

BLD-324

August 3, 2017

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 17-2142

NEAL L. PATTON, Appellant

VS.

SUPERINTENDENT GRATERFORD SCI, ET AL.

(W.D. Pa. Civ. No. 2-16-cv-01413)

Present: AMBRO, GREENAWAY, JR., and SCIRICA, Circuit Judges

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

in the above-captioned case.

Respectfully,

Clerk

MMW/AS/mb

ORDER

The foregoing application for a certificate of appealability is denied. Slack v. McDaniel, 529 U.S. 473, 484 (2000). For substantially the reasons provided by the District Court, Patton has not arguably shown that trial counsel performed deficiently, see Strickland v. Washington, 466 U.S. 668, 687-88 (1984), that his Due Process rights were violated by the omission of an instruction on voluntary manslaughter, see Geschwendt v. Ryan, 967 F.2d 877, 884 n.13 (3d Cir. 1992), or that his Due Process rights were violated by his sentence of life imprisonment without the possibility of parole, see Jones v. Superintendent of Rahway State Prison, 725 F.2d 40, 43 (3d Cir. 1984). Jurists of reason would also not disagree that Patton's remaining claims are procedurally defaulted as the state court's reliance on 42 Pa. Cons. Stat. § 9544(b) provides an independent and adequate ground to support the judgment. Campbell v. Burris, 515 F.3d 172, 176 (3d Cir. 2008).

By the Court,

s/Anthony J. Scirica
Circuit Judge

Dated: September 28, 2017
MB/cc: Neal L. Patton
Ronald M. Wabby, Jr. Esq.



A True Copy

Marcia M. Waldron

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Certified order issued in lieu of mandate.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-2142

NEAL L. PATTON,
Appellant

v.

SUPERINTENDENT GRATERFORD SCI;
DISTRICT ATTORNEY ALLEGHENY COUNTY;
ATTORNEY GENERAL PENNSYLVANIA

(D.C. Civ. No. 2-16-cv-01413)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, MCKEE, AMBRO, CHAGARES, JORDAN,
GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, and
SCIRICA*, Circuit Judges

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

*As to panel rehearing only.

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

BY THE COURT,

s/Anthony J. Scirica
Circuit Judge

Dated: October 25, 2017
MB/cc: Neal L. Patton
Ronald M. Wabby, Jr., Esq.

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

NEAL L. PATTON,	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 16-1413
	)	
	)	Judge Hornak
CYNTHIA LINK, et al.,	)	Magistrate Judge Mitchell
Respondents.	)	

I. Recommendation

It is respectfully recommended that the petition for writ of habeas corpus filed by petitioner (ECF No. 1) be denied and that a certificate of appealability be denied.

II. Report

Petitioner, Neal L. Patton, brings this habeas corpus action pursuant to 28 U.S.C. § 2254, challenging his conviction on charges of criminal homicide and the sentence of life imprisonment without the possibility of parole, imposed by the Court of Common Pleas of Allegheny County, Pennsylvania on May 24, 2005 at Criminal Action No. CP-02-CR-4832-2004. The charges stemmed from the August 25, 2003 incident in which Petitioner shot and killed his brother, Anthony Patton. For the reasons that follow, the petition should be denied.

Procedural History

On June 8, 2004, Petitioner, through James P. Sheets, Esquire of the Office of the Public Defender, filed a Motion for Discovery. (Answer Ex. 3) (APP 23-27). On September 16, 2004, Donald Turner, Esquire, requested a postponement of trial due to the fact that he had recently been retained and required time to prepare and to review additional discovery that had been provided. The matter was postponed until February 22, 2005.

On February 15, 2005, Petitioner, through Attorney Turner, filed an Omnibus Pretrial

Motion, which sought to suppress Petitioner's statement to the police and requested additional discovery in the form of a copy of Petitioner's tape-recorded statement. (Answer Ex. 4) (APP 28-36). On February 23, 2005, Petitioner appeared before the Honorable John K. Reilly, Jr. for a motion hearing. Attorney Turner represented Petitioner. Assistant District Attorney Stephanie-Anna Kapourales, Esquire represented the Commonwealth. After the hearing, the motion was denied.

On February 23, 2005, the case proceeded to a jury trial before Judge Reilly. On February 25, 2005, the jury returned a verdict of guilty of first degree murder. Sentencing was deferred until May 24, 2005. On May 24, 2005, Petitioner appeared before Judge Reilly for sentencing. Attorney Turner represented petitioner. Assistant District Attorney Kapourales represented the Commonwealth. Petitioner was sentenced to a mandatory term of life imprisonment.

On June 3, 2005, Petitioner, through Attorney Turner, filed a Post-Sentence Motion. (Answer Ex. 5) (APP 37-44). On September 20, 2005, Petitioner, through Attorney Turner, filed a Motion for 30-Day Extension on Post-Sentence Motion. (Answer Ex. 6) (APP 45-49). On September 28, 2005, Judge Riley granted an extension of thirty (30) days within which to decide the motion, and set a hearing for October 24, 2005, but it was never held. (Answer Ex. 7) (APP 50).

On November 4, 2005, Attorney Turner sought and was granted leave to withdraw from Petitioner's representation, and the Office of the Public Defender was appointed. (APP 55.) An Order of Court was issued on November 17, 2005 indicating that post-sentence motions had been denied by operation of law. (Answer Ex. 8) (APP 51). On December 13, 2005, Petitioner, through Kirk J. Henderson, Esquire, filed a Notice of Appeal to the Superior Court. (Answer Ex.

9) (APP 52-68). On March 9, 2006, Petitioner, through Attorney Henderson, filed a Rule 1925(b) Concise Statement of Matters to be Raised on Appeal. (Answer Ex. 10) (APP 69-74). On April 24, 2006, Judge Reilly filed his Opinion. (Answer Ex. 11) (APP 75-81).

