instructed the jury to continue to deliberate, resulting in a unanimous guilty verdict the following day). Consequently, the state court's decision was not an unreasonable application of clearly established federal law. Habeas relief is thus denied.

V. CERTIFICATE OF APPEALABILITY

This Court must determine whether Petitioner is entitled to a certificate of appealability in this matter. *See* Third Circuit Local Appellate Rule 22.1. The Court will issue a certificate of appealability if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Based on the discussion in this Opinion, Petitioner has not made

a substantial showing of denial of a constitutional right, and this Court will not issue a certificate of appealability.

VI. CONCLUSION

For the reasons discussed above, Petitioner's habeas petition is denied.

An appropriate order follows.

Dated: April 29, 2020

THE HONORABLE MADELINE COX ARLEO
United States District Judge

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CRIMINAL PART
ESSEX COUNTY
IND. NO. 04-12-3785
APP. DOC. NO. A-000530-14 T1

STATE OF NEW JERSEY,	
vs.	TRANSCRIPT OF PROCEEDINGS
OSCAR PORTER,	P.C.R. HEARING
Defendant.	

Place: Veterans Courthouse
50 West Market Street
Newark, New Jersey 07102

Date: June 6, 2014

BEFORE:

HON. MICHAEL L. RAVIN, J.S.C.

TRANSCRIPT ORDERED BY:

CYNTHIA PORTER, 10 Richmond Street, Newark, New Jersey 07103

APPEARANCES:

HARRY MOSKOWITZ, ESQ., Assistant Prosecutor, Essex County Prosecutor's Office
Attorney for the State

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Appendix C

INDEX TO WITNESSES

THE COURT: ... v. Oscar Porter, indictment 4-12-3785. Appearances, please.

MR. MOSKOWITZ: Harry Moskowitz, assistant prosecutor, for the state.

MS. DeJULIO: Lois DeJulio on behalf of Oscar Porter, who's been brought from state prison, is seated here at counsel table with me.

THE COURT: How you doin' today, Mr. Porter?

MR. PORTER: Okay, Judge.

THE COURT: Alright. Alright, as I understand it, this is a P.C.R., ineffective assistance of counsel, and I understand that the issue is limited to trial counsel's failure to investigate an alibi defense. I would say succinctly that that's what this is about. If I'm wrong, you can correct me, Ms. DeJulio.

MS. DeJULIO: Judge, I -- I -- I would say yes. And also there is some testimony from the two witnesses relating to the identification in this case, as well.

THE COURT: Okay. Do you understand that to be an issue, Mr. Moskowitz?

MR. MOSKOWITZ: Judge, the Supreme Court was very specific in sending this down and their opinion said it applies to the alibi. We're here for the

alibi. That's it. As --

THE COURT: Wouldn't you agree?

MR. MOSKOWITZ: -- (indiscernible).

MS. DeJULIO: Uh, Judge, I think the opinion says that Rashana (phonetic) Lundey's (phonetic) testimony may be taken. And, uh, she is not an alibi witness. She, um, her testimony would relate only to the fact that the victim and the defendant knew each other and were well acquainted, knew each other by name. Um, and, therefore, it would be unusual that the surviving victim did not hear any conversation between the two men that would reflect that they knew each other.

THE COURT: Where is that referenced in the Appellate Division opinion that the remand is to include that issue?

MS. DeJULIO: The Supreme Court opinion, --

THE COURT: Yes.

MS. DeJULIO: -- Judge? Yes.

THE COURT: Sorry.

MS. DeJULIO: Judge, I'm looking at the, um, slip sheet. So, that would be my page 16, the Supreme Court says: With respect to Lundey's proffered testimony, we note that defendant was not convicted of any charges concerning Ashford (phonetic), and that

defendant has not made out a prima facie showing entitlement to a hearing.

Nevertheless, the remand judge may consider whether or not trial counsel's failure to investigate Lundey's statement in her certification that Ashford and defendant were good friends constitutes ineffective assistance of counsel.

MR. MOSKOWITZ: Judge, I'm relying on the language on page 2, Judge, with respect to Lundey's, uh, ... The defendant has not made out a prima facie showing of entitlement to a hearing on that claim, Judge. I'd ask that this hearing be narrowly limited to the alibi. That's the -- that's the operative words, Judge, in that phrase.

MS. DeJULIO: Well, I think nevertheless, the remand judge may consider, uh, would be up to Your Honor to decide. Um, although it's certainly true, Mr., um, Porter was not convicted of the counts relating to Ray (phonetic) Ashford; however, um, this is a single transaction. And so the identification, um, relates to both, uh, both victims since this is one single transaction.

If it could be shown that Mr. Porter and Mr. Ashford were close friends, had known each other, you know, since their school days, um, the identification

made by the surviving victim would be undermined if his testimony did not reflect that there was any conversation between, um, Rayford (phonetic), uh, Rayfield (phonetic) Ashford and Mr. Porter that you would expect if they knew each other. Um, particularly under the circumstances, you would expect to hear, uh, something along the lines of, you know, Oscar, we've known each other. Why are you doing this? Don't -- don't kill me. We grew up together. Something along the lines that would, uh, be normal in a situation where two people who've known each other from childhood are involved in this situation.

And the trial testimony, the -- the surviving victim, David (phonetic) Veal (phonetic), didn't indicate anything at all that would show that, um, Ashford knew one of the assailants, um, knew him well from childhood. So, I think that although there was a hung jury on the, um, counts relating to, um, Ashford, certainly it was one transaction. The two men were together. They were on their knees side-by-side when they were shot. Um, so I think the I.D. goes to both, um, both men.

MR. MOSKOWITZ: Judge, the state would strongly disagree. The operative word there -- expect -- expect how his homicide victim would act when he

sees somebody he knows. Again, that's speculation. That's not appropriate for a post-conviction relief evidentiary hearing to speculate as to how a victim should act and as to what conversations should have taken place.

MS. DeJULIO: Well, Judge, I would only --

MR. MOSKOWITZ: It could --

MS. DeJULIO: I'm sorry.

MR. MOSKOWITZ: I'm sorry, counsel.

MS. DeJULIO: Please, go ahead.

