

No. _____

IN THE
Supreme Court of the United States

RAHEEM WILCOX,

Petitioner,

vs.

**WARDEN NEW JERSEY STATE PRISON;
ATTORNEY GENERAL NEW JERSEY,**

Respondents.

*On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Third Circuit*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Defendants have a Sixth-Amendment right to the effective assistance of counsel at the sentencing phase of a criminal proceeding. In capital cases, effective assistance means that counsel should investigate and submit evidence of the defendant's background and mental health history to mitigate against a death sentence. The Court has not decided whether the Sixth Amendment requires that counsel present such evidence during the sentencing phase in non-capital cases in which judges or juries also reduce penalties if mitigating factors (including a defendant's mental health and related background information) outweigh aggravating factors.

In this case, the Third Circuit concluded that counsel engaged in a reasonable strategy at sentencing to withhold known and available psychiatric reports and related expert testimony regarding the petitioner's mental health history and troubled background that would have satisfied a mitigating factor under state sentencing guidelines to support a lesser sentence than the 40-year sentence the petitioner received for his murder conviction. The court reasoned that the mitigating evidence also contained some potentially unfavorable information and would possibly open the door to the state's rebuttal evidence regarding the defendant's mental health history. The question presented is therefore as follows:

At sentencing in a non-capital case, does the Sixth Amendment require that counsel present evidence of a defendant's troubled background and mental health issues to satisfy a mitigating factor that would support a lesser sentence than the one the defendant received?

LIST OF PARTIES

Petitioner, Raheem Wilcox, is an inmate incarcerated in New Jersey pursuant to a 40-year sentence with parole eligibility after serving a minimum of 30 years. Respondents are the State of New Jersey, the New Jersey Attorney General, and the Warden of the state facility in which Mr. Wilcox is incarcerated.

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INTRODUCTION AND SUMMARY

Raheem Wilcox requests that the Court grant his petition for a writ of *certiorari* to resolve an important constitutional question of first impression that should be settled by this Court.

The question in this case is whether, at sentencing in a non-capital case, the Sixth Amendment requires that counsel present evidence of a defendant's troubled background and mental health issues to satisfy a mitigating factor that would support a lesser sentence than the one the defendant received. The answer is yes in capital cases. The answer should be yes in a non-capital case based on related precedent and prevailing professional standards.

In this case, counsel for Mr. Wilcox secured two psychiatric reports during trial preparation. The state secured its own. The reports demonstrated that Mr. Wilcox suffered from a troubled background and experienced diminished mental health. New Jersey law on sentencing includes a mitigating factor that accounts for a defendant's mental health status and related background information that, although not sufficient to excuse guilt, should mitigate in favor of a lesser sentence.

Counsel never submitted any of this evidence at sentencing or called any witnesses to sponsor related testimony. As a result, the sentencing judge found two mitigating and two aggravating circumstances and sentenced Mr. Wilcox to 40 years in prison – ten more years than the minimum – because the aggravating circumstances “slightly outweighed” the mitigating circumstances.

The decision to withhold the mitigating evidence violated Mr. Wilcox’s Sixth Amendment right to effective assistance of counsel at sentencing under *Strickland v. Washington*, 466 U.S. 668, 689-92 (1984). Mr. Wilcox – a first-time offender with no prior history of violence or run-ins with the law – is confined in a New Jersey state prison for 40 years for the offense of murder when he should be serving something less than 40 years. Had counsel submitted the psychiatric evaluations at sentencing to support additional mitigating factors that the state judge is required by law to consider and apply, the mitigating factors would have outweighed the aggravating factors and the result would have been different. Because any amount of jail time resulting from ineffective assistance of counsel has constitutional significance, Mr. Wilcox was entitled to *habeas* relief.

The Third Circuit concluded, however, that counsel had no obligation to present the mitigating evidence at sentencing because it contained potentially unfavorable information that could have opened the door to rebuttal evidence from the state. In effect, the court’s ruling is that counsel’s decision to withhold available evidence of a defendant’s troubled background and diminished mental health is *per se* a “reasonable strategy” because such evidence almost always contains potentially unfavorable information that may open the door to rebuttal evidence.

As described below, the court’s decision creates a heightened standard for *habeas* petitioners asserting sentencing-phase ineffective-assistance claims in non-capital cases based on a failure to present mitigating evidence. The court’s rationale also engenders a split with the Fifth and Sixth Circuits, both of which have rejected the Third Circuit’s “reasonable

strategy” rationale as a basis to excuse counsel’s failure to present mitigating evidence that could result in a lesser sentence. The Court should grant the petition and hold that the Sixth Amendment requires that counsel present evidence of a defendant’s troubled background and mental health issues to satisfy a mitigating factor that would support a lesser sentence than the one the defendant received.

OPINIONS BELOW

The opinion of the Third Circuit (Appendix A) is unreported but available at *Warden New Jersey State Prison; Attorney General New Jersey*, --- Fed. Appx. ---, No. 16-1024, 2018 WL 317264 (3d Cir., Jan. 8, 2018). The opinion of the district court (Appendix B) is unreported but available at *Wilcox v. Warren*, No. 13-3524, 2015 U.S. Dist. LEXIS 167242 (D.N.J., December 15, 2015). The opinion of the state court (Appendix C) is unreported but available at *State v. Wilcox*, No. A-1188-10T4, 2012 WL 3116701 (N.J. Super., July 20, 2012).

JURISDICTION

The court of appeals entered its judgment on January 8, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The court of appeals and the district court had jurisdiction under 28 U.S.C. §§ 1331 and 2254.

STATUTORY PROVISIONS INVOLVED

Section 2254 of the Anti-terrorism and Effective Death Penalty Act (“AEDPA”), 28 U.S.C. § 2254, is excerpted in relevant part at Appendix “D.”

STATEMENT OF THE CASE

Mr. Wilcox is confined in a New Jersey state prison. He is serving a sentence of 40 years with a possibility of parole after serving 30 years.

On April 13, 2000, Mr. Wilcox and his then girlfriend, Ms. Ernestine Williams, engaged in a violent altercation that resulted in her death. A grand jury later indicted Mr. Wilcox for first-degree murder and other offenses under New Jersey law.

During trial preparation, counsel for Mr. Wilcox received psychological evaluations from two physicians regarding Mr. Wilcox's background and mental health history. Robert Latimer, M.D., a board certified psychiatrist, opined that at the time of the offense Mr. Wilcox: (a) was unstable; (b) had been exposed to post-traumatic stress "stemming from early childhood experiences" involving his mother's violence; (c) suffered from paranoid traits resulting in suspicion; (d) had a disorganized mind; and (e) was probably unable to appreciate the quality of his acts at the time of the offense.

Dr. Matthew Johnson, a licensed psychologist, separately reached similar conclusions about Mr. Wilcox's mental health at the time of the offense. Dr. Johnson opined, among other things, that Mr. Wilcox's psychological testing revealed: (a) "psychosis of the paranoid variety, such as delusional persecutory thinking, ideas of reference, grandiosity, and projection"; (b) post-traumatic stress disorder; (c) neurological symptoms; and (d) a desensitization to violence.

Drs. Latimer and Johnson both concluded in their separate reports that the effects of Mr. Wilcox's troubled background and unaddressed mental health issues converged at the time of the offense to trigger

his actions. Neither Drs. Latimer nor Johnson concluded or opined that Mr. Wilcox is a recidivism risk.

On behalf of the state, Dr. Steven S. Simring conducted an evaluation of Mr. Wilcox and reviewed the evaluations of Drs. Lattimer and Johnson. Dr. Simring's report disputed the conclusions of Drs. Latimer and Johnson that the psychological evidence support an insanity defense. However, Dr. Simring conceded that Mr. Wilcox's challenging childhood and background that contributed to his diminished mental health "*may be important at the time of sentencing*" although (in his opinion) the evidence was not sufficient to establish an insanity defense.

At trial, counsel did not introduce evidence of Mr. Wilcox's troubled background and diminished mental health reflected in the psychological reports of Drs. Latimer and Johnson, nor did he offer any testimony from them or raise the issue in summations. In turn, the state did not introduce Dr. Simring's report or submit any testimony from him.

A jury convicted Mr. Wilcox of first-degree, premeditated murder and the various other offenses. The penalty is anywhere from a minimum of 30 years in prison to life in prison. N.J. Stat. § 2C:11-3(b)(1). The sentencing judge is required to evaluate aggravating and mitigating circumstances under N.J. Stat. § 2C:44-1b, including, among other things, evidence submitted by the defendant about whether there are "substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense." N.J. Stat. § 2C:44-1b(4). This section has been interpreted to include mental health and related background information of the defendant. *State v. L.V.*, 979 A.2d 821 (N.J. Super. 2009).

At the sentencing phase, counsel for Mr. Wilcox argued on behalf of his client and submitted letters written on behalf of Mr. Wilcox. Mr. Wilcox and his sister both submitted statements. Counsel did not submit either of the psychological reports of Drs. Lattimer and Johnson or offer their testimony regarding their conclusions about the troubled background and diminished mental health that they believed affected Mr. Wilcox's behavior at the time of the offense.

The judge sentenced Mr. Wilcox to 40 years in prison. Among other things, the judge stated:

- “[T]o be honest with myself and to be honest with the law and the state of the law, I believe that Mr. Wilcox’ sentence should be at the bottom end of that range [*i.e.*, the minimum of 30 years] and not the top of that range.”
- He also stated that “[t]his is not a person who has a long history of prior crimes, whether they be violent or non-violent. I find that mitigating factor 7 which is no prior criminal history exists, and mitigating factor 12, that there’s a willingness of the defendant to cooperate with law enforcement authorities once the crime was committed. I find those two exist.”
- The judge stated that the sentence should be “towards the bottom range of premeditated murders and that’s somewhat more than the minimum” and that the “aggregating factors somewhat outweigh[ed] the mitigating factors.”

The judgment of conviction and sentencing issued by the judge states his reasons for imposing the 40-year sentence. The judgment of conviction and sentencing states that “aggravating factors 3 and 9 out-

weigh mitigating factors 7 and 12.” Aggravating factor 3 is “[t]he risk that the defendant will commit another offense” and aggravating factor 9 is “[t]he need for deterring the defendant and others from violating the law.” N.J. Stat. § 2C:44-1a(3), (9). Mitigating factor 7 is “[t]he defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense”; and mitigating factor 12 is “[t]he willingness of the defendant to cooperate with law enforcement authorities.” *Id.* § 2C:44-1b(7), (12). In other words, the “score” was 2-2 and the judge made a call to sentence Mr. Wilcox to ten years more than the minimum rather than the minimum urged by counsel.

After a direct appeal from his conviction (which the appellate division denied followed by the state supreme court denying certification), Mr. Wilcox filed a petition for post-conviction relief (“PCR”) in state court and was later represented by new counsel. The PCR petition alleged (among other things) that (a) counsel was ineffective under the Sixth Amendment for failing to submit at trial evidence of Mr. Wilcox’s diminished mental health and troubled background in support of an insanity defense; and (b) counsel was ineffective at sentencing for failing to submit this evidence as a mitigating factor.

The judge orally denied Mr. Wilcox’s PCR petition (except for one issue held over for further hearing that is unrelated to this appeal). At the PCR hearing, the judge concluded that counsel for Mr. Wilcox made strategic decisions during the guilt phase of trial to forego a provocation or insanity defense and to pass on certain potential lines of cross-examination. Regarding the sentencing-phase inef-

fective-assistance claims, the judge concluded that Mr. Wilcox submitted no psychological evidence to support them; the judge never concluded that counsel for Mr. Wilcox engaged in any strategic decisions to withhold at sentencing any evidence of Mr. Wilcox's diminished mental health and troubled background.

On appeal from the denial of post-conviction relief, Mr. Wilcox (again with new counsel) raised the ineffective-assistance claims. The appellate court stated – without any supporting evidence in the record – that Mr. Wilcox's counsel at trial and sentencing was effective under constitutional standards because (a) he did a good job getting the sentencing judge to give Mr. Wilcox a prison term on the lower end of the sentencing spectrum; and (b) he withheld mitigating evidence of Mr. Wilcox's troubled background and diminished mental health as a strategy to avoid rebuttal evidence from the state that would have contradicted an insanity defense during trial. The state supreme court denied certification.

Mr. Wilcox filed a petition for a writ of *habeas corpus* in the district court in which he raised the ineffective-assistance claims (among other claims). The district judge, without a hearing, denied the petition with prejudice. With respect to the sentencing-phase ineffective-assistance claim, the district judge adopted the rationale of the state court and concluded that its decision is not contrary to, or an unreasonable application of, clearly established federal law.

Mr. Wilcox appealed on January 5, 2016. The Third Circuit entered a certificate of appealability on August 4, 2016, that states: “The application for a certificate of appealability is granted as to Wilcox's claim that his Sixth Amendment rights were violated

when trial counsel failed to present available expert psychiatric reports at sentencing. Although we express no opinion as to whether Wilcox will ultimately be entitled to relief, we are satisfied that he “has made a substantial showing of the denial of a constitutional right” as to that particular claim. 28 U.S.C. § 2253(c)(2). In all other respects, the application for a certificate of appealability is denied.” The court appointed the undersigned as *pro bono* counsel for Mr. Wilcox.