On September 21, 2006, Petitioner, through Attorney Henderson, filed a Brief for Appellant in the Superior Court of Pennsylvania, which was docketed at No. 2130 WDA 2005. (Answer Ex. 13) (APP 87-135). On appeal, Petitioner raised the following claims:

I. May a prosecutor implore the jury to “send a message” to the community with its verdict despite clear and forceful language from the Supreme Court that is prosecutor may not do this and that this type of argument causes per se prejudice?

II. When the cumulative impact of a series of events has caused a person to act under a sudden and intense passion resulting from serious provocation, can a trial court nonetheless refuse to instruct the jury that this could lead to a voluntary manslaughter conviction?

(Answer Ex. 13 at 4.) On October 17, 2006, the Commonwealth, through Assistant District Attorney Sandra Preuhs, Esquire, filed a Brief for Appellee. (Answer Ex. 14) (APP 136-166). On October 31, 2006, Petitioner, through Attorney Henderson, filed a Reply Brief for Appellant. (Answer Ex. 15) (APP 167-180). On November 19, 2007, the Superior Court affirmed the judgment of the Court of Common Pleas of Allegheny County in a published opinion.

Commonwealth v. Patton, 936 A.2d 1170 (Pa. Super. 2007). (Answer Ex. 16) (APP 181-187).

On December 18, 2007, Petitioner, through Attorney Henderson, filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania, which was docketed at No. 599 WAL 2007. (Answer Ex. 18) (APP 191-244). In his petition, Petitioner presented the following claims:

I(A). Do send-a-message arguments cause per se prejudice “at any stage of a criminal proceeding” as this Court has held or do they cause per se prejudice only in death penalty cases as Superior Court held in this published opinion?

I(B). If send-a-message arguments (contrary to this Court’s opinions) are subject

to a prejudice analysis, was prejudice caused when the Commonwealth urged the jurors to send a message to the Commonwealth's sole eyewitness and to the larger community that a verdict other than first-degree murder would send a message that talking to the police is a worthless endeavor?

II. Was Superior Court correct that a court can refuse to give a voluntary manslaughter instruction when a person is acting under a sudden and intense passion resulting from serious provocation?

(Answer Ex. 18 at 4.) On December 20, 2007, the Commonwealth, through Assistant District Attorney Preuhs, filed a "no answer" letter. (Answer Ex. 19) (APP 245). On June 27, 2008, the Supreme Court entered the following order:

AND NOW, this 27th day of June, 2008, the Petition for Allowance of Appeal is GRANTED, LIMITED TO the issue set forth below. Allocatur is DENIED as to all remaining issues. The issue, rephrased for clarity, is:

Whether the per se rule of DeJesus applies in non-capital cases; if not, was the within request improper and prejudicial?

Commonwealth v. Patton, 952 A.2d 1166 (Pa. 2008). (Answer Ex. 20) (APP 246).¹

On August 11, 2008, Petitioner, through Attorney Henderson, filed a Brief for Appellant in the Supreme Court of Pennsylvania, which was docketed at No. 34 WAP 2008. (Answer Ex. 22) (APP 252-323). On appeal, Petitioner raised the following claims:

I. With prosecutors repeatedly ignoring this Court's numerous prohibitions against making send-a-message arguments, is a per se prejudice rule now necessary in all criminal trials so that prosecutors will understand that this forbidden and prejudicial argument no longer will be tolerated?

II. If the per se rule is not applicable to all criminal cases, can the Commonwealth prove beyond a reasonable doubt that this prejudicial error was harmless when the Commonwealth's evidence was far from overwhelming?

(Answer Ex. 22 at 4.) On September 9, 2008, the Commonwealth, through Assistant District

¹ The reference is to Commonwealth v. DeJesus, 860 A.2d 102 (Pa. 2004), in which the Pennsylvania Supreme Court held that, in capital cases, prosecutors' suggestion that the jury should "send a message" with its verdict were per se prejudicial.

Attorney Preuhs, filed a Brief for Appellee. (Answer Ex. 23) (APP 324-358). On September 19, 2008, Petitioner, through Attorney Henderson, filed a Reply Brief for Appellant. (Answer Ex. 24) (APP 359-369). On December 30, 2009, the Supreme Court affirmed the judgment of the Superior Court in a published opinion. Commonwealth v. Patton, 985 A.2d 1283 (Pa. 2009). (Answer Ex. 25) (APP 370-376).

On October 28, 2010, Petitioner filed a pro se Modification of Sentence Nunc Pro Tunc. (Answer Ex. 26) (APP 377-395). On November 29, 2010, Judge Reilly denied the motion. (Answer Ex. 27) (APP 396).

On December 3, 2010, Petitioner filed a pro se Notice of Appeal. (Answer Ex. 28) (APP 397-403). On January 18, 2011, Petitioner filed a pro se Concise Statement of Matters Complained of on Appeal. (Answer Ex. 29) (APP 404-407). On January 28, 2011, Judge Reilly filed his Opinion. (Answer Ex. 30) (APP 408-410).

Petitioner's appeal was docketed in the Superior Court of Pennsylvania at No. 48 WDA 2011. On January 24, 2011, the Superior Court quashed the appeal. (Answer Ex. 32) (APP 414). On February 22, 2011, Petitioner filed a pro se Notice of Appeal in the Supreme Court of Pennsylvania, which was docketed at No. 9 WT 2011. (Answer Ex. 33) (APP 415-417). On March 4, 2011, the Supreme Court closed the case, because the appeal was not perfected. (Answer Ex. 34) (APP 418).

Meanwhile, on December 28, 2010, Petitioner filed a pro se Motion for Post Conviction Collateral Relief and a Memorandum of Law. (Answer Exs. 35 and 36) (APP 419-447; 448-452). On September 12, 2011, Judge Reilly passed away.