MR. MOSKOWITZ: It could just easily be said is he saw a gun, and he was in shock that a friend would pull a gun on him and he didn't say a word. Either way, it could be true, Judge, but we're speculating. We're here for a narrow issue on the alibi, and did counsel commit a grievous error in not calling this alibi witness? Mr. Saluti is ready to testify, Judge. The state would respectfully submit that we move on.

MS. DeJULIO: Judge, I would just state that because, um, Mr. Porter's original trial attorney did not speak with Ms. Lundey or Ms. Adams regarding the relationship of Mr. Porter and Mr. Ashford, that the questioning of Mr. Veal, um, did not address that. Uh, and had that happened, we might have a great deal more

information about what occurred during that horrible time when the two men were basically awaiting their anticipated death. Um, if the proper investigation had been done, that -- there might be a great deal more testimony relating to whether or not there were any signs that, um, Ashford recognized one of the assailants as Oscar Porter.

THE COURT: This hearing is going to be limited to the issue of the alleged failure of trial counsel to investigate the alibi. After this hearing is concluded, after I've taken the testimony, if in my judgment I want to expand the hearing, I'll let you know. And if I -- if I do think that that should be done, I'll state the reasons why. And if I don't think it should be done, I'll state the reasons why not.

MS. DeJULIO: So, Judge, you do not want to hear the testimony of Rashana Lundey?

THE COURT: Correct, not today.

MS. DeJULIO: And -- and, um, alright, Judge, uh, then ask that she be excused?

THE COURT: Any objection?

MR. MOSKOWITZ: No. No objection, Your Honor.

THE COURT: You may excuse her.

MS. DeJULIO: (Pause). Would you just go,

Rashana? You're not needed here today.

THE COURT: Call your first witness.

MR. MOSKOWITZ: Yes, Judge, the state would call Gerald Saluti to the stand.

MS. DeJULIO: Uh, ...

THE COURT: Yes.

MS. DeJULIO: ... Judge, I thought the burden was on the defense and that I would need to go first.

THE COURT: Well, Mr. Moskowitz is very gracious. I suppose, uh, he -- he was just being gracious, not --

MR. MOSKOWITZ: Oh, I'm sorry, go ahead.

MS. DeJULIO: Uh, well, ...

MR. MOSKOWITZ: No, no. Okay, I'm sorry.

MS. DeJULIO: Ms. Adams, Katrina Adams.

MR. MOSKOWITZ: Okay.

MS. DeJULIO: You can sit down, Mr. Porter.

THE COURT: As the defense, the petitioner has the burden. Sooner or later Mr. Saluti was going to testify, Mr. Moskowitz. It was only a matter of who was going to be able to lead and who was not, but -- and that would be decided by who called them.

SHERIFF'S OFFICER: Remain standing and I'll swear you in. Raise your right hand.

K A T R I N A A D A M S, WITNESS FOR THE DEFENSE,

SWORN/AFFIRMED.

SHERIFF'S OFFICER: State your name for the record.

MS. ADAMS: Katrina Adams.

SHERIFF'S OFFICER: Spell it in full, please.

MS. ADAMS: K-A-T-R-I-N-A A-D-A-M-S.

THE COURT: Thank you. You may be seated. Proceed.

MS. DeJULIO: Thank you, Judge.

DIRECT-EXAMINATION BY MS. DeJULIO:

Q. Ms. Adams, before we begin the important testimony, let me just ask you, are you wearing braces right now on your teeth?

A. Yes.

Q. And does that affect your ability to speak a little bit?

A. Yes.

Q. Um, when were those braces put on?

A. Um, about a year ago.

Q. And, uh, is this going to be a permanent situation or will they at some point be removed?

A. I have a retainer. The retainer comes on in a couple of months.

Q. Okay. Let me ask you, how old are you?

A. Twenty-nine.

Q. And what was the last grade that you finished in school?

A. Some college.

Q. Some college? Where did you go to high school?

A. University High School.

Q. And did you graduate?

A. Yes.

Q. And where have you been attending college?

A. Essex County College.

Q. Are you employed?

A. Yes.

Q. Where do you work?

A. J.P. Morgan Chase.

Q. And how long have you worked there?

A. Ten years.

Q. And what is your job title?

A. I'm lead teller, operations specialist.

Q. And could you just explain what that means?

A. Um, I manage the teller line, and I work with the manager hand-to-hand to insure that the branch is following policies and procedures.

Q. And when you say you manage the teller line, does that mean you supervise the other tellers in the bank?

A. Yes.

Q. Do you have any criminal convictions?

A. No.

Q. Do you know Oscar Porter?

A. Yes.

Q. How long have you known him?

A. For about 20 years.

Q. How did you meet?

A. Elementary.

Q. Elementary school?

A. Yes.

Q. And did there come a time when you began a romantic relationship?

A. Yes.

Q. When did that begin approximately?

A. I was around 14.

Q. Okay.

A. I'm gonna say around 15 years ago.

Q. And did you begin --

THE COURT: One moment. Tell the people in the cell they need to quiet down, please. Tell them if they don't quiet down, they'll be sent downstairs and they will not be seen. (Pause). How long ago did you say you became romantic with, uh, Mr. Porter?

MS. ADAMS: Around 15 years ago.

BY MS. DeJULIO:

Q. And did there come a time when you began living together?

A. Yes.

Q. Now, were you also acquainted with Rayfield Ashford?

A. Yes.

Q. And how long did you know him before his death?

A. Around 20 years.

Q. And, um, how well did you know him?

A. Um, we live on the same block and went to the same school.

Q. And to your knowledge, was Oscar Porter acquainted with Mr. Ashford?

A. Yes.

Q. And how long did they know each other?

A. Around the same time, around 20 years.

Q. Did you see them together on occasion?

A. Yes.

Q. And, uh, did Ashford know Mr. Porter by name?

A. Yes.

Q. Now, going back to September of 2005, were you living together with Mr. Porter at that time? I'm sorry, September of 2003, were you living together with

Mr. Porter at that time?

A. Yes.

Q. And when did you learn of Mr. Ashford's death?

A. The next day.

Q. The next day?

A. Yes.

THE COURT: What day? Oh, the day after he died. I thought you meant like date, okay.

MS. ADAMS: The date, September 11th.