After briefing and argument, the Third Circuit affirmed. The court held that counsel engaged in a reasonable strategy to withhold mitigating evidence during sentencing because it contained negative information about Mr. Wilcox and would have invited the state to submit rebuttal evidence and testimony. The court concluded, in the alternative, that Mr. Wilcox suffered no prejudice from counsel’s decision because the sentencing judge – who admittedly did not review the psychiatric reports or hear related testimony – stated that counsel did the best job he could at sentencing.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition to determine whether the Sixth Amendment requires that counsel present evidence of a defendant’s troubled background and mental health history at sentencing in a non-capital case to satisfy a mitigating factor that would support a lesser sentence than the one the defendant received. The Third Circuit concluded otherwise based on a “reasonable strategy” rationale that, if allowed to stand, creates a heightened test under *Strickland* for non-capital cases that departs

from this Court's precedent and engenders a circuit split that the Court should address.

I. THE COURT SHOULD RESOLVE THE STANDARD FOR SIXTH AMENDMENT CLAIMS THAT ARE BASED ON A FAILURE TO PRESENT MITIGATING MENTAL HEALTH EVIDENCE DURING SENTENCING IN A NON-CAPITAL CASE.

Although the issue is settled in capital cases, the Court has yet to decide whether the Sixth Amendment requires that counsel present evidence of the defendant's mental health issues and troubled background during the sentencing phase in non-capital cases when the evidence mitigates in favor of a lesser sentence. The Court of Appeals said no. The answer should be yes.

A. *As in capital cases, the Sixth Amendment should require that counsel present evidence of a defendant's background and mental health history during the sentencing phase in non-capital cases to mitigate in favor of a lesser sentence.*

As a threshold matter, "evidence about a defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). The right to have such mit-

igating evidence presented means little, however, if counsel fails to present a case for mitigation at sentencing. *Strickland v. Washington*, 466 U.S. 668, 706 (1984) (Brennan, J., concurring).

A defendant’s mental health history is particularly important evidence at the sentencing phase. The question at sentencing is not whether the defendant committed the offense or whether he should be excused from committing the offense; the question is whether there are mitigating circumstances that suggest the defendant should not be punished as harshly. Thus, the sentencing phase is “the stage of the proceedings where counsel can do his or her client the most good.” See *Glenn v. Tate*, 71 F.3d 1204, 1207 (6th Cir. 1995) (quoting *Kubat v. Thieret*, 867 F.2d 351, 369 (7th Cir. 1989)).

In view of those principles, the Court consistently has held that criminal defendants in capital cases have a right under the Sixth Amendment to have their counsel investigate and submit mitigating evidence of their background and mental health status at the sentencing phase in order to avoid the death penalty. See *Porter v. McCollom*, 558 U.S. 30, 30-31, 40 (2009) (defense counsel’s failure to “*uncover and present*” mitigating evidence regarding defendant’s mental health, family background, or military history constituted ineffective assistance of counsel) (emphasis added); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); *Rompilla v. Beard*, 545 U.S. 374 (2005).

In fact, the Court has held that a capital sentencer “may not be precluded from considering, as a mitigating factor, any aspects of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a

sentence less than death.” *See Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978).

When evaluating ineffective-assistance claims at the sentencing phase in capital cases, the Court consults objective standards developed by the American Bar Association. *See Wiggins*, 539 U.S. at 524 (ABA standards are “guides to determining what is reasonable” under *Strickland*). Under those standards, counsel should investigate “to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.” *See* ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES § 11.4.1(C) (1989) (revised 2003); *see also* ABA CRIMINAL JUSTICE STANDARDS ON MENTAL HEALTH §§ 7-9.1-7-9.8 (revised 2016).

The Court has applied these concepts in other contexts, including non-capital cases, when a defendant’s background and mental health status are relevant factors to determine the constitutionality of penalties for crimes. For example, the Court has held that mandatory life sentences for juveniles violate the Eighth Amendment’s prohibition against cruel and unusual punishment precisely because those mandatory sentencing schemes for juveniles fail to account for the juvenile defendant’s maturity, background, mental health, and other factors that might mitigate in favor of something less than a life sentence without parole eligibility. *See, e.g., Miller v. Alabama*, 567 U.S. 460, 474-75 (2012).

Although this case presents an issue of first impression for the Court, the same objective standards that apply to counsel’s failure to submit mitigating mental-health and related background evidence should apply in non-capital cases as surely as they

apply in death penalty cases. *See, e.g., Glover v. United States*, 531 U.S. 198, 204 (2001); Carissa Byrne Hessic, *Ineffective Assistance at Sentencing*, B.C. L. Rev. 1069, 1098-1122 (2009) (discussing standards of performance of counsel under *Strickland* in non-capital cases involving discretionary sentencing).

As in capital cases, the ABA has developed similar objective standards that apply to counsel's performance in non-capital cases. In determining what is "reasonable" during the sentencing phase, counsel "*should present all arguments or evidence which will assist the court or its agents in reaching a sentencing disposition favorable to the accused.*" *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION § 4.81(b) (1993) (emphasis added). Subsection (d) conveys the even more compelling mandate that counsel "*should gather and submit to the presentence officers, prosecution, and court as much mitigating information relevant to sentencing as reasonably possible.*" *Id.* 4.81(d) (emphasis added). *See also* ABA CRIMINAL JUSTICE STANDARDS ON MENTAL HEALTH § 7-8.5 (revised 2016) (outlining standards for sentencing proceedings in non-capital cases involving mental health issues).

Other guidelines explicitly state that counsel's obligation under the Sixth Amendment in capital and non-capital cases includes the presentation of evidence at sentencing that explains the defendant's background and mental health status. *See* National Legal Aid and Defender Association, *Performance Guidelines for Criminal Defense Representation* § 8.1(a)(3) (1995) (counsel should "ensure [that] all reasonably available mitigating and favorable information, which likely to benefit the client, is present-

ed to the court”); Anthony G. Amsterdam & Randy Hertz, *Trial Manual 6 for the Defense of Criminal Cases* §§ 16.1-16.7 (6th ed. 2016); Miriam S. Gohara, *A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 AM. J. OF CRIM. L. 41, 63-66 (2013) (summarizing the guidelines for submitting mitigating mental health information in non-capital cases).

Counsel’s duty to submit evidence of a defendant’s background and mental health situation is particularly important in situations in which state law requires that judges or juries apply mitigating factors supported by the evidence to reduce an offender’s penalty. Many states have sentencing guidelines for capital and non-capital cases that utilize mitigating circumstances to reduce penalties. *See, e.g.*, National Center for State Courts, *State Sentencing Guidelines* (2008), available [here](#) (profiling 21 states with discretionary sentencing systems that utilize mitigating and aggravating factors).

In states like New Jersey, it is reversible error if a judge finds (or should have found based on the evidence) mitigating factors that outweigh aggravating factors and nevertheless imposes a harsher sentence. *See, e.g.*, *State v. L.V.*, 979 A.2d 821 (N.J. Super. 2009) (“Indeed, a trial judge is *required* to consider all of the aggravating and mitigating factors and to find those supported by the evidence. Error by the trial court in determining the existence of any aggravating or mitigating factors will nullify the weight accorded to such factors and materially alter the calculus in the ensuing balancing of aggravating and mitigating factors.”) (emphasis in original; quotations and citations omitted).

Under objective standards, then, counsel should have a duty in non-capital cases to submit evidence

of a defendant's background and mental health history to satisfy mitigating factors that sentencing judges or juries are required by law to consider and weigh in favor of a lesser sentence. The rule is consistent with the Court's jurisprudence in capital cases. When, as here, it is reasonably probable that the mental-health and related evidence supports an additional mitigating factor under sentencing guidelines that would "tip the scale" in favor of a lesser sentence, then the failure to submit that evidence is at once objectively unreasonable and prejudicial such that the *habeas* petitioner is entitled to relief.

Accordingly, the Court should grant the petition and conclude that effective assistance at the sentencing phase means that counsel should present evidence of a defendant's mental health issues and related background information if the evidence satisfies a mitigating factor to support a lesser sentence.

B. The Third Circuit's decision creates a heightened standard for habeas petitioners asserting sentencing-phase ineffective-assistance claims in non-capital cases based on a failure to present mitigating evidence.

The court of appeals avoided the analysis above by characterizing counsel's decision to withhold mitigating mental health evidence during the sentencing phase as a part of a "reasonable strategy" because (a) it also contained potentially negative information about Mr. Wilcox that the state might exploit; and (b) the state would have offered its expert report and rebuttal testimony.

There are several problems with the Third Circuit's analysis that the Court should address. At the outset, the Court has rejected attempts to create a heightened *Strickland* standard in sentencing-phase ineffective-assistance cases that do not involve the death penalty. *Glover*, 531 U.S. at 204. In *Glover*, the Court rejected the Seventh Circuit's rule that an increase of 6 to 21 months in a defendant's sentence was not "significant enough" to amount to prejudice for purposes of *Strickland*, reasoning that the rule "is not well considered in any event, because there is no obvious dividing line by which to measure how much longer a sentence must be for the increase to constitute substantial prejudice."

With *Glover*'s principle in mind, the court's "reasonable strategy" decision here creates a heightened standard for *habeas* petitioners asserting ineffective assistance at sentencing in non-capital cases based on a failure to present mitigating evidence. This is so for two reasons.

First the court's decision creates a new, seemingly *per se* rule that excuses counsel's decision to withhold mitigating evidence at sentencing any time it contains any unfavorable information or opens the door for rebuttal. However, evidence of a defendant's troubled background and diminished mental health will almost always contain some unpleasant information about the defendant, and the state surely will seek to exploit that evidence in favor of a harsher sentence or offer up countervailing evidence purely as a function of the adversarial process.

These circumstances do not relieve counsel from putting the client's best foot forward at sentencing where counsel can do the most good and advocate for a lesser penalty. Moreover, the threat of these possi-

bilities is outweighed by this Court's acknowledgment that defendants who suffer from unfortunate circumstances or mental deficiencies are the ones that society should treat as less culpable than defendants who do not suffer from those afflictions. *Penry*, 492 U.S. at 319.

If the decision stands, it will be virtually impossible for *habeas* petitioners to ever meet the standard given the court's rationale. At a minimum, the court's decision suggests that *habeas* petitioners now will also be compelled to show that any "good" information in the mitigation case outweighs any "bad" information in order to challenge counsel's decision to completely withhold mental health and related evidence, *even if* the evidence satisfies a mitigating factor to support a lesser sentence. That does not defer to counsel's strategy; it gives counsel an easy way out of advocacy at the sentencing phase to the detriment of his or her client. That cannot be the standard.

Moreover, as in *Glover*, there is no obvious dividing line by which to measure how much better the good information in the mitigation case must be, or how much worse the bad information must be, to excuse counsel from his decision to withhold the evidence altogether or to predict how the good or bad information may or may not have affected the sentence. This analysis creates too many twists and turns for litigants and courts alike.

Finally, the Third Circuit's rationale – that counsel need not submit mitigating evidence because it might backfire – also creates tension with the Fifth and Sixth Circuit Courts of Appeal, both of which have concluded that a failure to present mitigating evidence at sentencing is not a reasonable strategy merely because the evidence may contain negative

information about the defendant and may open the door to rebuttal from the prosecutor.

In *Miller v. Dretke*, 420 F.3d 356 (5th Cir. 2005), for example, the court concluded that counsel failed to investigate and present evidence of the defendant's mental health history during the sentencing phase such that the jury probably imposed a harsher sentence. The court rejected the argument that counsel made a strategic choice to forego a mitigation case based on the defendant's troubled background and history of diminished mental health merely because it contained some "bad" information:

We recognize that the state court could have concluded that the sentence would be equally as harsh or even more harsh because the testimony of the doctors would have emphasized the dangerousness of the defendant. We find, however, that such a conclusion is an objectively unreasonable application of *Strickland*, because we assume that the jury would have sentenced to some degree on the basis of Miller's moral culpability and the testimony of these doctors would have given the jury a firm basis to conclude that Miller was much less morally culpable for her crime than the jury could have concluded without such testimony.

Id. at 366.

Similarly, in *Mason v. Mitchell*, 543 F.3d 766 (6th Cir. 2008), the court of appeals rejected the state court's conclusion that counsel engaged in a reasonable strategy to forego a mitigation case at sentencing based on the defendant's childhood, dysfunctional family, and his emotional psychological problems. After concluding that the district court erred by assuming that the rebuttal evidence was relevant to

the specific mitigation evidence urged by the defendant, the court stated:

Mentioning the possibility that presenting evidence “as to his good character and rehabilitation potential” would risk rebuttal evidence makes absolutely no sense given that the opinion had just described Mason’s argument that his counsel should have presented a mitigation case focusing on his childhood, dysfunctional family, and his emotional psychological problems, not his good character or rehabilitation potential. It was objectively unreasonable to hold that Mason failed to show prejudice by invoking the spectre of rebuttal evidence responding to a mitigation strategy that Mason was not advocating.

Id. at 785.