On November 4, 2011, Petitioner filed a pro se Writ of Habeas Corpus and an Application for an Immediate Hearing on the Pending Writ of Habeas Corpus. (Answer Exs. 38

and 39) (APP 470-514; 515-516). On August 9, 2013, Petitioner filed a pro se Application to Request for Reassignment and Amendment of PCRA Petition. (Answer Ex. 40) (APP 517-524). Petitioner's case was reassigned to the Honorable Kathleen A. Durkin. On October 8, 2013, Judge Durkin appointed Charles Pass, III, Esquire, to represent Petitioner. (APP 533.) On October 23, 2013, Petitioner filed a pro se Motion to Request Waiver of Counsel. (Answer Ex. 41) (APP 525-533). On October 28, 2013, Petitioner, through Attorney Pass, filed a Motion for a Grazier Hearing. (Answer Ex. 42) (APP 534-552).

On November 25, 2013, Petitioner appeared before Judge Durkin for a waiver of counsel hearing. Attorney Pass represented Petitioner. Assistant District Attorney Ronald Wabby represented the Commonwealth. Following a colloquy, Attorney Pass was granted leave to withdraw and Petitioner was granted the right to proceed pro se. (Answer Ex. 43) (APP 553). On November 25, 2013, Petitioner filed a pro se Motion to Request Remand, which requested to be returned to SCI Graterford. (Answer Ex. 44) (APP 554-566).

On February 28, 2014, petitioner filed pro se Amended Petition for Post Conviction Collateral Relief. (Answer Ex. 45) (APP 567-660). In his petition, Petitioner raised the following claims:

¶48. May the Petitioner be convicted of a Capital Offense during a Non-Capital trial, in violation of the Due Process Clauses of the United States Constitution and the Pennsylvania [Constitution]?

¶49. May the Petitioner be convicted of a Capital Offense during a Non-Capital trial, in violation of the Pennsylvania Rules of Criminal Procedure as well as the well-established holdings of the Pennsylvania Supreme Court?

¶50. May the Petitioner be sentenced pursuant to a statute that is not applicable to him, and without the trial court conducting the mandatory sentencing procedures prescribed within that statute, in violation of the Due Process Clauses of the United States Constitution and the Pennsylvania Constitution, and the laws of the Commonwealth of Pennsylvania?

¶51. May the Petitioner's trial, conviction, and sentence have any legal effect if the trial judge was not properly assigned to the matter pursuant to Pennsylvania Law and Pennsylvania Rules of Judicial Administration?

¶52. May the Petitioner's sentence have any legal effect if such a sentence was imposed by a judicial officer that did not have lawful jurisdiction to exercise judicial authority?

¶53. May the Petitioner's trial counsel be deemed effective after failing to object to an erroneous jury instruction before the jury retires to deliberate, which is required by the Pennsylvania Rules of Criminal Procedure?

¶54. May the Petitioner's trial counsel be deemed effective after requesting a jury instruction that clearly conflicts with trial evidence as well as the Petitioner's testimony?

¶55. May the Petitioner be held to answer for an alleged crime without a Grand Jury indictment or presentment, in violation of the United States Constitution's Supremacy Clause (at Article VI, Clause 2)?

(Answer Ex. 45 at 10-11.)

On March 24, 2014, Judge Durkin issued a Notice of Intention to Dismiss. (Answer Ex. 46) (APP 661). On April 4, 2014, Petitioner filed a pro se Motion to Request Continuance of PCRA Proceedings. On April 15, 2014, Judge Durkin granted Petitioner a continuance. On July 14, 2014, Petitioner filed a pro se Amended Petition for Post-Conviction Collateral Relief. (Answer Ex. 47) (APP 662-769). In his amended petition, Petitioner raised the following claims:

[Claim 1] ¶60. Petitioner was denied his constitutional right to confront witnesses against him, causing a violation to the Confrontation Clauses at U.S. Constitution, Amendment VI, and the Pennsylvania Constitution, Article I, § 9.

[Claim 2] ¶61. Petitioner's trial counsel was ineffective for failing to object to improper witness testimony, causing a violation to the Petitioner's constitutional right to effective assistance of counsel as guaranteed by U.S. Constitution, Amendment VI.

[Claim 3] ¶62. Petitioner's trial judge, John K. Reilly Jr., improperly removed the charge of Voluntary Manslaughter from jury consideration, resulting in a conviction that violated the Due Process Clauses of U.S. Constitution, Amendments V and XIV, Pennsylvania Constitution, Article I, § 9 the Petitioner's right to be notified of the accusation against him at U.S. Constitution, Amendment VI, and so undermined the truth-determining process that no reliable adjunction of guilt or innocence could have taken place.

[Claim 4] ¶63. Petitioner's trial judge gave improper definitions of criminal offenses to the jury, resulting in a conviction that violated the Due Process Clauses of U.S. Constitution, Amendments V and XIV, Pennsylvania Constitution, Article I, § 9, the Petitioner's right to a fair trial by impartial jury at U.S. Constitution, Amendment VI, and so undermined the truth-determining

process that no reliable adjudication of guilt or innocence could have taken place. [Claim 5] ¶64. Petitioner's conviction and sentence resulted from violations of the U.S. Constitution, Amendments V and XIV, Pennsylvania Constitution, Article I, § 9, and Pennsylvania Rules of Criminal Procedure 802, all of which so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.

[Claim 6] ¶65. Petitioner's trial judge, John K. Reilly, Jr., presided over the Petitioner's jury trial without being properly assigned to Allegheny County, Pennsylvania's jurisdiction, causing a violation to the Due Process Clauses of U.S. Constitution, Amendments V and XIV, Pennsylvania Constitution, Article I, § 9, and the Pennsylvania Rules of Judicial Administration, all of which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(Answer Ex. 47 at 12-13.)