BY MS. DeJULIO:

Q. And, um, how did you learn about his death?

A. I got a phone call.

Q. When did you learn that Mr. Porter was suspected of shooting Ashford?

A. Months later, after, um, the police came to his grandmother house.

THE COURT: I'm sorry, did you say a month or --

MS. ADAMS: Months.

THE COURT: -- months, plural?

MS. ADAMS: Months, plural.

THE COURT: Months, plural.

MS. ADAMS: Mm-hmm.

THE COURT: One second. (Pause). What

happened months later that caused you to learn that he was a suspect?

MS. ADAMS: Um, the police came to his grandmother's house.

BY MS. DeJULIO:

Q. And were you present when the police came?

A. No.

Q. Um, how -- did someone then tell you that the police were looking for Oscar Porter?

A. Yes.

Q. And who was that?

A. His mother.

Q. And as a result of that, what happened?

A. As a result of it, I told him that he needs to turn himself in.

Q. And did that happen?

A. Yes.

Q. Did there come a time when the police came to your apartment?

A. Yes.

Q. And what happened on that occasion?

A. They knocked on the door.

THE COURT: Wait a second. I'm a little bit confused. There was a time when the defendant's mother told you the defendant was a suspect. You told the

defendant he had to turn himself in. Now you're telling me that there came a time when the police came to your house. And my question is when, in reference to when you heard he was a suspect and when you told him to turn himself in, when did the police come to your house?

MS. ADAMS: I don't remember if it was days or weeks later. But they came to my house after the grandmother's house. He didn't turn his self in till after that.

THE COURT: Was that after you told him to turn himself in that the police came to your house?

MS. ADAMS: Yes.

THE COURT: One moment, please. (Pause). Next question.

BY MS. DeJULIO:

Q. Was that a frightening experience when the police broke down the door?

MR. MOSKOWITZ: Objection, Your Honor.

THE COURT: What's the objection?

MR. MOSKOWITZ: What's the relevance?

THE COURT: What's the relevance?

MS. DeJULIO: Uh, Judge, I anticipate that there will be a question as to why, um, Ms. Adams did not go with her alibi testimony to the police.

THE COURT: I'll allow it for that purpose.

BY MS. DeJULIO:

Q. Was it a frightening experience when the police broke the door down to your apartment?

A. I wasn't there when they came to my apartment.

Q. You were not there.

A. No.

Q. And did you hear about it later?

A. Yes.

Q. And what -- were you disturbed when you heard about what had happened?

A. Yes.

Q. Now, going to September 11th of 2003, at 5:00 A.M., do you know where Mr. Porter was at that time?

A. Yes.

Q. Where was he?

A. Eight-sixteen South 16th Street.

Q. And --

THE COURT: I'm sorry. Can I get that address again?

MS. ADAMS: Eight-sixteen South 16th Street.

THE COURT: Eight-sixteen South 16th. And what date was that?

MS. ADAMS: September 11th.

THE COURT: Of what, 2003?

MS. ADAMS: Yes.

THE COURT: Next question.

BY MS. DeJULIO:

Q. Do you know where Mr. Porter was?

A. Yes.

Q. And how do you know?

A. Because he was with me.

Q. And where were the both of you?

A. Sleep.

Q. Asleep?

A. Yes.

Q. And was that address that you just gave to the judge your apartment, the --

A. Yes.

Q. -- apartment that you shared?

A. Yes.

Q. And, um, how can you be sure that Mr. Porter was there at the time? Couldn't he have sneaked out while you were sleeping?

A. No, I laid on his chest.

THE COURT: I'm sorry, I didn't understand you.

MS. ADAMS: I laid on his chest.

BY MS. DeJULIO:

Q. (Pause). Uh, once you found out that Mr.

Porter was being charged with shooting Mr. Ashford, why didn't you go to the police and tell them about this information?

A. Well, they kicked down my door. I didn't feel comfortable talking to them.

Q. Now, were you ever contacted by Mr. Porter's trial attorney, Mr. Saluti?

A. No.

Q. Um, did you ever speak with anyone from his office, such as an investigator?

A. No.

Q. If Mr. Saluti had asked you to testify at Mr. Porter's trial, would you have willing to do so?

A. Yes.

Q. And would you have testified to the, uh, information you've just given us as to Mr. Porter's whereabouts on that date and time?

A. Yes.

MS. DeJULIO: I have no further questions.

THE COURT: Cross.

MR. MOSKOWITZ: Thank you, Your Honor.

CROSS-EXAMINATION BY MR. MOSKOWITZ:

Q. Ms. Adams, my name is Harry Moskowitz. I'm an assistant prosecutor. When Mr. Porter was originally tried, were you at the -- were you in the

courtroom -- I mean the courthouse?

A. Yes.

Q. And you watched the entire trial?

A. No.

Q. Part of the trial.

A. Yes.

Q. Did you see the victim testify?

A. Yes.

Q. Okay. Now, it's your testimony that you weren't there when the police kicked down the door, right?

A. No.

Q. You just saw evidence of a broken door?

A. No. My mother and my little sister was there.

Q. Okay, but you weren't there.

A. No.

Q. Answer my questions, please.

A. No.

Q. You were not there.

A. No.

Q. And you're saying today that you were so frightened that you didn't go to the police. Is that correct?

A. Yes.

Q. Okay. And you stated that you knew Mr.

Ashford was, uh, murdered the day after it happened, correct?

A. The same day.

Q. The same day.

A. It happened at 5:00 A.M. I found out later that morning.

Q. And you found out that your boyfriend, your paramour, somebody who's living with you was wanted in connection with that murder. Is that correct?

A. Yes.

Q. And when you found out, you didn't go to the police, correct?

A. No.

Q. 'Cause you could have told them that they got the wrong guy. But you didn't go, ...

A. No.

Q. ... right?

A. No.

Q. And then when he was arrested, you didn't go to the police, correct?

A. No.

Q. A month goes by, you didn't go to the police then, either, right?

A. No.

Q. And you knew you could go to the police.

A. Yes.

Q. But you didn't do anything.

A. No.

Q. You just sat with that information. You kept it to yourself, right?

A. No.

Q. You didn't keep it to yourself?

A. No.

Q. You didn't tell the police, though.

A. No.

Q. Okay. You told everybody else around but the police. Is that correct?

A. Yes.

Q. Okay. Now, let's go back to that September 11th day. You knew it happened at 5:00 A.M. What time -- were you working at Morgan on that time, at the time when the murder happened?