Even the Third Circuit has rejected the notion that counsel has no duty to investigate and present mitigating evidence at sentencing merely because it may contain unfavorable information. In *Outten v. Kearney*, 464 F.3d 401 (3d Cir. 2006), the court held that counsel was ineffective by failing to investigate and present available information about the defendant’s background and mental health history during sentencing in a capital case. The state argued, as here, that counsel’s decision to withhold the mitigating evidence was a reasonable strategy because the records also contained information unfavorable to the defendant. The court’s response to that argument is instructive:

The State asserts, and we acknowledge, that not all of the evidence in the records counsel failed to investigate is favorable to Outten. *This is nearly always the case.* Indeed, the same was true of the evidence not investigated

by counsel in *Williams*. There, the Supreme Court observed that “the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams’ favor was not justified by . . . [the] decision to focus on Williams’ voluntary confession.” *Williams*, 529 U.S. at 398, 120 S.Ct. 1495. The same is true here; *the failure to introduce considerable evidence that could have been helpful to Outten was not justified by counsel’s belief, without an adequate investigation, that the net result of any investigation would be negative.*

...

In this context, we conclude that the Delaware Supreme Court unreasonably applied the second prong of *Strickland* in reaching the determination that Outten could not establish prejudice because Outten’s records contained some harmful information. ... Because the jury recommended death by the narrow margin of 7 to 5, persuading even one juror to vote for life imprisonment could have made all the difference. This without doubt satisfies *Strickland’s* prejudice prong.

Outten, 464 F.3d at 422-23 (emphasis added).

The Third Circuit’s contrary decision in this case is likely to create a deeper divide in the future that the Court should resolve now. As noted, the Court has yet to address the standard of counsel’s performance in non-capital cases when judges and juries impose lesser sentences based on evidence supporting mitigating factors. If a defendant claims that counsel failed to present mitigating evidence at the sentencing phase in a non-capital case, the courts of appeal will either join the Third Circuit’s view (that counsel is essentially immune from such claims if

there is any unfavorable information in the mitigation case) or follow the Fifth and Sixth Circuits that demand more from counsel to satisfy constitutional standards.

Accordingly, the Court should grant the writ and conclude that the mere possibility of counterarguments or rebuttal evidence does not excuse counsel from his decision to withhold evidence at the sentencing phase in a non-capital case that would satisfy a mitigating factor to support a lesser sentence.

II. APPLYING THE PROPER STANDARD, THE THIRD CIRCUIT ERRED BY CONCLUDING THAT MR. WILCOX IS NOT ENTITLED TO *HABEAS* RELIEF.

With the proper standard in mind, the court of appeals erred by rejecting Mr. Wilcox's arguments and denying him *habeas* relief. As the Court is aware, a *habeas* petitioner alleging a Sixth Amendment violation must establish that (1) his counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the petitioner. *Strickland*, 466 U.S. at 689-92. Mr. Wilcox satisfied *Strickland* and the court erred by concluding otherwise.

A. Mr. Wilcox satisfied *Strickland*.

Counsel for Mr. Wilcox secured two psychological evaluations from separate medical experts during trial preparation detailing the effects of Mr. Wilcox's troubled background and diminished mental health that converged at the time of the offense. Yet, counsel never submitted any of this evidence at sentencing. The state judge found two aggravating factors

and two mitigating factors and sentenced Mr. Wilcox to 40 years in prison. But for counsel's decision to withhold the evidence from the sentencing judge, the mitigating factors would have outweighed the aggravating factors (3-2) in favor of a lesser sentence than the one Mr. Wilcox ultimately received. Having met *Strickland's* two-part test, the court of appeals erred by concluding that counsel's decision to withhold mitigating evidence constitutes effective assistance.

B. The Third Circuit did not rely on evidence to support its “reasonable strategy” conclusion.

Consistent with the analysis above, it is objectively unreasonable to withhold evidence that supports a mitigating factor that the sentencing judge, by law, must apply to tip the scale in favor of something less than the prison sentence the defendant received. New Jersey sentencing guidelines provide that a defendant's background and mental health are mitigating factors. See N.J. Stat. § 2C:44-1b(4). Under New Jersey law, state sentencing judges have a duty to find this mitigating factor if supported by the evidence and to reduce the penalty accordingly if the mitigating factors outweigh the aggravating factors. See *State v. L.V.*, 979 A.2d 821 (N.J. Super. 2009) (sentencing judge erred by not considering substantial evidence of troubled background and mental retardation to conclude that mitigating factors outweighed aggravating factors). The court ignored this analysis.

Beyond that, the court did not rely on evidence to conclude that counsel made a strategic choice as required by this Court's precedent. See, e.g., *Wiggins*, 539 U.S. at 527 (state court unreasonably applied

Strickland by assuming that, because counsel had some evidence of the defendant’s background, he must have engaged in strategy to withhold it); *Mason*, 543 F.3d at 775. There is no evidence here that counsel engaged in any investigation beyond the psychiatric reports procured during the trial phase. There is also no evidence that counsel decided to withhold this evidence as part of his sentencing strategy. Rather, the state court, the district court, and the court of appeals inferred from the record – unreasonably – that counsel must have withheld this evidence as part of his strategy. As this Court and other courts have held, the inference is unreasonable and insufficient to support a “reasonable strategy” conclusion under *Strickland*.

Accordingly, the court of appeals erred by concluding that counsel’s decision to withhold mitigating evidence is a “reasonable strategy” particularly without any record evidence to support the conclusion beyond the assumptions of judges reviewing Mr. Wilcox’s case.

C. *The Third Circuit did not properly evaluate “prejudice” in light of the mitigating evidence.*

Finally, the court incorrectly concluded that Mr. Wilcox did not suffer prejudice after counsel elected to withhold mitigating evidence during the sentencing phase. In a sentencing-phase ineffective assistance case, the court “reweighs the evidence in aggravation against the totality of available mitigating evidence” to determine the probability that the defendant would have received a shorter sentence had counsel presented the mitigating evidence. *Wiggins*, 539 U.S. at 534. *See also Williams*, 529 U.S. at 362.

Here, the sentencing judge found two aggravating factors and two mitigating factors and concluded that the aggravating factors “slightly” outweighed the mitigating factors. The mental health evidence satisfied a third mitigating factor that should have tipped the scale 3-2 in favor of the minimum 30-year sentence of at least something less than a 40-year sentence. If it is reasonably probable that counsel’s constitutional misstep resulted in even one more day in prison, Mr. Wilcox is entitled to *habeas* relief. *Glover*, 531 U.S. at 203 (“[A]ny amount of actual jail time has Sixth Amendment significance.”).

The court of appeals focused only on the “negative” information in the mitigating evidence and did not properly engage in any reweighing of the sentencing record as required by *Wiggins* and *Williams*. Instead, the court concluded that Mr. Wilcox would have received the same sentence because the sentencing judge knew about the existence of psychiatric reports and stated that counsel otherwise did the best job he could, even though the sentencing judge admittedly never reviewed any psychiatric reports or heard testimony from experts about the effects of Mr. Wilcox’s troubled background and mental health issues that converged at the time of the offense. The court’s conclusion is based on an unreasonable inference that the record does not support.

Accordingly, the court of appeals erred by inferring that Mr. Wilcox suffered no prejudice when it is reasonably probable based on a proper reweighing of the evidence that Mr. Wilcox satisfied another mitigating factor to support a lesser sentence than the one he actually received.

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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April 4, 2018

APPENDIX A – Third Circuit Opinion

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-1024

RAHEEM WILCOX, Appellant

v.

WARDEN NEW JERSEY STATE PRISON;
ATTORNEY GENERAL NEW JERSEY

Appeal from the United States District Court for the
District of New Jersey (D.N.J. No. 1-13-cv-03524)
District Judge: Honorable Jerome B. Simandle

Argued: November 14, 2017

Before: VANASKI, SHWARTZ, and FUENTES,
Circuit Judges

(Filed January 8, 2018)

OPINION*

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

2a

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SHWARTZ, Circuit Judge.

Raheem Wilcox was convicted of murder and weapons offenses and sentenced to 40 years in prison. Wilcox filed a habeas petition, asserting that his counsel was ineffective for failing to present at sentencing two expert reports detailing his troubled background and diminished mental health. The District Court denied his petition. For the reasons set forth herein, we will affirm.

¹ We thank Appellant's counsel and his firm for accepting the *pro bono* appointment and for their very able representation. Lawyers who act *pro bono* provide the highest service that the bar can offer.

3a

I

A

Wilcox and his then-girlfriend, Ernestine Williams, worked at Federal Express. On the morning of April 13, 2000, Wilcox took three knives to work. Before entering the building, he hid the knives under a trailer. After his work shift ended, he retrieved the knives and accompanied Williams to her car in the parking lot, where he stabbed her to death. Wilcox was charged with first-degree murder, third-degree possession of a weapon for an unlawful purpose, and fourth-degree unlawful possession of a weapon and found guilty of all counts. He faced a minimum sentence of thirty years and a maximum of life imprisonment. N.J. Stat. § 2C:11-3(b)(1).

At sentencing, his counsel submitted work records, school records, and numerous character letters. Trial counsel explained that “what Mr. Wilcox did [] was an aberration.” App. 207. He described Wilcox as “a law-abiding good person who let the emotions get the better of him and did a horrible thing, “ App. 208, and added:

And I think what happened after the anger and rage of what he had done, when he realized what he had done, the real Mr. Wilcox came back in a few hours. And you saw that he was an honest, caring person who could not believe what he had done.

App. 210. Wilcox’s sister also spoke on his behalf and stated that “obviously he killed [Williams] because he let his emotions get involved.” App. 214. Wilcox himself similarly described to the sentencing judge the role of his emotions in the murder:

[W]hat I experienced that night was an emotional frenzy that caused me to lose control of myself and what triggered this sudden rush of blind passion was the fact that I was taunted.

...

As hard as it may seem to fathom, but love make[s] you do crazy things. This crime was totally out of character

App. 222-23.

In selecting a sentence, the sentencing judge considered the aggravating and mitigating factors set forth in N.J. Stat. § 2C:44-1. The sentencing judge applied mitigating factor 7, “[t]he defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense, “ N.J. Stat. § 2C:44-1b(7), because Wilcox did not have a “long history of prior crimes, whether they be violent or non-violent.” App. 225. He also applied mitigating factor 12 because Wilcox cooperated with law enforcement after committing the crime. The sentencing judge stated that he did not apply mitigating factor 8, “the defendant’s conduct was the result of circumstances unlikely to recur, “ or mitigating factor 9, that “the character and attitude of the defendant indicate that he is unlikely to commit another offense, “because he had not seen any psychological evaluations. N.J. Stat. § 2C:44-1b(8) & (9).

The sentencing judge applied aggravating factor 9, “the need for deterring the defendant and others from violating the law, “ § 2C:44-1a(9), and aggravating factor 3, “that there is a risk the defendant will

commit another offense.”² App. 226. He found that there were “not serious aggravating, extenuating factors beyond premeditated murder that would justify putting this case into the high end of the sentencing range for a premeditated murder.” App. 225. The sentencing judge concluded that the “aggravating factors somewhat outweigh the mitigating factors” and sentenced Wilcox to forty years’ imprisonment with thirty years parole ineligibility.³ App. 227.

Wilcox appealed his conviction and sentence. The Appellate Division affirmed and the New Jersey Supreme Court denied certification.

B

Wilcox filed a petition for post-conviction relief (“PCR”), which was assigned to the trial judge. In his PCR petition, Wilcox alleged, among other things, that he received ineffective assistance of counsel because his trial counsel did not submit at sentencing the psychological evaluations he obtained for use at trial regarding his troubled background and mental health history. Robert Latimer, M.D., a board certified psychiatrist, prepared a report that concluded Wilcox was: (a) “exposed to Post Traumatic Stress Disorder stemming from early childhood experiences”; (b) “vulnerable to Discontrol when under stress

² With respect to aggravating factor 3, the sentencing judge noted that the State had not submitted any psychological evaluations.

³ While the sentencing judge orally stated that “aggravating factor 1 [whether the crime was committed in an especially heinous, cruel or depraved manner] . . . exists to a certain extent but not a major extent, “ App. 226, the written judgment does not identify aggravating factor 1 as a factor the court weighed against the mitigating factors.

and in an impassioned state of mind”; and (c) “unable to appreciate the quality of his acts” at the time of the stabbing. App. 61-63. Dr. Matthew Johnson, a licensed psychologist, opined that: (a) Wilcox was “suffering with post-traumatic residual symptoms resulting from the circumstances of his upbringing”; (b) Wilcox’s “psychological controls were diminished” due to his background and the emotional impact of his relationship with Williams; and (c) Wilcox “did not appreciate the potential seriousness of his attack” on Williams. App. 74.

The reports also revealed conflict in Wilcox and Williams’s relationship. Both reports show that Wilcox noted that Williams “was afraid he would kill her, “ App. 70, and recounted an incident in which Wilcox “slashed one of her car tires” out of anger. App. 50; 70. Latimer’s report contained Wilcox’s sister’s statement that Wilcox told her “that he wanted to strike” Williams, App. 53, and Wilcox’s admission that he “thought of hurting” Williams before work on the day he ultimately murdered her. App. 54.