On July 18, 2014, Judge Durkin again issued a Notice of Intention to Dismiss. (Answer Ex. 48) (APP 770). On August 4, 2014, the Commonwealth, through Attorney Wabby, filed a Commonwealth's Answer to Post Conviction Relief Act Petition. (Answer Ex. 49) (APP 771-810). On August 14, 2014, Petitioner filed a pro se Motion to Request Continuance of PCRA Proceeding and an Evidentiary Hearing.

On October 28, 2014, Judge Durkin withdrew the July 18, 2014 Notice of Intention to Dismiss and issued a new Notice of Intention to Dismiss. (Answer Ex. 50) (APP 811). On November 18, 2014, Petitioner filed a Motion to Request Continuance of PCRA Proceeding and an Evidentiary Hearing. On December 11, 2014, Judge Durkin granted Petitioner's continuance. (APP 820.) On December 29, 2014, Petitioner filed a Notification of Intent to Proceed. On February 27, 2015, Judge Durkin dismissed the petition. (Answer Ex. 51) (APP 812).

On March 27, 2015, Petitioner filed a pro se Notice of Appeal. (Answer Ex. 52) (APP 813-822). On June 11, 2015, Petitioner filed a pro se Concise Statement of Matters Complained of on Appeal. (Answer Ex. 53) (APP 823-851). On June 26, 2015, Judge Durkin filed her Opinion. (Answer Ex. 54) (APP 852-856).

On September 22, 2015, Petitioner filed his pro se Brief for Appellant in the Superior Court of Pennsylvania, which was docketed at No. 532 WDA 2015. (Answer Ex. 56) (APP 861-944). On appeal, Petitioner raised the following:

I. May the Appellant be denied his right to confront the affiant of the forensic autopsy report that was used against him, in light of the precedent(s) established by the U.S. Supreme Court in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009), and Bullcoming v. New Mexico, 564 U.S. ___, 131 S.Ct. 2705 (2011)?

II. May the Appellant be denied his right to confront the affiant of the forensic autopsy report that was used against him, in violation of the Confrontation Clauses at U.S. Constitution, Amendment VI and Pennsylvania Constitution, Article I, Section 9?

III. Can the Appellant's trial counsel be considered effective after failing to object to Appellant's right to Confrontation, which is in violation of the Appellant's right to have effective assistance of counsel as guaranteed under Amendment VI of the United States Constitution?

IV. May the trial judge inform the Appellant during the trial that he is facing Voluntary Manslaughter, then wait until the Appellant's defense rests to remove Voluntary Manslaughter from jury consideration, in clear violation of Due Process of Law and the Appellant's constitutional right to be informed of the specific charge(s) against him as guaranteed at U.S. Constitution, Amendments V and XIV, as well as Pennsylvania Constitution Article I, Section 9?

V. May the Appellant be convicted of a capital offense during a non-capital trial, in violation of the Due Process Clauses at U.S. Constitution, Amendments V and XIV, as well as Pennsylvania Constitution Article I, Section 9?

VI. Can the Appellant's trial judge preside over Appellant's trial and exercise judicial authority without being lawfully assigned to the jurisdiction of Allegheny County, Pennsylvania, in light of the mandatory provisions of the Pennsylvania Rules of Judicial Administration?

VII. Can the Appellant's trial, conviction, and sentence have any legal effect if the trial judge was not lawfully assigned to preside over the matter pursuant to Pennsylvania law and the Pennsylvania Rules of Judicial Administration?

VIII. Can the PCRA Court dismiss Appellant's PCRA petition without providing the Appellant with a 20-day notice of such intention to dismiss, in clear violation of governing court rule Pa.R.Crim.P. 907(1)?

(Answer Ex. 56 at 4-5.) On October 30, 2015, the Commonwealth, through Assistant District Attorney Preuhs, filed a Brief for Appellee. (Answer Ex. 57) (APP 945-989). On February 9, 2016, the Superior Court affirmed the judgment of the Court of Common Pleas of Allegheny County. (Answer Ex. 58) (APP 990-1001).

On March 10, 2016, Petitioner filed a pro se Petition for Allowance of Appeal in the Supreme Court of Pennsylvania, which was docketed at No. 128 WAL 2016. (Answer Ex. 60) (APP 1005-1067). In the petition, Petitioner raised the following:

I. May the Petitioner be denied his right to confront the affiant of the forensic autopsy report that was used against him, in light of the precedent(s) established by the U.S. Supreme Court in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009), Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), and Bullcoming v. New Mexico, 564 U.S. ___, 131 S.Ct. 2705 (2011)?

II. Can the Petitioner's trial counsel be considered effective after failing to object to the denial of Petitioner's constitutional right to Confrontation?

III. May the Petitioner's trial court inform the Petitioner that he is facing Voluntary Manslaughter before and during trial, then wait until the Petitioner's defense rests to remove Voluntary Manslaughter from jury consideration, in clear violation of the Petitioner's constitutional right to be informed of the specific charge(s) against him as guaranteed at U.S. Constitution, Amendment VI, as well as Pennsylvania Constitution Article I, Section 9?

IV. May the Petitioner be convicted of a capital crime during a non-capital trial, in violation of the mandatory statutory provisions at 42 Pa. C.S. § 9711(a)(1), mandatory court rule provisions at Pa.R.Crim.P. 802 and the Due Process Clauses at U.S. Constitution, Amendments V and XIV and Pennsylvania Constitution Article I, Section 9?

V. Can the Petitioner's trial judge preside over the Petitioner's trial and exercise judicial authority despite not being lawfully retained through a previous municipal election, in clear violation of statutory law and the Pennsylvania Rules of Judicial Administration?

(Answer Ex. 60 at 5.) On March 30, 2016, the Commonwealth, through Assistant District Attorney Preuhs, filed a "no answer" letter. (Answer Ex. 61) (APP 1068). On August 10, 2016, the Supreme Court denied the petition. (Answer Ex. 62) (APP 1069).