A. When the -- I'm sorry?

Q. Were you working -- were you working at your present position at that time?

A. No.

Q. Where were you working then?

A. Best Buy.

Q. Best Buy.

A. Yes.

Q. Okay. What time did you have to get up for work?

A. I didn't have to be to work until 4:00.

Q. Four P.M.

A. Yes.

Q. So, when you had to go to work at 4:00 P.M., what time did you stay up till at night?

A. I don't remember.

Q. You don't remember what time you stayed up to?

A. No, I don't.

Q. Let's go back with your best estimate. Did you stay up till 3:00 in the morning, 4:00 in the morning when you used to have to go to work late?

A. I don't remember.

Q. You don't remember that day.

A. No.

Q. Okay. Do you remember what T.V. shows you watched that day?

A. No, I don't.

Q. Do you remember if you went to work the next day?

A. Yes.

Q. What day of the week was it?

A. I don't --

Q. Don't remember.
A. -- remember.
Q. Do you remember what you had for dinner that day?
A. No, I don't.
Q. But you remember he was sleeping on your chest.
A. No. I was sleeping on his chest.
Q. And you remember that specifically.
A. Yes.
Q. Were you doing that the day before, ...
A. Yes.
Q. ... sleeping on his chest? So, you always slept on his chest.
A. Yes.
Q. So, there's no way he could have gotten out ...
A. Yes.
Q. ... 'cause you slept on his chest every night.
A. Yes.
Q. Now, did you go to his lawyer, Gerry Saluti, and say you knew all this information, that he had to be with you?
A. No.

Q. Did you go to him?
A. No.
Q. Did you know he was represented by Gerry Saluti?
A. Yes.
Q. But you didn't go forward to him.
A. No.
Q. You didn't prepare -- you didn't prepare a statement for him to say, listen, call me because I know where he was. You didn't do that.
A. No.
Q. So, the first time you made Gerry Saluti aware that you had this alibi that he was with you was what, a week before trial? Two weeks before trial? When?
A. I -- I told Oscar to tell his lawyer. His lawyer was supposed to contact me. I'm not sure when he told him.
Q. Okay, but you never went and told the lawyer, you never went out of your way.
A. No.
Q. And how long was he your boyfriend for?
A. I don't remember the exact amount of years. You want me to calculate?
Q. Ten years?

A. I would say ... yeah, roughly.

Q. Okay. But you never came forward to tell him that you were the -- that he was with you that night he was -- and he's accused on murder.

A. No.

Q. And when he got indicted, you found out he got indicted for murder, right?

A. Yes.

Q. But you didn't come forward then, either, did you?

A. No.

Q. By the day -- the day after the murder, let's go on to September 12th. Was Oscar Porter with you?

A. (Pause). Yes.

Q. You seem hesitant in your voice.

A. Because when I said the next day, I meant the same day, but it was later on that day.

Q. Okay. So, he was with you?

A. That day, yes.

Q. Did you sleep on his chest that night?

A. That night, September ...

Q. Twelfth.

A. Yes.

Q. And September 13th, did you sleep on his chest that night?

A. I remember September 11th.

Q. Okay. But 12th and 13th is a little fuzzy?

A. No. I don't -- I don't remember.

Q. You don't remember.

A. No.

Q. Okay. But you remember the 11th.

A. Yes.

Q. Okay. Do you remember the 10th?

A. Yes.

Q. Oh -- you remember the 10th?

A. Yes.

Q. Tell me about the 10th. Were you sleeping on his chest that night?

A. Yes.

Q. Okay. But you don't remember the 12th and the 13th.

MS. DeJULIO: Judge, at this point this --

MS. ADAMS: No.

MS. DeJULIO: -- has been asked and answered repeatedly.

THE COURT: I think you've sufficiently gone into the sleeping on the chest, uh, aspect of your cross-examination, Mr. Moskowitz. Proceed.

MR. MOSKOWITZ: Thank you.

BY MR. MOSKOWITZ:

Q. Now, before you said you remember -- you said you remember September 11th. Um, before you went to sleep, did you watch T.V.?

A. I don't remember.

Q. Did you have dinner together?

A. No.

Q. No. Okay, so when was the first time you were together that night?

A. When he picked me up from work.

Q. And what time was that?

A. Ten something.

Q. And then you went home.

A. Yes.

Q. Okay. Do you know what time you got up that morning of the homicide?

A. No.

Q. Okay. By the way, how far -- when you were living -- what was the address again? The apartment you were living together at?

A. Eight-sixteen.

Q. Eight-sixteen what?

A. South Sixteenth Street.

Q. In Newark.

A. Yes.

Q. How far was the homicide from where you were?

A. A couple blocks.

MR. MOSKOWITZ: I have no further questions, Your Honor.

THE COURT: Ms. DeJulio, anything?

MS. DeJULIO: Just one question.

THE COURT: Yes, ma'am.

RE-DIRECT EXAMINATION BY MS. DeJULIO:

Q. Um, did you expect to be contacted by Mr. Porter's attorney?

A. Yes.

Q. And did you expect to be called to testify at the trial?

A. Yes.

MS. DeJULIO: Thank you.

THE COURT: (Pause). One moment. (Pause). Mr. Moskowitz, any re-cross?

MR. MOSKOWITZ: No, thank you.

THE COURT: You may step down. Thank you. Please call your next witness.

MS. DeJULIO: Your Honor, that's the only witness we have.

THE COURT: Mr. Moskowitz, please call your first witness.

MR. MOSKOWITZ: Yes, Your Honor, the state would call Gerald Saluti to the stand.

SHERIFF'S OFFICER: (Pause). Remain standing. Raise your right hand, please.

G E R A L D M I C H A E L S A L U T I, J R.,

WITNESS FOR THE STATE, SWORN/AFFIRMED.

SHERIFF'S OFFICER: Please state your name for the record. Spell your last name, please.

MR. SALUTI: Gerald Michael Saluti, Jr., --

SHERIFF'S OFFICER: Quiet in court please.

MR. SALUTI: -- S-A-L-U-T-I.