The PCR court dismissed Wilcox’s contention that his trial counsel rendered ineffective assistance by not presenting these reports at sentencing. Although the reports themselves were not presented, PCR counsel described their contents.⁴ After hearing the descriptions and counsels’ arguments, the PCR court

⁴ See App. 259 (noting that the experts had information about Wilcox’s “history, how he was raised, raised in a violent environment and [how] he’s a product of his environment”), 260 (explaining that the experts’ reports and testimony would “go[] to the issue of . . . [Wilcox being] so in love with this girl when he found out what she was doing on a continuous basis, he ‘snapped’”), 263 (explaining that the experts described Wilcox as “recovering from post-traumatic stress disorder stemming from an abusive childhood in which violence surrounded him”).

found that the contention that counsel provided ineffective assistance was “not supported by the record” and that trial counsel had “made the best argument he could make under the facts of this case, which were very difficult, and in light of the overwhelming nature of the case, anything else that he conceivably could have said wouldn’t have made any difference.” App. 273. The Appellate Division affirmed, noting that Wilcox’s claim “does not take into account the weight the court might have given to the State’s evidence of defendant’s mental status when the crime was committed” and attributed the decision to “forego presentation of the reports” to “strategy.” App. 292. The New Jersey Supreme Court denied certification.

Wilcox then filed a petition for a writ of habeas corpus in the District Court. The District Court denied the petition with prejudice without a hearing. The District Court concluded that trial counsel’s decision not to use the mental health reports was strategic and held that the “Appellate Division’s determination that counsel was not deficient in failing to use the previously obtained mental health reports at trial or sentencing is not contrary to, or an unreasonable application of *Strickland* and its progeny.” App. 35.

Wilcox appealed, and this Court granted a certificate of appealability “as to Wilcox’s claim that his Sixth Amendment rights were violated when trial counsel failed to present available expert psychiatric reports at sentencing.” App. 44.

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II⁵

A

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 28 U.S.C. §§ 2241-2254, restricts a federal court’s power to grant a writ of habeas corpus when a state court has already denied such a claim on the merits. *E.g.*, *Branch v. Sweeney*, 758 F.3d 226, 232-33 (3d Cir. 2014) (stating that the AEDPA “significantly limited the federal courts’ power to grant a writ of habeas corpus” and noting the limitations where a state court rejected a petition on the merits).⁶ A federal court may grant relief only if the state court’s adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as

⁵ The District Court had jurisdiction under 28 U.S.C. § 2254(a). We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(a). “Because the District Court did not conduct an evidentiary hearing before ruling on the habeas petition, our review is plenary and we conduct our analysis as the District Court did.” *Blystone v. Horn*, 664 F.3d 397, 416-17 (3d Cir. 2011) (internal citations omitted).

⁶ Wilcox contends that AEDPA does not restrict this Court’s review of his sentencing phase ineffective assistance of counsel claim because the PCR court did not render a decision on that claim and the Appellate Division’s rejection of that claim is “irrelevant.” Reply Br. 4. Wilcox is mistaken. Because the highest state court opinion on Wilcox’s claim is an unexplained order from the New Jersey Supreme Court, “we look through the higher state court-opinion and apply § 2254(d)’s standards to the highest reasoned opinion.” *Blystone*, 664 F.3d at 417 n.15 (internal quotation marks and alterations omitted). The highest reasoned opinion is the Appellate Division’s opinion, which rejects the sentencing phase ineffective assistance claim because the “decision to forego presentation of the reports . . . [was] one of strategy.” App. 292. Its resolution of the claim on the merits limits our review under § 2254(d).

determined by the Supreme Court of the United States” 28 U.S.C. § 2254(d)(1); *Blystone v. Horn*, 664 F.3d 397, 417 (3d Cir. 2011).⁷ A state court decision is “contrary to” clearly established law “if it applies a rule that contradicts the governing law set forth in the [Supreme] Court’s cases or if it confronts a set of facts that are materially indistinguishable from a decision of the [Supreme] Court and nevertheless arrives at a result different from the [Supreme] Court’s precedent.” *Blystone*, 664 F.3d at 417 (citing *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). “A state court decision is objectively unreasonable if the state court identifies the correct governing principle from the Supreme Court’s decision but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* (internal citations, quotation marks, and alterations omitted).

The governing principle for ineffective assistance of counsel claims is the Supreme Court’s two-part test in *Strickland*: “To succeed on such a claim, the petitioner must demonstrate (1) that counsel’s performance was deficient, in that it fell below an objective standard of reasonableness, and (2) that the petitioner suffered prejudice as a result of the deficiency.” *Blystone*, 664 F.3d at 418 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). “Surmounting *Strickland*’s high bar is never an easy task.” *Paddilla v. Kentucky*, 559 U.S. 356, 371 (2010).

The PCR court and the Appellate Division applied *Strickland* to Wilcox’s sentencing phase ineffective

⁷ Under § 2254(d)(2), a court may also grant relief if the state court decision was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” Wilcox does not challenge the state court decision on this basis.

assistance of counsel claim. *See* App. 273, 289. Because Wilcox has not disputed that the state court recited the correct standard or shown that it arrived at a result different from a materially indistinguishable case decided by the Supreme Court, he has not shown that the state court decision was contrary to federal law. Thus, he may obtain relief only if he shows that the state court's application of *Strickland* was objectively unreasonable. For the reasons that follow, he has failed to do so.

B

With respect to *Strickland*'s first prong, there is a "strong presumption" that counsel's performance was not deficient. *Jermyn v. Horn*, 266 F.3d 257, 282 (3d Cir. 2001). Here, the Appellate Division found that counsel's performance was not deficient because the decision to withhold the reports was "one of strategy." App. 292. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. Trial counsel investigated Wilcox's background and mental health by retaining two experts. The experts interviewed Wilcox, reviewed other materials, and prepared reports summarizing their findings. Trial counsel had the reports prior to sentencing. Thus, the facts do not show counsel failed to investigate material that may be relevant to sentencing.⁸

The issue here is whether counsel was deficient in failing to present the reports. Statements contained

⁸ For this reason, this case is distinguishable from the cases Wilcox cites and which hold that counsel's failure to both investigate and present mitigation evidence at sentencing amounts to a deficient performance.

in the reports would have undercut counsel's sentencing strategy to present the murder as an emotionally driven aberration from Wilcox's normal conduct. During the sentencing, counsel described Wilcox as "a law-abiding good person who let the emotions get the better of him and did a horrible thing." App. 208. He explained that, "after the anger and rage of what he had done . . . the real Mr. Wilcox came back" App. 210. When Wilcox's sister spoke at sentencing, she framed his decision to murder Williams as "obviously" the result of "his emotions." App. 214. Wilcox told the sentencing judge that "what [he] experienced that night was an emotional frenzy that caused [him] to lose control of [himself]" App. 222. He assured the sentencing judge that the "crime was totally out of character" and driven by "love." App. 223.

Trial counsel's strategically selected theme would have been undermined by the reports, which contained statements revealing that Wilcox had previously contemplated harming Williams. Latimer's report contained Wilcox's admission that he "thought of hurting" Williams before work on the day he murdered her. App. 54. Wilcox's sister admitted to Latimer that Wilcox told her "that he wanted to strike" Williams. App. 53. In interviews with Johnson and Latimer, Wilcox noted that Williams "was afraid he would kill her." App. 70. These statements demonstrate that Wilcox had contemplated hurting Williams, or Williams had reason to fear Wilcox would hurt her, prior to the murder.⁹ Trial counsel's deci-

⁹ Wilcox asserts that, under *Outten v. Kearney*, 464 F.3d 401 (3d Cir. 2006), counsel cannot withhold mitigating evidence merely because it may contain some "bad information." Appellant Br. 27-28. *Outten* does not stand for that proposition. In

sion not to offer the reports allowed him to portray the violent stabbing as an isolated incident without having to deal with events that would undermine this view. Thus, his decision not to offer the reports at sentencing is consistent with the “wide latitude counsel must have in making tactical decisions.” *Strickland*, 466 U.S. at 689.

Accordingly, Wilcox has failed to demonstrate that the state court unreasonably applied *Strickland* in concluding that his counsel’s performance was not deficient.

C

Even if trial counsel’s performance was deficient, Wilcox has failed to establish prejudice. “To establish prejudice the petitioner must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would

Outten, trial counsel had failed to investigate records concerning a range of mitigating factors. The fact that the investigation may have disclosed unfavorable evidence did not excuse trial counsel from investigating the records to determine whether “the net result of any investigation would be negative.” *Id.* at 422. We have explained that the significance of requiring counsel to conduct a full investigation was not that “trial counsel may . . . have introduced into evidence all of Outten’s records at sentencing . . . [but that] the records most certainly would have informed counsel’s preparation.” *Id.* Here, trial counsel did investigate Wilcox’s mental health, obtained reports about it, and, as allowed for under *Outten*, made an informed decision when he declined to introduce them. Furthermore, unlike in *Outten*, where “much of the aggravating evidence in the records was either introduced or elicited on cross-examination by the State at sentencing, “the harmful information contained in the reports at issue here would not come before the sentencing judge unless the reports were presented to him. 464 F.3d at 422. Thus, we cannot criticize trial counsel for deciding not to present the reports at sentencing.

have been different.” *Blystone*, 664 F.3d at 418 (citing *Strickland*, 466 U.S. at 694) (internal quotation marks omitted). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* To determine whether trial counsel’s failure to present certain mitigating evidence was prejudicial, a court “must reconstruct the record and assess it anew. In so doing, [the Court] cannot merely consider the mitigation evidence that went unmentioned in the first instance; [it] must also take account of the anti-mitigation evidence that the [prosecution] would have presented to rebut the petitioner’s mitigation testimony.” *Williams v. Beard*, 637 F.3d 195, 227 (3d Cir. 2011) (citing *Wong v. Belmontes*, 558 U.S. 15, 26 (2009)). Thus, after reconstructing the record, the court must “reweigh the evidence in aggravation against the totality of available mitigation evidence.” *Wiggins*, 539 U.S. at 534.

The reconstructed record does not support Wilcox’s claim that if not for trial counsel’s failure to present the reports, there is a reasonable probability he would have received a lower sentence. Had these reports been presented, the State likely would have produced its expert report, which repeated unfavorable information about Wilcox, and concluded that the theories set forth by Wilcox’s experts were “creative, “ “fanciful, “ and “entirely speculative.” App. 84. Thus, Wilcox’s assumption that the reports “offered evidence of ‘substantial grounds tending to excuse or justify’ [his] behavior under N.J. Stat. § 2C:44-1b(4), “Appellant Br. 24, “does not take into account the weight the court might have given to the State’s evidence of defendant’s mental status when the crime was committed, “ App. 292, and ignores the impact of

the unfavorable statements contained in all of the reports.

Moreover, the same judge who sentenced Wilcox reviewed Wilcox's PCR petition. At the PCR hearing, that judge was informed about the contents of the reports, which stated that Wilcox suffered post-traumatic stress disorder arising from a violent and abusive childhood and that this background, together with his suspicions about his girlfriend, caused him to lose control. After hearing the description of the reports and arguments concerning trial counsel's alleged ineffectiveness at sentencing, the judge found that trial counsel "made the best argument he could make under the facts of this case, which were very difficult, and in light of the overwhelming nature of the case, anything else that he conceivably could have said wouldn't have made any difference." App. 273. These comments further show that it is unlikely the sentencing judge would have imposed a lesser sentence if he were presented with the full reports.

Because the reports may have derailed efforts to portray the incident as an aberration, and the record does not show that there is a reasonable probability they would have made a difference, Wilcox has failed to demonstrate that he was prejudiced by trial counsel's failure to present the reports at sentencing.

III

For the foregoing reasons, we will affirm the order of the District Court.

APPENDIX B – District Court OpinionUNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

RAHEEM WILCOX,	:	
Petitioner,	:	Civil Action No. 13-3524
v.	:	(JBS)
CHARLES E. WAR-	:	
REN, JR., <i>et al.</i> ,	:	OPINION
Respondents.	:	

JEROME B. SIMANDLE, Chief District Judge¹

Raheem Wilcox filed a Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 challenging a judgment of conviction filed in the Superior Court of New Jersey, Union County, on July 5, 2002, after a jury found him guilty of the first-degree murder of Ernestine Williams and other charges. The State filed an Answer with the record. Wilcox filed a motion to amend the Petition to include three claims of ineffective assistance of post-conviction relief counsel and a motion to stay the Petition, as amended, until he exhausts those claims in the New Jersey courts. After carefully reviewing the arguments of the parties and the state court record, this Court will deny the motions to amend and to stay, dismiss the Petition with prejudice, and deny a certificate of appealability.

¹ This case was reassigned to the undersigned following the death of the Hon. Dickinson R. Debevoise in August, 2015.

I. BACKGROUND

A. The Crimes

Raheem Wilcox challenges a judgment of conviction imposing a 40-year term of imprisonment with 30 years of parole ineligibility imposed by the Superior Court of New Jersey, Law Division, Union County, on July 5, 2002, after a jury found him guilty of the first-degree murder of Ernestine Williams on April 13, 2000, third-degree possession of a weapon for an unlawful purpose, and fourth-degree unlawful possession of a weapon. Under the Antiterrorism and Effective Death Penalty Act (“AEDPA”), state court factual findings are presumed correct unless rebutted by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1). As Wilcox has not rebutted the factual findings of the Superior Court of New Jersey, Appellate Division, with respect to the crime, the Court will rely on those findings. See *State v. Wilcox*, 2012 WL 3116701 (N.J.Super. Ct., App. Div., July 20, 2012); *State v. Wilcox*, Docket No. A-6787-01T4 sl. opinion (N.J.Super. Ct., App. Div., Oct. 10, 2003) (ECF No. 1-2 at 6-17.).