On September 13, 2016, Petitioner filed the instant petition for writ of habeas corpus (ECF No. 1). On October 21, 2016, Respondents filed an answer to the petition (ECF No. 9). On December 2, 2016, Petitioner filed a reply brief (ECF No. 18).

Petitioner's Claims

In the petition, Petitioner raises the following claims:

1. Petitioner was denied his constitutional right to confront a witness against him, causing a violation to the confrontation clause at U.S. Constitution, Amendment VI and Pennsylvania Constitution, Article I, Section 9.
2. Petitioner's trial counsel was ineffective for failing to object to the violation of Petitioner's right to confrontation, causing a violation to the Petitioner's right to have effective assistance of counsel was protected by U.S. Constitution, Amendment VI and Pennsylvania Constitution Article I, Section 9.
3. Petitioner's trial judge improperly removed the charged of voluntary manslaughter from jury consideration, resulting in a conviction that violated the due process clauses at U.S. Constitution, Amendments V and XIV, and Pennsylvania Constitution, Article I, Section 9, as well as the Petitioner's right to be notified of the accusation against him as protected at U.S. Constitution, Amendment VI.
4. Petitioner's conviction and sentence resulted from violations to U.S. Constitution, Amendments V and XIV, Pennsylvania Constitution, Article I, Section 9, and Pennsylvania Rules of Criminal Procedure 802, all of which so undermined the truth-determining process that no reliable adjudication could have taken place.
5. Petitioner's trial judge presided over the Petitioner's jury trial despite failing to be lawfully retained through a previous municipal election, causing a violation to the due process clauses of U.S. Constitution, Amendments V and XIV, Pennsylvania Constitution, Article I, Section 9, and the Pennsylvania Rules of Judicial Administration, all of which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(Pet. ¶ 12 & App. D.)

Respondents concede that the petition is timely. (Answer at 20.) They also agree that the claims have been exhausted. (Answer at 25.) However, they argue that two of them are procedurally defaulted. (Answer at 26.) In addition, they argue that his claims are meritless.

Exhaustion

The first issue that must be addressed by a federal district court when considering a habeas corpus petition filed by a state prisoner is whether the prisoner has exhausted available state court remedies as required by 28 U.S.C. §§ 2254(b) and (c). The Antiterrorism and Effective Death Penalty Act of 1996 (the AEDPA), provides that:

(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.

28 U.S.C. § 2254(b).

It is well settled that, as a matter of comity, the state should be provided with the first opportunity to consider the claims of constitutional violations and to correct any errors committed in its courts. Rose v. Lundy, 455 U.S. 509, 518 (1981); Preiser v. Rodriguez, 411 U.S. 475 (1973). Accordingly, before a state prisoner's claims may be addressed by a federal habeas court, the constitutional issues must first have "been fairly presented to the state courts" for review. Castille v. Peoples, 489 U.S. 346, 351 (1989) (quoting Picard v. Connor, 404 U.S. 270, 275 (1971)). Both the factual and legal basis for the claim must have been presented to the

state courts. Thus, the Supreme Court held that “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.” Duncan v. Henry, 513 U.S. 364, 366 (1995).

The Court of Appeals has stated that:

To “fairly present” a claim, a petitioner must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted. See Anderson v. Harless, 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982); Picard v. Connor, 404 U.S. 270, 277-78, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). It is not sufficient that a “somewhat similar state-law claim was made.” Harless, 459 U.S. at 6, 103 S.Ct. 276. Yet, the petitioner need not have cited “book and verse” of the federal constitution. Picard, 404 U.S. at 277, 92 S.Ct. 509.

McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999). The court has further identified four ways in which a petitioner can “fairly present” a claim:

(a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Evans v. Court of Common Pleas, Delaware Cty., Pa., 959 F.2d 1227, 1232 (3d Cir. 1992)

(citing Daye v. Attorney Gen. of N.Y., 696 F.2d 186, 194 (2d Cir. 1982) (en banc)).

As Respondents have indicated, Petitioner raised all of his claims in his direct appeal and in his PCRA petition and on appeal therefrom. Thus, they are exhausted.

Factual History of the Case

The Superior Court summarized the facts of the case as follows:

¶ 2 The record establishes that on the evening of August 25, 2003, twenty-two-year-old Appellant shot and killed his twenty-year-old brother, Anthony, in front of an apartment building located at 530 North Euclid Street in the East Liberty neighborhood of Pittsburgh. Appellant promptly fled to Cleveland, Ohio, where he was arrested in connection with the shooting approximately six months later.

On March 25, 2004, Appellant was transported back to Pittsburgh and interviewed by Allegheny County Detective Dennis Logan. After receiving Miranda warnings, Appellant gave written and audiotaped statements implicating himself in the killing. Appellant subsequently filed a motion to suppress those statements, which was denied. The case proceeded to a jury trial on February 23, 2005.

¶ 3 At trial, the Commonwealth presented the testimony of Loenell Howze, an eyewitness who had been conversing with the victim on a street corner moments before the shooting occurred. Mr. Howze testified that Appellant walked up to Anthony, who was sitting on a fire hydrant, and asked “if [Anthony] was still talking shit.” N.T. Trial, 2/23/05, at 56. Anthony stood up to confront Appellant but did not respond. Appellant pulled out a small handgun and immediately fired the weapon at “point blank” range, wounding Anthony in the pelvis. Id. at 60. Anthony fell to the ground and lay motionless near the curb. Seconds later, Appellant walked up to his brother, placed the gun near Anthony’s right temple, and pulled the trigger, thereby inflicting a traumatic head wound that proved to be fatal. Appellant then proceeded to “walk away like nothing [had happened].” Id. at 63.