SHERIFF'S OFFICER: Thank you, sir.

THE COURT: You may be seated.

MR. SALUTI: Thank you, Judge.

THE COURT: Proceed, Mr. Moskowitz.

MR. MOSKOWITZ: Thank you.

DIRECT-EXAMINATION BY MR. MOSKOWITZ:

Q. Sir, are you a member of the New Jersey Bar?

A. Uh, not currently.

Q. How long were you a member of the Bar?

A. Twenty-two years.

Q. And what areas of law did you practice in?

A. Almost exclusively criminal.

Q. Did you try a lot of cases?

A. Uh, that would be an understatement. Yes, I have.

Q. About how many jury trials did you have?

A. Somewhere between 100 and 200.

Q. Um, were they primarily criminal cases?
A. All.
Q. All criminal cases.
A. Yes, sir.
Q. Okay. And did you try homicide cases?
A. Very many.
Q. How many would you say?
A. The lowest number would be 20.
Q. Okay. And this was over the course of how many years that you tried these cases?
A. Around 20 years.
Q. Twenty years, okay. And you were also an assistant prosecutor?
A. Bergen County, New Jersey, sir.
Q. Okay. And how long were you an assistant prosecutor for?
A. Two-and-a-half years.
Q. Okay. Now, sir, there came a point where you represented, uh, one Oscar Porter?
A. I did.
Q. Okay, and you prepared the case?
A. I did.
Q. And you tried the case.
A. -- I did.
Q. -- Is that correct?

A. I did.

THE COURT: If I may interrupt, it goes without saying that this is an ipso facto waiver of any attorney-client privilege. You would agree.

MS. DeJULIO: Yes, Judge.

THE COURT: Okay?

MS. DeJULIO: But as to the issues here, yes.

THE COURT: You know what I mean, Mr. Saluti, don't you?

MR. SALUTI: I sure do, Judge.

THE COURT: And you -- this -- this circumstance means a waiver of your conversations with your former client, correct?

MR. SALUTI: I'm aware, sir.

THE COURT: You understand what -- what we're talking about, Mr. Porter?

MR. PORTER: Yes.

THE COURT: Okay. I'm sorry to interrupt, Mr. Moskowitz, proceed.

MR. MOSKOWITZ: Okay, thank you.

BY MR. MOSKOWITZ:

Q. And you interviewed your client obviously before trial?

A. Yes, I did.

Q. And you discussed possible defenses with him?

A. Yes, I did.

Q. And did he relay some defenses to you?

A. He did.

Q. And what were some of -- what -- did he relay an alibi defense to you?

A. He did.

Q. Okay. And if you remember, do you remember the alibi defense?

A. I remember the alibi defense. I do not remember the, um, young woman's name who was the alibi witness.

Q. Okay. Did you interview her?

A. I believe so.

Q. Okay. And why -- why in your opinion, based upon your experience, didn't you call for an alibi witness?

A. In my experience, Mr. Moskowitz, um, generally, when I go to use an alibi witness in a case, whether it be a homicide or any other type of case, um, I try not to use, if I -- if I can, someone that's related to the individual -- or, in this instance, I believe the young lady was a paramour of Mr., uh, Mr. Porter's. Um, if I'm -- if I recall correctly, she was young. And I don't believe she had a terrific recollection of that evening, specifically him being in her home that evening. Um, so, strategically, I didn't think, uh, it

was prudent to use her as an alibi witness.

Q. Why did you not think it was strategically prudent?

A. I think one of the worst things you can do as a defense attorney in a homicide case or any other case is put on a bad alibi witness. And if I remember the issues in the case correctly, um, I believed that Mr. Porter would be successful at trial without the use of the alibi witness because the identification, in my opinion, and I believe the individual's name that one of the -- there was -- I believe there was three individuals involved. There was two individuals that, uh, were deceased. One individual, I think his name was David Veal, uh, he --

THE COURT: David who?

MR. SALUTI: Veal, V-E -- I want to say A-L, Judge, like the meat, but I'm not sure of the spelling.

THE COURT: Okay.

MR. SALUTI: Um, it -- when I -- when I remember reading the discovery and his identification of my client, I thought I could cross-examine him well enough that his identification wouldn't be, um, believed by a jury.

Uh, what -- what had happened was Mr. -- Mr. Veal had said that although -- if my memory serves me

-- the individual that shot Mr. Veal and the other two individuals put them basically on -- on the ground in a line, like laying down, face down on the ground. Um, and Mr. Veal put his hands -- and for the record, Judge, I'm taking my hands up in the air, placing them over head, uh, and inter -- interlacing my fingers behind me -- had his hands interlaced behind him and his face to the ground, uh, when the individual shot him. Uh, and I think the individual obviously believed he had killed Mr. Veal. Turned out he'd actually blown Mr. Veal's thumb off.

Mr. Veal, um, was I guess very smart or very scared, stood completed still. So, it was -- I believe it was believed by whoever shot him that he was dead, as well. Um, and I believe that when I cross-examined Mr. Veal, based upon the fact that it was such a stressful situation, that it happened quickly, um, and that he just -- I didn't think he got a good look at the individual, that -- that I would be successful in defending Mr. Porter, so I didn't pursue the alibi.

BY MR. MOSKOWITZ:

Q. So, it was a strategic decision not to pursue the alibi?

A. Yes, sir.

MR. MOSKOWITZ: I have no further questions.

THE COURT: Cross.

MS. DeJULIO: Thank you, Judge.

CROSS-EXAMINATION BY MS. DeJULIO:

Q. Mr. Saluti, you didn't speak to or interview Katrina Adams?

A. I honestly don't recall.

Q. You don't recall?

A. No.

Q. And, uh, you didn't send an investigator to take a statement?

A. I don't think so.

Q. Did you do any background check to see whether or not she had any criminal convictions?

A. Don't recall.

Q. You don't recall. To see whether she was employed?

A. Um, I'm pretty sure she had no criminal convictions, sitting here right now, um, --

Q. But back then, you didn't take steps to find out? (Pause). You didn't talk to her.

A. I don't think I did. I think I spoke to Mr. Porter about her, about their relationship and of that --

Q. But not to Ms. --

A. Not specifically --

Q. -- Adams, herself.

A. -- her, no.

Q. And it seems that your position is that if someone is a relative, or a friend, or close to the defendant, that you don't want to use them as an alibi witness.