The Appellate Division found that the evidence at trial showed that Wilcox and Ms. Williams both worked at Federal Express. On April 13, 2000, Wilcox brought three knives to work. He ended his shift early, waited for Ms. Williams, and they took the bus to the parking lot. They got into Williams’ car. Wilcox took out a knife and after a struggle, he stabbed Ms. Williams in the back as she ran away.

Eyewitnesses described Wilcox’s murder of Ms. Williams with a knife. One Federal Express employee named Denise Drayton testified that in the early morning hours of April 13, 2000, she saw a woman flee from a car in the parking lot and heard the

woman shrieking for Drayton to call the police while a male chased her. She saw the man catch the woman and raise his hand which held something pointy and shiny. Drayton approached the woman who was lying on the ground and saw there was a butcher knife in the middle of her back. Suna Ricks, another Federal Express employee, testified that she heard a car horn blowing in the parking lot and she saw the victim, whom she knew as "Tee, " trying to get out of a vehicle; when Tee broke away, the man chased her. Tee yelled, "Call the police, " and she fell to the ground.

Wilcox spontaneously blurted out his crime moments after he murdered Williams. Anthony Harley, a New Jersey Turnpike employee, testified that Wilcox approached Harley at about 3:00 a.m. and said he needed an ambulance because he had just stabbed his girlfriend. When State Police Officer Patrick Doyle arrived, Doyle handcuffed Wilcox, who told Doyle that he had just stabbed his girlfriend. Doyle asked where she was and, after calling for an ambulance and providing directions, Doyle read Wilcox his Miranda rights. Later, Wilcox gave two statements describing the murder to Sergeant Kevin Foley of the Union County Prosecutor's Office.

B. State Court Proceedings

After a grand jury indicted Wilcox for first-degree murder, third-degree possession of a weapon for an unlawful purpose, and fourth-degree unlawful possession of a weapon, Wilcox moved to suppress the admission of his statements. The trial judge conducted a suppression hearing and then denied the motion. After a two week trial, the jury convicted Wilcox on all charges. On July 5, 2002, the trial judge sentenced him to 40 years in prison with 30 years of pa-

role ineligibility. Wilcox appealed. On October 10, 2003, the Appellate Division affirmed. See *State v. Wilcox*, Docket No. A-6787-01T4 sl. opinion (N.J.Super. Ct., App. Div., Oct. 10, 2003) (ECF No. 1-2 at 6-17.) On November 3, 2005, the New Jersey Supreme Court denied certification. See *State v. Wilcox*, 185 N.J. 389 (2005) (table).

Wilcox filed his first petition for post-conviction relief in the trial court on April 17, 2006. After hearing oral argument on 17 ineffective assistance of counsel grounds, on May 9, 2008, the trial judge rejected all but one claim; the judge ordered an evidentiary hearing on the claim that counsel was ineffective in failing to request a voir dire on alleged juror misconduct. On June 26, 2009, the trial court conducted the evidentiary hearing. The trial judge denied relief in an opinion and order filed on January 22, 2010. Wilcox appealed. On July 20, 2012, the Appellate Division affirmed. See *State v. Wilcox*, 2012 WL 3116701 (N.J. Super. Ct., App. Div., July 20, 2012). On January 31, 2013, the New Jersey Supreme Court denied certification. See *State v. Wilcox*, 213 N.J. 46 (2013) (table).

In the Answer, the State indicates that Wilcox filed a second petition for post-conviction relief, which the trial court denied on January 24, 2014, because the grounds could have been raised in the first post-conviction relief petition, the issues “regarding failure to remove or to request a voir dire of members of the jury was raised in petitioner’s first post-conviction relief and rejected, “ and Wilcox did not “point to anything that might be contained in the jury selection transcripts that might support any post-conviction relief claim.” (ECF No. 12-21 at 2.) Wilcox filed a motion to reconsider the denial of his second

post-conviction relief petition, which the trial court denied on March 12, 2014. (ECF No. 12-21 at 11.) According to the State, Wilcox filed a notice of appeal and a brief supporting that appeal in the Appellate Division.

C. Procedural History of § 2254 Petition

On May 24, 2013, Wilcox signed and presumably handed to prison officials for mailing to the Clerk his § 2254 Petition (ECF No. 1.) He also filed a motion for a stay. By Order entered July 12, 2013, the Court notified Wilcox of his right to amend the Petition to include all available federal claims in accordance with *Mason v. Meyers*, 208 F.3d 414 (3d Cir. 2000). (ECF No. 2.) In response, Wilcox wrote a letter asking the Court to rule on the Petition as filed and to rule on his motion for a stay. (ECF No. 3.) In an Order and Opinion entered on October 7, 2014, the Court denied the motion for a stay and ordered the Government to file an answer and the record.

The Petition raises eight grounds:

Ground One: THE STATE COURTS['] RULING THAT PETITIONER WAS NOT DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS BY HIS TRIAL ATTORNEY[S] FAILURE TO USE THE MENTAL HEALTH EXPERT REPORTS AT TRIAL OR SENTENCING IN SUPPORT OF A DIMINISH[ED] CAPACITY DEFENSE AND ESPECIALLY IN LIGHT OF THE TRIAL COURT[S] IMPOSITION OF PENALTY AT THE LOWER END WAS CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW.

Ground Two: THE STATE COURTS['] RULING THAT PETITIONER WAS NOT DE-

PRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS RIGHT TO FUNDAMENTAL FAIRNESS BY APPELLATE COUNSEL'S FAILURE TO RAISE ON APPEAL THAT THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PERMITTING DETECTIVE FOLEY TO TESTIFY TO INADMISSIBLE HEARSAY MATERIAL THAT DENIED PETITIONER'S SIXTH AMENDMENT CONFRONTATION RIGHT BASED ON A NEW RULE OF CONSTITUTIONAL LAW AND PROVIDED CAUSE FOR PROCEDURAL DEFAULT CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW.

Ground Three: THE STATE COURTS['] RULING THAT PETITIONER WAS NOT DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY PCR COUNSEL'S FAILURE TO ADEQUATELY CROSS-EXAMINE PETITIONER'S TRIAL ATTORNEY DURING THE EVIDENTIARY HEARING HELD ON A TWOFOLD INEFFECTIVE A[SSISTANCE AND] JURY MISCONDUCT CLAIM TO ASCERTAIN THE IDENTITY OF PETITIONER'S FAMILY MEMBER WHO ADVISED HIM OF A JUROR'S UNFAVORABLE COMMUNICATION DURING TRIAL WITH A FAMILY MEMBER OF THE VICTIM BESIDES THE ALLEGED PETITIONER HE WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO TIMELY ADVISE THE COURT [] TO TAKE ACTION AGAINST BY HIS OWN ADMISSION, AND TO CALL OTHER POTENTIAL WITNESSES WAS BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF

THE EVIDENCE PRESENTED IN THAT PROCEEDING AND ESTABLISHED CAUSE TO EXCUSE A PROCEDURAL DEFAULT.

Ground Four: THE STATE COURTS['] RULING AFFIRMING THE DENIAL OF PETITIONER'S MOTION TO SUPPRESS ANY OF HIS STATEMENTS DEPRIVED HIM OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS AGAINST SELF INCRIMINATION AND DUE PROCESS OF LAW CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW.

Ground Five: THE STATE COURTS['] RULING TO NOT PERMIT PETITIONER TO CALL BACK A JUROR OR TO VOIR DIRE THE JURY BASED ON ITS DETERMINATION THAT PETITIONER WAS NOT DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR AN[D] IMPARTIAL JURY DUE TO TRIAL COUNSEL'S FAILURE TO TIMELY ADVISE THE COURT OF SAID JUROR WHO APPEARED TO HAVE MADE AN UNFAVORABLE COMMUNICATION WITH A VICTIM'S FAMILY MEMBER DURING PETITIONER'S TRIAL WAS CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW.

Ground Six: THE STATE COURTS['] RULING DENYING PETITIONER'S REQUEST FOR AN EVIDENTIARY HEARING TO DETERMINE WHETHER HIS TRIAL ATTORNEY DEPRIVED HIM OF HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW FOR FAILING TO REMOVE A BIASED VENIREMAN WAS CONTRARY TO CLEARLY ESTABLISHED

FEDERAL LAW RESULTING ALSO IN THE DENIAL OF PETITIONER'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL AND IMPARTIAL JURY.

Ground Seven: THE STATE COURTS['] RULING AFFIRMING THE DENIAL OF PETITIONER'S EXCESSIVE SENTENCE FOR HIS MURDER CONVICTION VIOLATED HIS EIGHTH AMENDMENT CONSTITUTIONAL RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT RESULTING IN AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW.

Ground Eight: THE STATE COURTS['] RULING THAT PETITIONER WAS NOT DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF PCR COUNSEL FOR FAILING TO USE THE MENTAL HEALTH EXPERT REPORTS ALTHOUGH RELYING ON THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ARGUMENT FOR FAILING TO PRESENT A DIMINISH[ED] CAPACITY DEFENSE WITH RESPECT TO PETITIONER BEING UNABLE TO FORM THE INTENT TO COMMIT MURDER RESULTED IN A DECISION THAT WAS BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN THE STATE COURT AND ESTABLISH[ES] CAUSE TO EXCUSE A PROCEDURAL DEFAULT.

(ECF No. 1-2 at 2-5.)

The State filed an Answer arguing that Wilcox is not entitled to habeas relief and Wilcox filed motions to amend and to stay the Petition.

II. MOTIONS TO AMEND AND STAY PETITION

After the Answer was filed, Wilcox filed two motions: a motion to amend the § 2254 Petition to add three claims and a motion to stay the Petition while he exhausts those claims before the New Jersey courts. Each of the three grounds Wilcox seeks to exhaust and to add to his Petition asserts that post-conviction relief counsel was ineffective.² The problem with amending the Petition to exhaust these ineffective assistance of post-conviction relief counsel grounds is that they are not cognizable under § 2254. Section 2254(i) provides that “[t]he ineffectiveness or incompetence of counsel during... State collateral post-conviction proceedings shall not be a ground for relief under section 2254.” 28 U.S.C. § 2254(i). See *Martel v. Clair*, 132 S.Ct. 1276, 1287 n.3 (2012) (“[M]ost naturally read, § 2254(i) prohibits a court from granting substantive habeas relief on the basis of a lawyer’s ineffectiveness in post-conviction proceedings.”); *Stevens v. Epps*, 618 F.3d 489, 502 (6th Cir. 2010) (“Ineffectiveness of post-conviction counsel cannot be the grounds for federal habeas relief”).

² In Ground A, he asserts that “PCR COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE TRIAL AND APPELLATE COUNSEL’S INEFFECTIVENESS[,] FOR FAILING TO OBJECT TO A POTENTIALLY BIASED JUROR . . . AND FOR FAILING TO REQUEST A VOIR DIRE[.]” (ECF No. 17 at 7.) In Ground B, he claims that “PCR COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE TRIAL COUNSEL’S FAILURE TO REQUEST A VOIR DIRE OF TWO SLEEPING JURORS,” and in Ground C he asserts that “PCR COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE PETITIONER’S PRO SE CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO EXERCISE A PEREMPTORY CHALLENGE[.]” *Id.* at 7-8.

In addition, shortly after he filed his § 2254 Petition, the Court issued an Order giving Wilcox an opportunity to amend the Petition to include all available grounds in accordance with *Mason v. Meyers, supra* . (ECF No. 2.) In response, Wilcox declined to add grounds, and he asked the Court to rule on the Petition as filed. (ECF No. 3.) The filing of Wilcox’s § 2254 Petition on May 24, 2013, did not toll the 365-day statute of limitations under 28 U.S.C. § 2244(d). See *Duncan v. Walker*, 533 U.S. 167 (2001) (holding that a properly filed § 2254 petition does not toll the statute of limitations under § 2244(d)). Accordingly, Wilcox’s new claims, which were set forth in his motion dated March 28, 2015, would in any event be time barred. See 28 U.S.C. § 2244(d)(1) (imposing a one-year statute of limitations under § 2254, which generally begins to run from the date on which the judgment of conviction became final by the conclusion of direct review or the expiration of the time for seeking such review). For all of these reasons, the Court will deny the motion to amend the Petition to add new claims and the motion to stay the amended petition while Wilcox exhausts those claims.

II. STANDARD OF REVIEW FOR RELIEF UNDER § 2254

Section 2254 of title 28 of the United States Code sets limits on the power of a federal court to grant a habeas petition to a state prisoner. See *Cullen v. Pinholster*, 131 S.Ct. 1388, 1398 (2011). 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). Where a state court ad-

judicated petitioner’s federal claim on the merits,³ as in this case, a 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*, 132 S.Ct. 2148, 2151 (2012) (quoting 28 U.S.C. § 2254(d)). “When reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong.” *Woods v. Donald*, 135 S.Ct. 1372, 1376 (2015). The petitioner carries the burden of proof, and review under § 2254(d) is limited to the record that was before the state court that adjudicated the claim on the merits. See *Pinholster*, 131 S.Ct. at 1398.