Commonwealth v. Patton, 936 A.2d at 1172.

Standard of Review

A petitioner is only entitled to federal habeas relief if he meets the requirements of 28

U.S.C. § 2254(d), which provides:

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.

28 U.S.C. § 2254(d). Section 2254(d) “firmly establishes the state court decision as the starting point in habeas review.” Hartey v. Vaughn, 186 F.3d 367, 371 (3d Cir. 1999). This provision governs not only pure issues of law, but mixed questions of law and fact such as whether counsel rendered ineffective assistance. Werts v. Vaughn, 228 F.3d 178, 204 (3d Cir. 2000).

The Supreme Court has held that, “[u]nder the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts.” Williams v. Taylor, 529 U.S. 362, 412-13 (2000). The Court has also held that:

the “unreasonable application” prong of § 2254(d)(1) permits a federal habeas court to “grant the writ if the state court identifies the correct governing legal principle from this Court’s decisions but unreasonably applies that principle to the facts” of petitioner’s case. In other words, a federal court may grant relief when a state court has misapplied a “governing legal principle” to “a set of facts different from those of the case in which the principle was announced.” In order for a federal court to find a state court’s application of our precedent “unreasonable,” the state court’s decision must have been more than incorrect or erroneous. The state court’s application must have been “objectively unreasonable.”

Wiggins v. Smith, 539 U.S. 510, 520 (2003) (quoting Lockyer v. Andrade, 538 U.S. 63, 76 (2003) (other citations omitted)). In other words, “the question under AEDPA is not whether a federal court believes the state court’s determination was incorrect but whether that determination was unreasonable – a substantially higher threshold.” Schriro v. Landrigan, 550 U.S. 465, 473 (2007) (citations omitted).

Section 2254(e) provides that:

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 shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1).

Claims 1-2: Witness Confrontation

In his first claim, Petitioner alleges that he was denied the ability to confront a witness and in his second claim, he alleges that trial counsel was ineffective for failing to raise this claim. Specifically, Petitioner points to the fact that the Commonwealth did not call Dr. Leon Rozin,

who conducted the autopsy on the victim, but instead called Dr. Shaun Ladham, another member of the Allegheny County Coroner's Office. Respondents argue that the first claim is procedurally defaulted and that both claims are meritless in any event.

Dr. Ladham was offered and accepted as an expert in forensic pathology. (TT1 132-134). He indicated that Dr. Rozin was the chief of forensic pathology. (TT1 134), but stated that he did "a lot of reviewing," including reviewing Dr. Rozin's work. (TT1 135).

Dr. Ladham stated that Dr. Rozin performed the autopsy on Anthony Patton, the victim herein, on August 26, 2003. (TT1 137-38). He stated that he "went through" Dr. Rozin's typed autopsy report and the photographs taken during the autopsy "to put together [his] impression of the case." (TT1 138). He explained several of the observations Dr. Rozin had made of the body. (TT1 139-44), and added his own observations and interpretations ("When I looked, we didn't see anything here, but we have got a hole with the punched out spot and rim, so it's a classic entrance wound" (TT1 142); "This went through the temporal lobe ... so it went down from the top of the head or above the ear downwards through the temporal lobe and then hit the ... temporal bone" (TT1 143)). Dr. Ladham explained the pathway of the bullet through Anthony Patton's head (TT1 145), and noted that Dr. Rozin had recovered that bullet for transportation to the crime lab. (TT1 146). He also described the second wound to Anthony Patton, characterizing it as an entrance wound (TT1 146), noting that surgery had been attempted in that area when Anthony Patton was brought to the hospital (TT1 147), and describing the path of the bullet. (TT1 148).

Dr. Ladham stated:

Using a combination of the photograph, his [Dr. Rozin's] description and the x-rays, I could see that the bullet had come to rest approximately here so that we're looking at a view that's going slightly downwards, slightly leftwards.

(TT1 148-49). Dr. Ladham was asked to give his opinion of whether the gunshot wound to Anthony Patton's head could have been made when he was lying on the ground, and stated that it was "entirely likely." (TT1 150). When he was asked if it could have come from somebody facing him head-on, he stated that that "would be impossible," although the wound to the abdomen would have been possible from a face-on position. (TT1 150).

When he was asked whether soot or powder had been observed, he noted that Dr. Rozin had not seen any, but had shaved off hair and sent it to the crime lab. (TT1 151). He also observed that there were staples in the head wound, and stated that the hospital would have rinsed the area before stapling it. (TT1 153). He stated that the head wound was not a contact wound, but that he could not rule out the possibility that the gun was within a couple of inches of the head. (TT1 153).

When he was asked if, based on his review of Dr. Rozin's reports, he could give an expert opinion as to cause of death, he stated that either wound could have been fatal. (TT1 154). He noted that Dr. Rozin had reached that conclusion as well. (TT1 154). As to the manner of death, Dr. Ladham stated that it was homicide. (TT1 154). Dr. Ladham stated that his expert opinions were given within a reasonable degree of medical and scientific certainty. (TT1 155).

On cross-examination, he agreed that the fact that no soot was found could have indicated either that the shot was too far away or that washing had been done at the hospital. (TT1 155). He stated that he could not speak to whether there was "back splatter" of blood on the gun because analysis of the gun was performed in the crime lab. (TT1 156). He explained that if a wound was wider at one edge than the other, the wider edge would be where the bullet hit first. (TT1 157-58). He also agreed that it was not "locked in" that the victim had to be lying down when wounded in the head. (TT1 158). Further, he stated that he did not observe linear

lacerations coming from a central hole in the skull, which he would have expected in a contact wound or one within a centimeter. (TT1 159), and reconfirmed that the analysis and his review showed there was no soot at all, so that he could not characterize the wound as a contact wound. (TT1 160). He stated, ultimately, that Anthony Patton could have been on the ground or falling to the ground when shot in the head, but it was unlikely if he was standing, although it would depend on whether the shooter was standing and where Anthony Patton's head was at the time of the shot. (TT1 162). On recross, he noted that "as long as the head is going down" the victim could have been somewhere between standing and lying. (TT1 165).