A. That's correct to a certain extent.

Q. So, you pretty much limited yourself with regard to ever using an alibi defense, haven't you?

A. No, I've used them in the past.

Q. Well, most of the time when people are asked to account for their whereabouts, they're with family, friends, co-workers, people who arguably have a bias. Isn't that correct?

A. Absolutely.

Q. So, I would guess that in the jury trials that you did, there would be very few where you could have put on an alibi defense.

A. That's true.

Q. Now, you said that your strategy was to challenge the identification of, um, Mr. Porter by David Veal, correct?

A. Yes.

Q. And an alibi defense isn't incompatible with that, is it?

A. Not at all.

Q. In fact, it would actually strengthen a misidentification strategy, wouldn't it?

A. It would bolster it very much.

Q. Yeah. So, putting on an alibi defense in conjunction with a challenge to the identification, um, there's no, uh, reason that those two would be counter-productive.

A. Not at all.

Q. Um, with regard to the relationship between Mr. Porter and Mr. Ashford, that would only support your mistaken identification strategy, wouldn't it?

THE COURT: I'm sorry. Could you please repeat your question?

MS. DeJULIO: Yes.

BY MS. DeJULIO:

Q. Um, with regard to Ms. Adams' testimony regarding the relationship between Oscar Porter and Rayfield Ashford, that would only support a misidentification defense, wouldn't it?

A. Yes.

Q. If the two men knew each other, um, knew each other by name, um, that would be an important factor, wouldn't it, in challenging the identification?

MR. MOSKOWITZ: Judge, I'm going to object at

this point.

THE COURT: What's the objection?

MR. MOSKOWITZ: We're here about alibi. Now we're talking about misidentification, as opposed to alibi. And we're going into speculation because the two defendants -- because the victim and the defendant knew each other, that, therefore, that would aid as to whether he would have killed him or not. And I submit that now we're engaging in speculation that will not -- it just have no relevance to this case or this inquiry or this hearing.

THE COURT: Would you respond, please?

MS. DeJULIO: Judge, once again, I think that it would have all the relevance to an identification defense. Um, --

THE COURT: Actually, but -- but that's not -- the -- the -- the -- the -- the issue is this -- and I understand what's going on -- Mr. -- Mr. Saluti says, if he's to be believed, that as a strategic matter --

MS. DeJULIO: Yes.

THE COURT: -- he does not generally like to call alibi witnesses when the alibi witness is a paramour or -- or related to the defendant. He says he especially does not like -- and you can correct me if I'm wrong -- he says, uh, that strategy he usually

employs in situations where the I.D. itself, he believes he can cross-examine and, uh, eviscerate its credibility.

Like, where he says that when the main witness had -- had their head down to the ground, it seems that he's saying that the -- the risk of putting on the paramour or a bad alibi witness is outweighed by the utility of trying to destroy the bad I.D.

MS. DeJULIO: Judge, I'm just --

THE COURT: So, I'm -- so, I can understand for -- for that -- for the purpose of the -- the credibility, assessing Mr. -- credibility -- Mr. Saluti's credibility of that which he told me, I could see where these questions would be relevant. And that is why I would overrule the objection.

MS. DeJULIO: Thank you, Judge.

THE COURT: Right.

MS. DeJULIO: Um, --

MR. SALUTI: Can I ask you -- can I ask you to repeat the question? I don't remember it.

MS. DeJULIO: Yes.

MR. SALUTI: Thank you.

BY MS. DeJULIO:

Q. With regard to your decision not to call Christina (phonetic) Adams, I am simply saying the

strategy you chose to pursue, to challenge the identification, that would have been helped or supported by testimony regarding the relationship between Mr. Porter and Mr. Ashford.

A. Correct.

Q. In determining whether a witness should be called, um, obviously, bias is one factor which you would consider, correct?

A. Yes.

Q. Would you also not consider whether someone had a clean record, no criminal convictions?

A. Of course.

Q. Wouldn't it be important to gauge the witness' level of education?

A. Sure.

Q. Or their level of employment?

A. Yes.

Q. Aren't these things which weigh in a positive manner before the jury in assessing the credibility of a witness?

A. Yes.

Q. So, if -- if a witness has a clean record, is employed, has graduated from high school, is perhaps attending college classes, wouldn't you say those are factors that should be weighed in the balance in

deciding whether or not to call a witness?

A. Absolutely.

Q. And wouldn't you say that it's important if the testimony the witness is giving would not contradict the strategy you've chosen to pursue?

A. I didn't think that form of the question, but, yes, I think I know where you're going.

Q. If -- if -- if the witness' testimony would support your chosen strategy, that would be a factor to consider in deciding whether or not to call that witness.

A. That would be one of the factors I would consider, of course.

Q. And with regard to calling family, or friends, or co-workers of a defendant, would you agree that it would help humanize a defendant in the eyes of a jury for the jury to see that the defendant has a family member, or close friend, or lover who is -- is, uh, has no criminal record and who makes a good impression on the jury?

A. I would have to agree with that, sure.

Q. That would be an added bonus to putting on an alibi witness who is -- has some bias because of the relationship to the defendant?

A. It would.

MS. DeJULIO: Thank you.

THE COURT: Mr. Moskowitz.

RE-DIRECT EXAMINATION BY MR. MOSKOWITZ:

Q. Mr. Saluti, um, counsel's referred to positives. Now negatives would be if you had a alibi witness who'd failed to come forward. Would that be a negative in your consideration?

A. Yes.

Q. And if the alibi witness was sketchy as to specifics, details, would that weigh heavily on your, uh, ...

A. Very --

Q. ... evaluation?

A. Very much so.

MR. MOSKOWITZ: I have no further questions, Your Honor.

THE COURT: Correct me if I'm wrong, but did you say that was another reason why you didn't, uh, use the potential alibi witness?

MR. SALUTI: That was something I put into my formula in that decision, Judge.

THE COURT: Re-cross?

RE-CROSS EXAMINATION BY MS. DeJULIO:

Q. If a witness didn't approach the police, wouldn't it be important to find out the reason why?

A. (Pause). I don't think I understand the question.

Q. If -- if you have a situation, as in this case, where Christina (phonetic) Adams did not approach the police with the alibi information, wouldn't it be important to speak with her and find out why she didn't go to the police?