A court begins the analysis under § 2254(d)(1) by determining the relevant law clearly established by the Supreme Court. See *Yarborough v. Alvarado*, 541 U.S. 652, 660 (2004). “[C]learly established law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of t[he Supreme Court’s] decisions, “ as of the time of the relevant state-court decision. *Woods*, 135 S.Ct. at 1376 (quoting *White v.*

³ “For the purposes of Section 2254(d), a claim has been adjudicated on the merits in State court proceedings’ when a state court has made a decision that 1) finally resolves the claim, and 2) resolves th[at] claim on the basis of its substance, rather than on a procedural, or other, ground.” *Shotts v. Wetzel*, 724 F.3d 364, 375 (3d Cir. 2013) (citation and internal quotation marks omitted).

Woodall, 134 S.Ct. 1697, 1702 (2014), and *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). A decision is “contrary to” a Supreme Court holding within 28 U.S.C. § 2254(d)(1) if the state court “contradicts the governing law set forth in [the Supreme Court’s] cases” or if it “confronts a set of facts that are materially indistinguishable from a decision of th[e Supreme] Court and nevertheless arrives at a [different] result.” *Williams*, 529 U.S. at 405-06. Under the “unreasonable application” clause of § 2254(d)(1), a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from th[e Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.*, 529 U.S. at 413.

Where a petitioner seeks habeas relief, pursuant to § 2254(d)(2), on the basis of an erroneous factual determination of the state court, two provisions of the AEDPA necessarily apply. First, the AEDPA provides that “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). Second, the AEDPA precludes habeas relief unless the adjudication of the claim “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2).

III. DISCUSSION

A. Self-Incrimination

In Ground Four of the § 2254 Petition, Wilson challenges the admission of his confessions to Trooper Doyle and Detective Foley. Wilcox claims that the denial of his motion to suppress his confessions violated his Fifth and Fourteenth Amendment rights not to incriminate himself. In the New Jersey courts, Wilcox challenged the admission of his pre-Miranda statements to State Trooper Doyle on the ground that he was in custody and Doyle had not informed him of his rights under Miranda. He challenged the admission of his post-Miranda statements on the grounds that he invoked his right to remain silent and he did not voluntarily waive his Miranda rights. The trial court and the Appellate Division rejected each argument.

(1) Pre-Miranda Confession

After conducting a suppression hearing, the trial court allowed the admission of Wilcox's statements to Doyle and Foley. Wilcox argued on direct appeal that his first confession to Trooper Doyle violated *Miranda v. Arizona*, 384 U.S. 436 (1966), because Wilcox was in custody when he gave the confession and Doyle had not administered the Miranda warnings. The Appellate Division found the following facts regarding the pre-Miranda statements to Doyle:

New Jersey Turnpike Authority employee Anthony Harley testified that [Wilcox] approached him at approximately 3:00 a.m. on April 13, 2000, and stated that he needed an ambulance because he "just stabbed [my] girlfriend." State Police Officer Patrick Doyle arrived at the scene and handcuffed defendant. Defendant told the trooper that he had just

stabbed his girlfriend. The trooper asked where the victim was because she may need medical attention. After the trooper called with directions to send an ambulance to the victim, Trooper Doyle read defendant his Miranda rights.

(ECF No. 1-2 at 8.)

The Appellate Division held that Wilcox's statement that he just stabbed his girlfriend was admissible under the public safety exception to the suppression remedy imposed by Miranda:

The trooper was responding to a call from the turnpike official who had reported a stabbing. When he arrived at the scene and even before defendant was placed into custody, defendant volunteered the fact that he had stabbed his girlfriend. At that point the trooper's focus was on whether defendant was armed and the whereabouts and condition of the victim. He made no effort to induce defendant to disclose details of the crime. See *New York v. Quarles*, 467 U.S. 649, 653... Indeed, according to the record, Trooper Doyle attempted to stop defendant from making admissions prior to giving him Miranda warnings.

(ECF No. 1-2 at 10.)

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Fourteenth Amendment incorporates the Fifth Amendment privilege against self-incrimination. See *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). In *Miranda*, the Court held that "without proper safeguards the process of in-custody interrogation... contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to

speak where he would not otherwise do so freely.” 384 U.S. at 467. When police ask questions of a suspect in custody without administering the required warnings, Miranda dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State’s case in chief. See *Oregon v. Elstad*, 470 U.S. 298, 317 (1985). “To safeguard the uncounseled individual’s Fifth Amendment privilege against self-incrimination... suspects interrogated while in police custody must be told that they have a right to remain silent, that anything they say may be used against them in court, and that they are entitled to the presence of an attorney, either retained or appointed, at the interrogation.” *Thompson v. Keohane*, 516 U.S. 99, 107 (1995); see also *Miranda*, 384 U.S. at 479.

In *New York v. Quarles*, Quarles was charged with criminal possession of a weapon. Officers Kraft and Scarring were on road patrol in Queens, N.Y., when a young woman approached their car and said that she had just been raped by a black male carrying a gun who was wearing a black jacket with the name “Big Ben” printed in yellow letters on the back and who had just entered an A & P supermarket. The officers drove the woman to the supermarket, and Officer Kraft entered the store and spotted a man matching the description given by the woman. The man ran; Officer Kraft pursued him with a drawn gun and ordered him to stop and put his hands over his head. Although more than three other officers had arrived on the scene by that time, Officer Kraft frisked the man and discovered that he was wearing an empty shoulder holster. After handcuffing him, Officer Kraft asked him where the gun was and Quarles nodded in the direction of some empty

cartons and said, “the gun is over there.” *Quarles*, 467 U.S. at 652. Officer Kraft retrieved a loaded revolver from one of the cartons, formally placed Quarles under arrest, and read him his Miranda rights. After Quarles indicated he would answer questions without an attorney, Kraft asked him if he owned the gun and where he bought it, and Quarles answered that he owned it and he had bought it in Miami.

The Supreme Court reversed the state courts’ suppression of Quarles’ statements, holding that a person’s statements, albeit not preceded by Miranda warnings, are admissible if the totality of the circumstances shows that the officer’s questions “relate to an objectively reasonable need to protect the police or the public from any immediate danger.” *Quarles*, 467 U.S. at 659 n.8.

In this case, the Appellate Division found on direct appeal that Trooper Doyle arrived at the turnpike toll in Newark after Wilcox had told the turnpike employee that he just stabbed his girlfriend. Trooper Doyle handcuffed Wilcox who told Doyle that he had just stabbed his girlfriend; Doyle asked where the victim was because she may need medical attention. The Court is required to presume the correctness of these factual findings. See 28 U.S.C. § 2254(e)(1) (“In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.”). Wilcox has not rebutted the presumption by clear and convincing evidence, and he has not shown that the Ap-

pellate Division's findings were unreasonable in light of the evidence presented at the suppression hearing.⁴[4] Thus, he has not satisfied the requirements of 28 U.S.C. § 2254(d)(2).

Wilcox is also not entitled to habeas relief under § 2254(d)(1). Under *Quarles*, the public safety exception to *Miranda* applies so long as the questioning "relate[s] to an objectively reasonable need to protect the police or the public from any immediate danger." *Quarles*, 467 U.S. at 659 n.8. The facts found by the Appellate Division in this case are consistent with application of the public safety exception set forth in *Quarles*, i.e., Trooper Doyle questioned Wilcox because there was an objectively reasonable basis for Doyle to conclude that the victim may need emergency medical care, since Doyle arrived in response to Hartley's report of a stabbing of a woman by Wilcox. Wilcox has not shown that the Appellate Division's determination that Wilcox's statement to Trooper Doyle was admissible under the public safety exception was contrary to, or an unreasonable application of, *Quarles* or other Supreme Court holdings. See *Allen v. Roe*, 305 F.3d 1046 (9th Cir. 2002) (holding that, although the area where the gun was found was isolated, the state courts' application of the public safety exception did not warrant habeas relief).

⁴ See also *Miller-El v. Dretke*, 545 U.S. at 240 (holding that a district court must "presume the [state] court's factual findings to be sound unless [petitioner] rebuts the Presumption of correctness by clear and convincing evidence."); *Rountree v. Balicki*, 640 F.3d 530, 541-42 (3d Cir. 2011) (habeas court is "bound to presume that the state court's factual findings are correct, with the burden on the petitioner to rebut those findings by clear and convincing evidence.") (quoting *Simmons v. Beard*, 590 F.3d 223, 231 (3d Cir. 2009)).

Wilcox is, therefore, not entitled to habeas relief on this portion of Ground Four.

(2) Claim of Invocation of Right to Remain Silent

Wilcox also challenged the admission of the statements he gave to Trooper Doyle and later to Detective Foley after he received the Miranda warnings, arguing that he had invoked his right to remain silent. The Appellate Division found that Wilcox did not invoke his right to remain silent or ask for an attorney after receiving the Miranda warnings:

[W]e agree with the trial court that [Wilcox] did not, ambiguously or otherwise, invoke his right to remain silent. After the Miranda warnings were given he agreed freely to be interviewed by Sergeant Foley. He made no request or even a fleeting reference to secession of the questioning, nor did he express a desire to have counsel present. Indeed, being fully cognizant of his rights, [Wilcox] initiated discussion about the details of the criminal episode on several occasions during the interviews, even without being pressed by Foley.

It is true that at one point, [Wilcox] stated, “I don’t like to talk about it, I know it’s wrong.” However, we agree with the trial court that, considered in context, these remarks were nothing more than an expression of remorse. For example, after the remark, [Wilcox] added “[i]t’s just hurting me by talking about it.” As the trial court observed, [Wilcox] apparently still had strong feelings about the victim, and an acknowledgment that he had caused her injury or even her death evoked pain and remorse. As such, they cannot be construed as even an equivocal invocation of his Miranda rights.

(ECF No. 1-2 at 11-12.)

Again, this Court must presume the correctness of the above factual findings, as Wilcox has not rebutted them with clear and convincing evidence. Those findings establish that at no point after he received the Miranda warnings did Wilcox say that he wanted to remain silent, that he did not want to talk with law enforcement officials, or that he wanted an attorney.

In *Berghuis v. Thompkins*, 560 U.S. 370 (2010), the Supreme Court reversed the Sixth Circuit's grant of habeas relief under § 2254 where the circuit had found that Thompkins' incriminating statement had been elicited in violation of Miranda because, after being given the Miranda warnings, Thompkins essentially sat in an interrogation room for almost three hours without speaking. When the police finally asked him if he believed in God, he responded "Yes." The officer asked if he prayed to God, and he again responded "Yes, " and if he prayed to God to forgive him for shooting that boy down and he answered "Yes." *Id.* at 375-76. The Supreme Court held that habeas relief was improper because the state court's decision to admit the statements was not contrary to, or an unreasonable application of, Supreme Court holdings as "[t]he Court has not yet stated whether an invocation of the right to remain silent can be ambiguous or equivocal." *Id.* at 381.

In this case, where the evidence in the record does not show that Wilcox unambiguously invoked his right to remain silent, the Appellate Division's determination that his post-Miranda statements were admissible is not contrary to, or an unreasonable application of, Miranda or other Supreme Court holdings. See *Berghuis*, 560 U.S. at 381-82; see also

Davis v. United States, 512 U.S. 452, 461-62 (1994) (“If the suspect’s statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.”)

(3) Waiver of Miranda Rights

Wilcox also argued on direct appeal that his post-Mirandized statements were not admissible because he had not voluntarily waived his Miranda rights. In *Berghuis*, the Supreme Court outlined its precedent on the waiver of Miranda rights:

[T]he accused’s statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused in fact knowingly and voluntarily waived [Miranda] rights when making the statement. The waiver inquiry has two distinct dimensions: waiver must be voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception, and made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Berghuis, 560 U.S. at 382-83 (citations and internal quotation marks omitted).

The *Berghuis* Court emphasized that the State may establish waiver by a preponderance of the evidence, *Berghuis*, 560 U.S. at 384, and that “Miranda rights can... be waived through means less formal than a typical waiver on the record in a courtroom.” *Id.* at 385. The Court further explained that, “[a]s a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exer-

cise has made a deliberate choice to relinquish the protection those rights afford.” *Id.*

In this case, the Appellate Division rejected Wilcox’s challenge to his waiver substantially for the reasons expressed by the trial judge, adding that “[n]othing in the record supports a conclusion that defendant’s statements were not the product of an essentially free and unconstrained choice.” (ECF No. 1-2 at 12) (citations and internal quotation marks omitted). The record shows that, after the suppression hearing, the trial judge found that Wilcox understood the Miranda warnings and that he decided to waive them. Specifically, as to Wilcox’s post-Miranda statements to Trooper Doyle, the trial judge found that while Trooper Doyle was reading the Miranda warnings, Wilcox

was alert, he was nodding that he understood those rights as they were given and - and was told that he could - he can waive those, you know, at any time he wanted, he could withdraw his waiver and assert those rights, and then - and then the Trooper asked okay? And he got an ah-hum, which under the circumstances was an affirmative - I interpret to be an affirmative yes. He then proceeded, once again, to totally be cooperative and volunteer information.

(ECF No. 12-30 at 28-29.)

With respect to the confessions Wilcox gave to Detective Foley, the trial judge found that “Mr. Wilcox was given his Miranda warnings over and over and over again, both orally and written, and that he understood his rights and that he knowingly waived his rights.” (ECF No. 12-30 at 29-30.)