Respondents argue that Petitioner has offered nothing to indicate that Dr. Rozin would have presented any information that was different in any way from that offered by Dr. Ladham, such that presentation of Dr. Rozin would likely have brought a more favorable result. In addition, the Commonwealth notes that defense counsel, Mr. Turner, brought out facts from Dr. Ladham that were helpful to his theory of the case.

On appeal from the denial of the PCRA petition, the Superior Court held as follows:

Appellant first argues that his constitutional right to confront witnesses was violated because he was not given the opportunity to cross examine Dr. Rozin regarding the content of his autopsy report. Appellant's Brief at 16-24. Appellant could have raised this issue at trial. Consequently, the issue is waived for purposes of the PCRA. See 42 Pa. C.S. § 9544(b) ("For purposes of this subchapter, an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding.").

Next, Appellant contends that trial counsel was ineffective for failing to object at trial to Dr. Ladham's testimony on the basis that Appellant should be permitted to confront Dr. Rozin regarding his autopsy report. Appellant's Brief at 25-35. "To establish ineffectiveness of counsel, a PCRA petitioner must show the underlying claim has arguable merit, counsel's actions lacked any reasonable basis, and counsel's actions prejudiced the petitioner. Prejudice means that, absent counsel's conduct, there is a reasonable probability the outcome of the proceedings would have been different." Commonwealth v. Jones, 71 A.3d 1061, 1063 (Pa. Super. 2013) (citations omitted).

At trial, Appellant conceded that he shot his brother. Through his testimony and trial counsel's arguments, Appellant attempted to convince the jury that he did not shoot his brother intentionally. In other words, Appellant contended that, while he may have committed a lesser-degree of homicide, he was not guilty of first-degree murder.

In support of the prejudice prong of his claim of ineffective assistance of counsel, Appellant seems to suggest that, if counsel would have objected to Dr. Ladham's testimony on the basis of a violation of his right to confront Dr. Rozin and if Appellant would have had the opportunity to cross examine Dr. Rozin, then he would have been able to establish that he did not shoot his brother intentionally. Appellant has failed to persuade us that counsel's inaction prejudiced him....

* * * *

Here, Appellant's argument fails to indicate how Dr. Rozin's testimony would have differed at all from Dr. Ladham's testimony. Indeed, Appellant does not offer a convincing explanation as to how the cross examination of Dr. Rozin would have bolstered his contention that he did not intentionally kill his brother. Stated succinctly, Appellant has failed to convince us that there is a reasonable probability that the outcome of his trial would have been different had counsel successfully objected to Dr. Ladham's testimony, requiring Dr. Rozin to testify at trial. Consequently, this claim of ineffective assistance of counsel warrants no relief.

(Answer Ex. 58 at 4-7) (APP 993-996).

As to the first claim, the state courts held that it was procedurally barred because he did not raise it at trial. Therefore, this claim is barred from relief in this proceeding as well.

In Coleman v. Thompson, 501 U.S. 722 (1991), the United States Supreme Court clarified the standard for procedural default and explicitly held:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. at 751. Procedural default can only be excused if there is cause and prejudice. Id. The

petitioner bears the burden of establishing the cause and prejudice necessary to overcome procedural default and the cause must be “something external to the petitioner that cannot fairly be attributed to him.” Id. at 753.

If petitioner fails to meet the “cause and prejudice” standard, the claim must implicate a fundamental miscarriage of justice in order to obtain review. Schlup v. Delo, 513 U.S. 298, 315 (1995). This exception is extremely narrow. In order to establish a miscarriage of justice, petitioner must demonstrate that “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” Murray v. Carrier, 477 U.S. 478, 496 (1986). In order to demonstrate actual innocence, petitioner must demonstrate that “it is more likely than not that a reasonable juror would have found petitioner guilty beyond a reasonable doubt.” Schlup, 513 U.S. at 327.

In a reply brief, Petitioner reiterates his argument on the confrontation clause claim on the merits, but does not address the procedural default issue (ECF No. 18 at 7-10). Thus, he has not even argued, much less established, cause and prejudice or a fundamental miscarriage of justice so as to excuse the procedural default. The Court should not reach the merits of this claim.

The second claim challenges the effectiveness of Petitioner’s trial counsel. The United States Supreme Court:

established the legal principles that govern claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An ineffective assistance claim has two components: A petitioner must show that counsel’s performance was deficient, and that the deficiency prejudiced the defense. Id., at 687, 104 S.Ct. 2052. To establish deficient performance, a petitioner must demonstrate that counsel’s representation “fell below an objective standard of reasonableness.” Id., at 688, 104 S.Ct. 2052. We have declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Ibid.

Wiggins, 539 U.S. at 521.

To satisfy the second prong of counsel ineffectiveness, “a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 534 (quoting Strickland, 466 U.S. at 694.) In addition, although a petitioner must satisfy both prongs to succeed on his ineffectiveness claim, the Court noted that “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.”

Strickland, 466 U.S. at 697.

The Court of Appeals has held that Pennsylvania’s test for assessing ineffective assistance of counsel claims is not contrary to Strickland. Werts, 228 F.3d at 204. Thus, the relevant question is whether the decisions of the Pennsylvania courts involve an unreasonable application of Strickland. Jacobs v. Horn, 395 F.3d 92, 106 n.9 (3d Cir. 2005). See also Taylor v. Horn, 504 F.3d 416, 430 (3d Cir. 2007). That is, a petitioner must show that the state courts “applied Strickland to the facts of his case in an objectively unreasonable manner.” Bell v. Cone, 535 U.S. 685, 699 (2002).