A. Yes.

Q. And if she had a good explanation for why she didn't go to the police, um, wouldn't that be a factor you would want to consider?

A. Yes, but in this one, I -- in this specific case, I don't recall, um, why that was.

Q. If I told you that she testified that she was intimidated by the police because they broke down the door to the apartment that she shared with her mother and her sister, um, might that not be an explanation that would satisfy a jury as to why she didn't go to the police?

A. I don't know it would satisfy a jury, but it's certainly something to consider.

MS. DeJULIO: Okay, thank you.

THE COURT: Anything, Mr. Moskowitz?

MR. MOSKOWITZ: Nothing further, Your Honor.

THE COURT: You may step down, sir. Thank you.

MR. SALUTI: Judge, may I be excused? To leave?

THE COURT: Sorry?

MR. SALUTI: To go home -- I mean I need to go some place. Can I be excused?

THE COURT: Well, there's no more reason for you to be here. The -- those who subpoenaed you are no longer questioning you.

MR. SALUTI: Just want to make sure.

THE COURT: -- Right.

MR. SALUTI: -- Thank you, Judge.

THE COURT: Thank you. (Pause). Any other witnesses, Mr. Moskowitz?

MR. MOSKOWITZ: No, Your Honor.

THE COURT: I'll entertain argument at this time.

MS. DeJULIO: Judge, I did file a -- an in limine motion asking the court to take judicial notice that Mr. Saluti was recently reprimanded and suspended from practice by the Supreme Court. And that during the course of that decision, the Supreme Court upheld an allegation that he was, um, not truthful in his professional conduct.

So, I would ask the court, as I did in my motion, to take that into consideration if there is a

question of credibility, um, as between Mr. Saluti and Ms. Adams. Quite frankly, I --

THE COURT: Are you done on that particular point? Because there is something I'd like to say on the point of the judicial notice.

MS. DeJULIO: (Pause). -- Yes.

THE COURT: -- Were you done with that?

MS. DeJULIO: Yes.

THE COURT: And as I understand it, you weren't going to oppose the application to take judicial notice. Is that right?

MR. MOSKOWITZ: That's correct, Your Honor.

THE COURT: It's an -- I found it rather curious that he was not cross-examined on that particular point. That must have been another example of someone's strategy. You can continue at this time.

MS. DeJULIO: Judge, uh, I didn't think it was necessary to cross-examine him as to the contents of an opinion by the Supreme Court.

THE COURT: Understood.

MS. DeJULIO: And I am not here to take relish in, uh, necessarily embarrassing a witness when I think the pertinent information is available to the court through the Supreme Court's decision.

THE COURT: I understand that, as well.

MS. DeJULIO: Um, however, I think that as the testimony has come in, I'm not sure that there is a great deal of credibility to assess, um, the witnesses. Uh, I think Mr. Saluti has agreed that he was aware of Ms. Adams' availability and had been told by Mr. Porter that she could furnish alibi information along with other perhaps relevant information. Um, and he chose not to interview her or have her interviewed by his investigator.

And I would submit based upon State v. Savage (phonetic) and State v. Bay (phonetic), that, um, a legitimate tactical decision cannot be made in a vacuum. Um, it is one thing for a -- an attorney to conduct an investigation, to interview witnesses, and then come to a decision that he's not going to call them. But he cannot simply, um, decide without any information, without any further investigation that it would be a bad strategy to call a witness -- in this case, an alibi witness.

In State v. Savage, for example, um, the trial attorney decided not to go with an insanity defense in a capital murder trial. But it turned out that he had never interviewed the defendant's family, he had never looked at his prior medical and psychiatric records, that he had not done an

investigation such that he could make an intelligent decision that he did not want to pursue that defense.

And I would submit that the same, uh, legal principles apply here, that Mr. Saluti did not speak to Katrina Adams, interview her as to what information she had. He did not know whether or not she would make a good witness. And I would submit that Your Honor has the opportunity to see her, um, to see how well spoken she is, uh, that she is a person without criminal convictions, that she has a good educational background, that she holds a job that puts her in a management position. Uh, this is a person who would have made a very good impression on the jury. But he wouldn't have known that because he never spoke to her or had anyone from his office speak to her.

Um, he did not take into consideration the positives and the negatives. While certainly it would be a negative that, um, Ms. Adams was, uh, living with Mr. Porter, that they had a romantic relationship, but that's only one factor in the balance. And he did not know or take into consideration the other positive factors.

In addition, I think any experienced defense attorney knows that, um, it helps humanize a defendant when a family member testifies, particularly one who

would make a nice impression. That, um, it comes to the defendant's benefit that someone, um, of that caliber is related, or is a friend, or is involved in a romantic relationship with him. So, there were many positives that were not considered. And I would submit that this violates the first prong of the Strickland test, that an attorney, um, must conduct an appropriate investigation before he can make a legitimate tactical decision. And I would submit that in this case, um, Mr. Saluti failed to do that. And as a result, he did not call a witness who would have made a good impression.

And, furthermore, the strategy he did adopt, which is to challenge the identification made by the surviving victim, um, an alibi defense would not be incompatible with that; would, in fact, be supportive of the, um, position that the surviving victim was mistaken, could not have made an accurate identification under the circumstances.

There are times when a defense attorney has mutually opposing defenses and has to make a choice. And that's a very different tactical decision because, uh, for example, you cannot have a defendant who says I didn't do it on the one hand and then raise as a self-defense defense on the other. But Mr. Saluti was not

in that situation at all. By calling Ms. Adams, he would be supporting what he decided was the better or the stronger approach to challenge the identification. So, I would say that he violated the first prong of the Strickland test.

The second prong, of course, is, okay, given that the attorney didn't do what he should have done or made an error that violated professional norms, did that have an impact on the trial? Um, would there be probable cause to believe that the outcome would be different? And in assessing that, I would ask the court to keep in mind that this was not a very strong case. In fact, the evidence was so unpersuasive that the jury acquitted Mr. Porter on one count and was hung on several other counts.