Again, the Court must presume the state courts' factual findings that Wilcox comprehended his Miranda rights and that he voluntarily chose to give statements to Doyle and Foley. See 28 U.S.C. § 2254(e)(1). Wilcox has not rebutted these findings by clear and convincing evidence, *id.*, or shown that they were unreasonable in light of the evidence in the record. See 28 U.S.C. § 2254(d)(2).

In addition, the New Jersey courts' determination that the admission of Wilcox's statements did not violate his Miranda rights because the statements were made freely with an understanding of his rights was consistent with Supreme Court precedent. "Where the prosecution shows that a Miranda warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." *Berghuis*, 560 U.S. at 384. Based on the foregoing, Wilcox has not shown that the New Jersey courts' adjudication of his waiver challenge was contrary to, or an unreasonable application of, U.S. Supreme Court holdings. See 28 U.S.C. § 2254(d)(1), (d)(2).

B. Ineffective Assistance of Post-Conviction Relief Counsel

In Grounds Three and Eight of the § 2254 Petition, Wilcox asserts that post-conviction relief counsel was constitutionally ineffective. As explained above, a ground challenging the ineffectiveness or incompetence of counsel during state post-conviction proceedings is not cognizable under § 2254. See 28 U.S.C. § 2254(i) and *supra* at pp. 8-9. Wilcox is, therefore, not entitled to habeas relief on Grounds Three and Eight.

C. Ineffective Assistance of Trial and Appellate Counsel

In Grounds One, Five, and Six of his § 2254 Petition, Wilcox asserts that trial counsel was deficient in failing to use previously obtained mental health expert reports at his trial and sentencing, failing to advise the trial court that a juror appeared to have made an unfavorable communication with a family member of the victim, and failing to seek to remove a biased venire person. In Ground Two, Wilcox asserts that counsel on direct appeal was deficient in failing to argue that the trial court erred by allowing Detective Foley to testify to (unidentified) hearsay that violated the Confrontation Clause.

The Sixth Amendment guarantees the accused the “right... to have the Assistance of Counsel for his defense.” U.S. Const. amend. VI. A claim that counsel’s assistance was so defective as to require reversal of a conviction has two components, both of which must be satisfied. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the defendant must “show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 687-88. To meet this prong, a “convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.” *Id.* at 690. The court must then determine whether, in light of all the circumstances at the time, the identified errors fell “below an objective standard of reasonableness[.]” *Hinton v. Alabama*, 134 S.Ct. 1081, 1083 (2014) (per curiam). To establish prejudice, the defendant must show that “there is a reasonable probability that the result of the trial would have been different absent the deficient act or omission.”

Id., 134 S.Ct. at 1083. “When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” *Id.* at 1089 (quoting *Strickland*, 466 U.S. at 695).

The Fourteenth Amendment guarantees a criminal defendant pursuing a first appeal as of right certain “minimum safeguards necessary to make that appeal adequate and effective, “ *Evitts v. Lucey*, 469 U.S. 387, 392 (1985) (quoting *Griffin v. Illinois*, 351 U.S. 12, 20 (1956)), including the right to the effective assistance of counsel, *id.* at 396. The ineffective assistance of counsel standard of *Strickland* applies to a claim that appellate counsel was ineffective. See *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *United States v. Cross*, 308 F.3d 308, 315 (3d Cir. 2002). However, “it is a well established principle that counsel decides which issues to pursue on appeal, “ *Sistrunk v. Vaughn*, 96 F.3d 666, 670 (3d Cir. 1996), and appellate counsel is not constitutionally required to raise every nonfrivolous claim requested by the defendant. See *Jones v. Barnes*, 463 U.S. 745, 751 (1983); see also *Smith v. Robbins*, 528 U.S. 259, 288 (2000).

(1) Failure to Use Mental Health Reports

In Ground One of the § 2254 Petition, Wilcox claims that trial counsel was deficient in failing to “use the mental health expert reports at trial or sentencing in support of a diminish[ed] capacity defense and especially in light of the trial court[']s imposition of penalty at the lower end[.]” (ECF No. 1-2 at 2.) Wilcox raised this ground on post-conviction relief and included in his appendix several mental health evaluations, arguing that, if presented at trial, the

evaluations would have established a diminished capacity defense or reduced his sentence.

As to use of the reports to establish a diminished capacity defense, the Appellate Division agreed with the trial judge “that trial counsel’s decision to pursue a passion/provocation defense as opposed to diminished capacity, was one of trial strategy.” *Wilcox*, 2012 WL 3116701 at *3. The Appellate Division noted that

the State asserted at oral argument that it had a report as to defendant’s mental status, prepared before trial, in which the expert concluded that [Wilcox] had the mental capacity to engage in purposeful and knowing conduct. By not introducing his own reports at trial [or] sentencing... defendant was able to argue diminished capacity without running the risk of the State offering evidence to the contrary.

Wilcox, 2012 WL 3116701 at *3.

The Appellate Division noted that trial counsel had argued in summation that Wilcox snapped at the time of the crime and that the evidence showed at worst that he had committed aggravated manslaughter. The court found that, “without opening the door to the admission of the State’s proofs, [Wilcox] nonetheless argued diminished capacity to the jury, without objection, once the judge refused to give the jury a passion/provocation instruction.” *Id.* at *4.

The Appellate Division further found that counsel’s decision not to use the reports at sentencing was not deficient. *Id.* . “Even in the absence of reports, trial counsel was so effective in his sentencing presentation that despite the presence of aggravating factor one, [t]he nature and circumstances of the

offense, ‘N.J.S.A. 2C:44-1(a)(1), [Wilcox] was sentenced in the lower end of the range.” *Id.*

As explained above, the Appellate Division found that trial counsel made a strategic decision not to use the mental health reports. The habeas petitioner “bears the burden of proving that counsel’s representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy.” *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986) (citing *Strickland*, 466 U.S. at 688-689). As *Strickland* explained, to establish constitutionally deficient performance, “the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Strickland*, 466 U.S. at 689 (citation and internal quotation marks omitted). The Appellate Division’s determination that counsel was not deficient in failing to use the previously obtained mental health reports at trial or sentencing is not contrary to, or an unreasonable application of *Strickland* and its progeny. See *United States v. Leggett* 162 F.3d 237, 247 (3d Cir. 1998) (“[T]here is no constitutional right to be represented by a lawyer who agrees with the defendant’s trial strategy. Mere disagreement between defendant and counsel with regard to strategic decisions does not create a situation severe enough to compel a district court to investigate whether the defendant’s rights are being impinged[.]”). Accordingly, Wilcox is not entitled to habeas relief on this claim.

(2) Failure to Advise the Court of Juror’s Communication

In Ground Five of his § 2254 Petition, Wilcox claims that counsel was ineffective in failing to timely advise the trial court that a juror appeared to have

made an unfavorable communication with a family member of the victim. (ECF no. 1-2 at 4.) Wilcox raised this ground in his post-conviction relief petition. After conducting an evidentiary hearing and considering the testimony of Wilcox, Tammy Smart (the ex-wife of Wilcox's cousin), and Wilcox's trial attorney, the trial court decided not to recall the juror because Wilcox failed to show that "a specific, non-speculative impropriety [] occurred" or that he "may have been harmed by jury misconduct." (ECF No. 1-2 at 25.)

The Appellate Division noted that Wilcox testified that "he saw a particular juror making flirtatious eye contact on three separate occasions with a woman seated behind the prosecutor, " and that "his attorney told him that he saw that same juror make an inappropriate gesture to [the victim's] family." *Wilcox*, 2012 WL 3116701 at *1. Wilcox's trial attorney testified that after the jury returned to the court room to render its verdict, Wilcox told him that he thought that a juror had made some eye contact with the victim's side, but Wilcox did not report any other observations regarding the juror. Tammy Smart testified that while she was in the courtroom after deliberations and immediately before the jury announced the verdict, she saw a juror nodding his head and patting his chest while making eye contact with the victim's family. The Appellate Division ruled that, "[i]n light of the judge's determination that trial counsel's testimony was credible, and was corroborated by Smart, and his conclusion that [Wilcox] was not credible, the judge certainly had no record upon which to require voir dire of the juror. Defendant made no showing at all, much less a strong showing' of such a need." *Id.* at *4 (citations omitted).

This Court must presume the correctness of the finding that the juror made a gesture to the victim's family after deliberations had concluded and after the jury returned to the courtroom, but immediately before the jury announced the verdict. Under the facts found by the New Jersey courts, Wilcox's trial attorney was not constitutionally deficient in failing to seek to voir dire the jury because the gesture occurred *after* deliberations had concluded. See *Ross v. District Attorney of the County of Allegheny*, 672 F.3d 198, 211 n.9 (3d Cir. 2012)) (“[C]ounsel cannot be deemed ineffective for failing to raise a meritless claim.”) (quoting *Werts v. Vaughn*, 228 F.3d 178, 202 (3d Cir. 2000)). No impropriety occurs when a juror, by body language, conveys the notion that the jury is about to announce a finding of guilt, and the state courts' conclusion does not violate any established precedent.

(3) Failure to Remove Biased Venire Person

In Ground Six of his § 2254 Petition, Wilcox asserts that trial counsel was deficient in failing to remove a biased venire person. As factual support, he does not explain the nature of the alleged bias; he simply refers to the brief filed on his appeal from the denial of post-conviction relief. In point five of that brief, counsel indicates that in Wilcox's pro se submission to the trial court, he had “alleged that his trial attorney was constitutionally ineffective because he failed to exercise a peremptory challenge on a venireman for bias.” (ECF No. 12-4 at 21.) Without setting forth the factual basis for the alleged bias, counsel continued, “[a]ssuming the defendant's facts are true, “ the trial court improperly rejected the claim without addressing the merits. *Id* . The Appellate Division affirmed the denial of relief on this

ground because “[n]o facts are even asserted supporting this claim.” *Wilcox*, 2012 WL 3116701 at *4.

This Court agrees with the Appellate Division and finds that, in the absence of any factual showing, Wilcox has not established that the Appellate Division’s rejection of this ground was based on an unreasonable determination of the facts in light of the evidence presented or was contrary to, or an unreasonable application of, Supreme Court holdings. See 28 U.S.C. § 2254(d)(1) and (d)(2).

(4) Failure to Argue on Direct Appeal That the Admission of Hearsay in Detective Foley’s Testimony Violated the Confrontation Clause

In Ground Two of the § 2254 Petition, Wilcox asserts that appellate counsel was deficient in failing to argue on direct appeal “that the trial court committed reversible error by permitting Detective Foley to testify to inadmissible hearsay material that denied Petitioner’s Sixth Amendment confrontation right[.]” (ECF No. 1-2 at 2.) As factual support, Wilcox does not describe the challenged testimony; he refers the Court to his pro se letter briefs filed on appeal from the denial of post-conviction relief. *Id.* The record shows that Wilcox raised the identical heading as point two in his pro se supplemental brief filed in the Appellate Division. (ECF No. 12-8 at 11.) He argued that “the Miranda card used by Detective Foley to elicit oral statements that resulted to written statements belonged to Officer Raul Morales, “ and that “Detective Foley’s use of inadmissible hearsay material consisting of testimony regarding another officer[’s] Miranda card violated defendant’s right to confrontation, given that the officers were available to testify.” (ECF No. 12-8 at 13.) Wilcox further argued that “the trial court erred in permitting Foley

to testify to the use of Officer[] Morales[] Miranda card to elicit oral statements from defendant without the right to confront him and Officer DiPalma.” *Id.* at 14-15. Wilcox claimed that the trial judge “should have allowed [Morales] to testify to rebut Detective Foley’s allegation that defendant wrote those responses.” *Id.* at 17. The Appellate Division did not discuss this ground, stating: “We briefly touch upon defendant’s pro se points, only to the extent we note that none raise issues worthy of discussion in a written opinion.” *Wilcox*, 2012 WL 3116701 at *5.

Wilcox appears to argue that counsel was constitutionally deficient in failing to challenge Foley’s trial testimony which indicated that Wilcox had acknowledged receiving Miranda warnings from Detective Morales. This Court notes that, after conducting the suppression hearing, the trial court found that “Mr. Wilcox was given his Miranda warnings over and over and over again, both orally and written, and that he understood his rights and that he knowingly waived his rights.” (ECF No. 12-30 at 29-30.) The Appellate Division agreed that Wilcox had voluntarily waived his Miranda rights. This Court finds that the New Jersey courts’ adjudication of the claim that counsel was deficient in failing to challenge Foley’s testimony was not contrary to, or an unreasonable application of, Supreme Court holdings concerning the Confrontation Clause or the right to the effective assistance of counsel. See, e.g., *Knowles v. Mirzayance*, 556 U.S. 111, 127 (2009) (“Counsel also is not required to have a tactical reason - above and beyond a reasonable appraisal of a claim’s dismal prospects for success - for recommending that a weak claim be dropped altogether.”)

D. Eighth Amendment

In Ground Seven of the § 2254 Petition, Wilcox asserts that his sentence violated the Eighth Amendment. Wilcox argued on direct appeal that his 40-year term of imprisonment was excessive and the Appellate Division rejected the claim, finding that “the sentence is not manifestly excessive or unduly punitive and does not constitute an abuse of discretion.” (ECF No. 1-2 at 16-17.)