So, clearly, this is not a case where the evidence was overwhelming. This was a completely circumstantial case. We do not have a confession. We don't have any, um, forensic evidence tieing Mr. Porter to the case. The only evidence was an identification made almost a year after the crime based upon photographs.

So, while there are some cases where the evidence is so overwhelming that an attorney's error could be considered harmless, I would submit that this

case is not one of them. This was a close case. And in such a situation, um, a failure to call a witness can make a difference between an acquittal and a conviction. So, I would submit that this error in the context of the evidence that came out at trial probably affected the outcome and, therefore, that we have satisfied both prongs of the Strickland test.

THE COURT: What a fortunate man you are, Mr. Porter, and I say this without regard to the merits of this case and how I will decide it, but you sure do have a very articulate attorney representing you.

MS. DeJULIO: Well, thank you very much, Judge.

THE COURT: Mr. Moskowitz.

MR. MOSKOWITZ: Judge, what we have is one, it wasn't a close case; it was a riveting witness, as Judge Casale noted in his previous decision. Mr. Veal was riveted. He lost his thumb. He remembered who shot him, Judge. So, it was persuasive beyond belief. It was persuasive beyond a reasonable doubt.

And counsel says they found him not guilty and hung. What happened was they found him guilty originally, and then there was hubbub in the courtroom and the witness -- and the jury was intimidated. And that was a whole other issue. So, that's not quite

accurate. I understand on the naked transcript, it may seem that way, but it wasn't. Mr. Veal, as Judge Casale said, was one of the most riveting witnesses you could ever want to see. But that's as far as the outcome.

Now, as far as Mr. Saluti's evaluation, what did he say? There were two factors here. He was concerned about the sketchiness of the alibi. He said he didn't remember if he talked to Ms. Adams. But he must have gotten the information 'cause as you, the court now witnesses Ms. Adams -- and in all fairness to Ms. -- it is many years later -- but it is a very sketchy alibi -- the day before, the day after -- I know I was repetitive, Judge, but I was repetitive for a point.

All she remembers from that day is not what they did, not what they ate, but he slept on my -- I slept on his chest, he couldn't have gone anywhere at 5:00 A.M. And she didn't remember when they went to bed. It's a very sketchy detail, Judge.

And if I was in front of a jury in that situation -- and I think many trial counsels would agree -- alibis can be deadly. They can take a case that's a close call and make it look really bad if that's your only witness. A witness like that who's

the paramour, as Judge -- uh, as, uh, Mr. Saluti pointed out, it could be devastating.

Here you have a close person, and that's what he came up with? I would submit that that would bolster the identification in this case. The jury would be going this is what you got? 'Cause she was subject to cross-examination, Judge, and I assure you that if she testified then, the cross would have been just as thorough and probably more thorough. For the purposes of this hearing, she gave sketchy details, Judge.

So, Judge, the second prong will never be satisfied 'cause you have the record from Judge Casale saying what a great witness Mr. Veal was. So, I don't think it's outcome determinative. But first of all, Mr. Saluti was correct in his evaluation, but he's entitled to make a tactical decision. Alibi with an I.D. case can also be a deadly combination in terms of success. If you have a weak alibi witness, all of a sudden you're back in the game if you're the state when we cross-examine them. And that's happened many times 'cause the defense is what you put on, this is what you give the jury.

And I submit in this case, it's not a question of truthfulness, it's a question that she had

no details, she had nothing to add. All she can say is like habit evidence. Well, we always slept together. We must have slept together that night, Judge. And it's based on that, Judge, I would ask that this P.C.R. evidence hearing that the motion be denied, Thank you.

THE COURT: Would you take a moment to give the state's assessment of Mr. Saluti's credibility in light of the, uh, Supreme Court's opinion about him that I'm taking judicial notice of? I think you need to address that some way.

MR. MOSKOWITZ: Sure.

THE COURT: You can't just leave it there. Of course you could, but it wouldn't be well advised.

MR. MOSKOWITZ: Judge, this incident, this unfortunate incident for which he was subject to disciplinary -- by the Supreme Court occurred almost a decade later from this incident. And I submit it doesn't -- you got to hear him testify. He testified truthfully on the stand, Judge. He said when he didn't remember something. He said what he did remember. He stated how his strategy, his general trial tactics. He was straightforward, Judge.

That Supreme Court decision does not affect how he acted on that date nine years ago. It's certainly unfortunate any member of the Bar has that,

Judge, of course. But I would submit to you today that he testified truthfully as to this specific incident barring what was -- barring his discipline before the Supreme Court. And I think the court can see his credibility. He did not come here with an agenda.

THE COURT: Anything else, Ms. DeJulio?

MS. DeJULIO: Uh, two things, Judge. First, with regard to the alleged sketchiness of the alibi, I think that it's part of our human experience that there are certain events in our life which are very devastating or troublesome or -- or -- or make us grievy (phonetic) -- grief -- grieve. Um, and we recall very clearly the events of that day, um, whereas the day before and the day after, um, disappear in our memories.

This was a morning when Ms. Adams found out that someone she had known from childhood, that she had gone through elementary school with had been murdered. Um, and it's very clear that the details of that morning stood out in her mind. The day before and the day after were routine days. And, so I don't think that an alibi can be considered sketchy because it pertains to a particular day when a very devastating event occurred.

Um, with regard to the disciplinary opinion

being, uh, nine years after this trial, uh, when we attack the credibility of a witness in a criminal trial based upon their criminal record, um, I think that anything under 10 years is considered fair game.

So, I would just simply say that while this is a little bit different, the timeframe I think with regard to credibility is still, um, valid in this context as it would be using criminal convictions in a jury trial to affect the credibility of a testifying witness.

THE COURT: You will get my written decision in a reasonable time from now. But before I let you go, Mr. Moskowitz, do you have the brief from earlier proceedings?

MR. MOSKOWITZ: I have Ms. DeJulio's -- I think you included everything in your brief, did -- did you?

MS. DeJULIO: Um, I did not include the state's brief. I did include the original brief filed on the first P.C.R. by the prior attorney, Mr. Anniwahu (phonetic).

MR. MOSKOWITZ: I'll see what I have, Judge. I have the decision, Judge.

THE COURT: I'll tell you what.

MR. MOSKOWITZ: Here you go, Judge. I think