The legality and length of a sentence are generally questions of state law over which this Court has no jurisdiction under § 2254. See *Chapman v. United States*, 500 U.S. 453, 465 (1991); *Harmelin v. Michigan*, 501 U.S. 957, 994-95 (1991); *Wainwright v. Goode*, 464 U.S. 78 (1983). Moreover, the Supreme Court held in *Lockyer v. Andrade*, 538 U.S. 63 (2003), that California’s imposition of two consecutive terms of 25 years to life in prison for a third strike conviction for stealing five videotapes did not violate clearly established Supreme Court Eighth Amendment precedent. In light of *Lockyer*, the New Jersey courts’ adjudication of the Eighth Amendment claim was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent.

E. Certificate of Appealability

Wilcox has not made a substantial showing of the denial of a constitutional right. Therefore, no certificate of appealability will issue pursuant to 28 U.S.C. § 2253(c)(1)(B). See Fed. R. App. P. 22(b)(1); 3d Cir. L.A.R. 22.2.

IV. CONCLUSION

This Court dismisses the Petition with prejudice and denies a certificate of appealability.

APPENDIX C – State Court Opinion

Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,

v.

Raheem WILCOX, Defendant–Appellant.

No. A–1188–10T4.

On appeal from the Superior Court of New Jersey,
Law Division, Union County, Indictment No. 00–12–
1580.

Submitted May 29, 2012.

Decided July 20, 2012.

Opinion

PER CURIAM.

Defendant Raheem Wilcox appeals from an order of the Law Division denying his petition for post-conviction relief (PCR). We affirm.

A jury found defendant guilty of first-degree murder, N.J.S.A. 2C:11–3(a)(1) and (2), third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39–4(d), and fourth-degree unlawful possession of a knife, N.J.S.A. 2C:39–5(d). The trial court merged the weapons offenses into the murder

count, and sentenced defendant, on July 5, 2002, to forty years imprisonment subject to thirty years of parole ineligibility. On appeal, we affirmed the judgment of conviction. *State v. Wilcox*, No. A-6787-01 (App. Div. Oct. 10, 2003). The Supreme Court denied defendant's petition for certification. *State v. Wilcox*, 185 N.J. 389 (2005).

Defendant's convictions resulted from the stabbing death on April 13, 2000, at around 2:30 a.m., of his former girlfriend, Ernestine Williams. He and the victim worked at Federal Express. On the date of the murder, defendant brought three knives, including the murder weapon, to work. He ended his shift early and waited for Williams. They took the bus to the Federal Express parking lot and got into Williams' car. Defendant then removed a knife from his pocket, and after struggling with Williams, stabbed her in the back as she ran. While the confrontation was ongoing, two other Federal Express employees saw Williams being chased by a man, while crying out that they should "call the police." Both saw the victim lying on the ground bleeding after she was knifed.

At trial, a New Jersey Turnpike Authority employee testified that at approximately 3:15 a.m., defendant approached him and asked him to call an ambulance because he had just stabbed his girlfriend. When a state trooper arrived, defendant volunteered the same information.

Prior to trial, the court conducted a *Miranda* hearing to assess the admissibility of defendant's formal statement, in which he reiterated that he had arranged to meet the victim while armed. In a subsequent statement, defendant admitted telling the victim's cousin that he intended to "hurt" the victim.

During oral argument on his PCR application, defendant presented seventeen points of ineffective assistance of counsel. The judge decided that only the claim of juror misconduct merited a plenary hearing. On the other points, the judge determined defendant had not established a *prima facie* case, and relief was denied outright.

After the plenary hearing, the judge assessed the credibility of witnesses and found defendant's testimony wanting. He testified on direct that he saw a particular juror making flirtatious eye contact on three separate occasions with a woman seated behind the prosecutor. He then altered this narrative to some extent, indicating it may have only been twice. Defendant also said that his attorney told him that he saw that same juror make an inappropriate gesture to Williams' family.

Defendant's trial attorney testified that after the jury returned to the courtroom to render its verdict, but before the verdict was actually delivered, defendant told him that

he didn't like the way the juror came in and he thought that the juror had made some sort of eye contact with the victim's side, whoever they were, and/or had made some sort of like gestures that, I'm trying to think how to phrase this, these were his words but that he thought that the juror was telling the victim and their family that everything was okay, meaning everything was not okay for Mr. Wilcox, everything was okay for them, in fact, and I'm reading into this, but this is my recollection, that he thought that the juror was telling them that the jury had returned a verdict that would make them happy.

Those were not his words but that was the gist of his message.

According to trial counsel, defendant did not report any other observations regarding the behavior of the juror. The judge found the trial attorney credible.

Tammy Smart, the former wife of defendant's cousin, also testified. She said that while present in the courtroom after deliberations were completed and immediately before the jury announced its verdict, she saw a juror nodding his head and patting his chest while making eye contact with the victim's family.

Because the judge did not find the testimony established "clear, strong, substantial and incontrovertible evidence that a specific, non-speculative impropriety ha[d] occurred[.]" he did not order the voir dire of the juror. He opined that it was "mere speculation" that he was attempting to communicate anything to anyone by virtue of patting his chest while looking at one side of the courtroom. He therefore denied PCR relief on this final ground.

On this appeal, defendant argues:

POINT ONE

THE DEFENDANT'S PCR ATTORNEY WAS CONSTITUTIONALLY INEFFECTIVE WHERE, ALTHOUGH RELYING ON THE ARGUMENT THAT THE DEFENDANT WAS MENTALLY UNABLE TO FORM THE INTENT TO COMMIT MURDER, HE FAILED TO INTRODUCE INTO EVIDENCE ANY EXPERT REPORT WITH RESPECT TO THE DEFENDANT'S MENTAL HEALTH.

POINT TWO

AN EVIDENTIARY HEARING IS NECESSARY TO DETERMINE WHY THE DEFENDANT'S TRIAL ATTORNEY DID NOT USE THE MENTAL HEALTH EXPERT REPORTS DURING ANY PART OF THE DEFENDANT'S TRIAL, PARTICULARLY WHERE HE ATTEMPTED TO ARGUE TO THE TRIAL COURT THAT THE DEFENDANT'S MENTAL CONDITION AT THE TIME OF THE CRIME WAS DIMINISHED.

POINT THREE

THE DEFENDANT'S TRIAL ATTORNEY'S STRATEGY TO NOT RELY ON THE MENTAL HEA[L]TH EXPERT REPORTS AT SENTENCING WAS CONSTITUTIONALLY INEFFECTIVE ESPECIALLY IN LIGHT OF THE TRIAL COURT'S IMPOSITION OF PENALTY AT THE LOWER END.

POINT FOUR

THE PCR COURT ERRED BY FAILING TO ALLOW THE DEFENDANT TO CALL BACK A JUROR WHO APPEARS TO HAVE MADE AN UNFAVORABLE COMMUNICATION DURING TRIAL WITH A FAMILY MEMBER OF THE VICTIM.

POINT FIVE

AN EVIDENTIARY HEARING IS NECESSARY TO DETERMINE WHETHER THE DEFENDANT'S TRIAL ATTORNEY FAILED TO REMOVE A BIASED VENIREMAN REGARDLESS OF INSTRUCTIONS FROM THE DEFENDANT.

Defendant raises the following points in his *pro se* brief:

POINT I

PCR COUNSEL WAS INEFFECTIVE FOR FAILING TO ADEQUATELY CROSS-EXAMINE DEFENDANT [']S TRIAL ATTORNEY TO ASCERTAIN THE IDENTITY OF DEFENDANT'S FAMILY MEMBER WHO ADVISED HIM OF A JUROR'S UNFAVORABLE COMMUNICATION DURING TRIAL WITH A FAMILY MEMBER OF THE VICTIM AND TO QUESTION HIM ABOUT HIS FAILURE TO ADDRESS THE IMPROPRIETY AND INATTENTION OF OTHER POTENTIAL WITNESSES.

POINT II

THE DEFENDANT'S APPELLATE ATTORNEY WAS CONSTITUTIONALLY INEFFECTIVE WHERE DID NOT RAISE ON APPEAL THAT THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT PERMITTED DETECTIVE FOLEY TO TESTIFY TO INADMISSIBLE HEARSAY MATERIAL THAT DENIED DEFENDANT'S RIGHT TO CONFRONTATION PURSUANT TO CRAWFORD v. WASHINGTON [, 541 U.S. 36, 124 S.Ct. 1354, 158 L. Ed.2d 177 (2004)] IN VIOLATION OF DEFENDANT'S SIXTH AMENDMENT RIGHTS. (Partially Raised Below)

POINT III

DEFENDANT[']S PCR PETITION SHOULD BE GRANTED FOR THE REASONS SET FORTH IN DEFENDANT'S PRO SE BRIEF IN SUPPORT OF HIS PETITION

In order for defendant to obtain PCR relief on ineffective assistance grounds, he is obliged to show not only the particular manner in which counsel's performance was deficient, but also that the deficiency prejudiced his right to a fair trial. *See Strickland*

v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Fritz*, 105 N.J. 42, 58 (1987). The alleged deficiencies here clearly failed to meet either the performance or prejudice prong of the Strickland test.

In support of his argument that his PCR attorney was ineffective, defendant's appendix included mental health evaluations completed prior to his trial, which were not provided to the Law Division judge on PCR. Although the reports themselves were not admitted as evidence, they were discussed in the course of oral argument.

The claim is now being made that had those reports been admitted into evidence, the judge would have had a basis for ordering an evidentiary hearing regarding ineffective assistance of counsel, as they allegedly established defendant's diminished capacity at the time of the murder. The argument lacks merit, however, because although not in evidence, the contents were discussed to a sufficient extent that the judge had the information necessary to reach a decision on the merits of the claim. And his basis for denying PCR on this issue in any event was unrelated to the contents of the report. The judge found that trial counsel's decision to pursue a passion/provocation defense, as opposed to diminished capacity, was one of trial strategy. Challenges to trial strategy are generally not a basis for ineffective assistance of counsel. *See State v. Chew*, 179 N.J. 186, 212–13 (2004) (declining to “second-guess counsels’ trial strategy” in selecting “between two weak defenses[.]”).

Furthermore, the State asserted at oral argument that it had a report as to defendant's mental status, prepared before trial, in which the expert concluded

that defendant had the mental capacity to engage in purposeful and knowing conduct. By not introducing his own reports at trial, sentencing, or during the course of his PCR presentation, defendant was able to argue diminished capacity without running the risk of the State offering evidence to the contrary.

In fact, even without expert testimony, trial counsel argued in summation that at the time of the crime defendant was laboring under diminished capacity:

I told you in my opening that this case would be about what his state of mind was on the night in question.... [H]e snapped. He let his emotions get the better of him....

This is not murder, ladies and gentlemen. This is at worse aggravated manslaughter, and I want you to consider as jurors you are the conscience of the community. You determine the facts. You determine ... [defendant's] state of mind[.]

Therefore, without opening the door to the admission of the State's proofs, defendant nonetheless argued diminished capacity to the jury, without objection, once the judge refused to give the jury a passion/provocation instruction.

Hence the failure to present the reports, at trial or during PCR, did not establish ineffective assistance of counsel. At trial, the decision was a matter of strategy. On PCR, the judge denied relief on the point because it was a matter of strategy. PCR counsel was therefore not ineffective for failing to introduce the reports where they could not have been a basis for relief.

Defendant also contends that trial counsel should have provided the evaluations at least to the sentenc-

ing judge, and that the failure to do so was ineffective assistance of counsel. Again, this claim does not take into account the weight the court might have given to the State's evidence of defendant's mental status when the crime was committed. The decision to forego presentation of the reports even at sentencing was also one of strategy. Even in the absence of reports, trial counsel was so effective in his sentencing presentation that despite the presence of aggravating factor one, "[t]he nature and circumstances of the offense," N.J.S.A. 2C:44-1(a)(1), defendant was sentenced in the lower end of the range.

Defendant also asserts that the PCR judge erred in failing to call into court and voir dire the juror alleged to have communicated with someone in the audience immediately prior to the verdict. In light of the judge's determination that trial counsel's testimony was credible, and was corroborated by Smart, and his conclusion that defendant was not credible, the judge certainly had no record upon which to require voir dire of the juror. Defendant made no showing at all, much less a "strong showing" of such a need. *See State v. Koedatich*, 112 N.J. 225, 288 (1988), *cert. denied*, 488 U.S. 1017, 109 S. Ct. 813, 102 L. Ed. 2d 803 (1989) (*quoting State v. Athorn*, 46 N.J. 247, 250, *cert. denied*, 384 U.S. 962, 86 S. Ct. 1589, 16 L. Ed. 2d 674 (1966)).

Defendant's last point in his counseled brief is that it was ineffective assistance of counsel for defendant's trial attorney to have failed to remove a biased juror. No facts are even asserted supporting this claim. *See State v. Hild*, 148 N.J. Super. 294, 296 (App. Div. 1977) (stating that the "rules clearly impose upon the attorneys for the parties to the appeal the absolute duty to make unnecessary an inde-

pendent examination of the record by the court[.]”). It does not warrant further discussion in a written opinion. R. 2:11–3(e)(2).

We briefly touch upon defendant’s pro se points, only to the extent we note that none raise issues worthy of discussion in a written opinion. R. 2:11–3(e)(2).

Affirmed.

APPENDIX D - 28 U.S.C. § 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of

the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

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

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts [21 USCS § 848], in all proceedings brought under this section, and any

subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 [28 USCS § 2254].