The question is not whether the defense was free from errors of judgment, but whether defense counsel exercised the customary skill and knowledge that normally prevailed at the time and place. Strickland, 466 U.S. at 689. The Supreme Court has “declined to articulate specific guidelines for appropriate attorney conduct and instead ha[s] emphasized that ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Wiggins, 539 U.S. at 521 (quoting Strickland, 466 U.S. at 688).

The Superior Court held that Petitioner failed to support his claim of prejudice, because

he offered no indication of how Dr. Rozin would have testified differently from Dr. Ladham. In his reply brief, Petitioner reiterates his argument that counsel's performance was deficient, but does not address the issue of prejudice (ECF No. 18 at 11-19). Petitioner has not demonstrated that the Superior Court's decision was an unreasonable application of Strickland. Therefore, as to this claim, the petition should be denied.

Claim Three: Removal of Voluntary Manslaughter Charge

In his third claim, Petitioner argues that the trial court improperly removed the charge of voluntary manslaughter from the jury's consideration. Respondents argue that this is a state law issue and that Petitioner cannot maintain a due process claim arising out of a trial court's failure to charge on a matter not submitted by the evidence.

As Respondents note, this claim decided as an issue of state law. The Supreme Court has "repeatedly held that 'it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions'" Waddington v. Sarausad, 555 U.S. 179, 192 n.5 (2009) (quoting Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)).

On direct appeal, the Superior Court of Pennsylvania addressed the claim as follows:

¶24 Upon review, we agree with the trial court's assessment that the evidence would not have supported a verdict of voluntary manslaughter. Voluntary manslaughter contemplates an intentional killing wherein the defendant harbors a specific intent to kill or cause serious injury. Commonwealth v. Mason, 474 Pa. 308, 378 A.2d 807 (1977); see also Commonwealth v. Tolbert, 670 A.2d 1172, 1179 (Pa. Super. 1995) ("Voluntary manslaughter is the intentional killing of another without malice but in a sudden heat of passion brought on by legal provocation."). In the instant case, however, Appellant claimed that he brandished the revolver in an attempt to threaten his brother and that the weapon discharged accidentally. This testimony, if believed, actually would have supported a verdict of involuntary manslaughter. Accord [Commonwealth v. Carter, 466 A.2d 1328 (Pa. 1983)]; see also 18 Pa. C.S. § 2504(a) (a person is guilty of involuntary manslaughter when he causes death of another person through the commission of an unlawful act in a reckless or grossly negligent manner). Therefore, as Appellant claimed the shooting was accidental, the trial court correctly determined that he was not entitled to a jury instruction on voluntary

manslaughter.

Commonwealth v. Patton, 936 A.2d at 1178.

Petitioner contends that a trial court must always charge on voluntary manslaughter, relying upon Commonwealth v. Covil, 378 A.2d 841 (Pa. 1977). However, that case was decided pursuant to the 1939 Penal Code, which did not define the crimes of murder and voluntary manslaughter. Pursuant to the 1972 Crimes Code, which does define these crimes, a trial court is not required to charge a jury regarding voluntary manslaughter unless evidence exists that would support such a verdict. Commonwealth v. Browdie, 671 A.2d 668, 673 (Pa. 1996). Even under Pennsylvania law, his claim is meritless.

Moreover, the due process clause is not offended by a trial court's refusal to charge the jury on matters not presented by the evidence. The Supreme Court has held that "the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." Keeble v. United States, 412 U.S. 205, 208 (1973). See also Bishop v. Mazurkiewicz, 634 F.2d 724, 725 (3d Cir. 1980); Halowell v. Keve, 555 F.2d 103, 107 (3d Cir. 1977). Petitioner's testimony, as the state courts held, suggested a theory of involuntary manslaughter, but it did not in any way support a theory of voluntary manslaughter. Therefore, the due process clause did not require that the jury be instructed on this offense.

Petitioner has not demonstrated that the Superior Court's decision was an unreasonable application of Keeble. Therefore, as to this claim, the petition should be denied.

Claim Four: Unconstitutional Conviction and Sentence

In his fourth claim, Petitioner contends that his conviction and sentence were unconstitutional because the Commonwealth did not file a "Notice of Aggravating

Circumstances” under Pennsylvania Rule of Criminal Procedure 802 and follow the procedures outlined in 42 Pa. C.S. § 9711. Essentially, Petitioner is challenging the fact that the procedures for sentencing in first-degree murder cases was not followed because the Commonwealth did not prosecute his case as it would a capital case. Respondents argue that this claim raises a state law issue and that it was decided on independent and adequate state law grounds.

The Superior Court held that:

The primary thrust of Appellant’s confusing argument seems to be that the trial court could not sentence him to life in prison because the jury never determined whether his sentence should be death or life imprisonment. However, the Commonwealth did not seek the death penalty in this case, which left the court with one sentencing option, namely, to sentence Appellant to life in prison. Because the trial court sentenced Appellant to life imprisonment, Appellant’s sentence is legal, and this issue warrants no relief.

(Answer Ex. 58 at 8-9) (APP 997-998)).

As Respondents observe, this issue involves a determination of state law, that is, whether the Commonwealth followed the procedures outlined in 42 Pa. C.S. § 9711 and Pennsylvania Rule of Criminal Procedure 802 in a non-capital case. It is not the province of this Court to review state law determinations on state law issues. Sentencing claims are not cognizable in federal habeas corpus unless the petitioner shows that the sentence is outside statutory limits or unauthorized by law, which Petitioner’s sentence certainly was not. See Bozza v. United States, 330 U.S. 160, 166 (1947); Jones v. Superintendent of Rahway State Prison, 725 F.2d 40, 42-43 (3d Cir. 1984).

Moreover, Petitioner’s claim is meritless in any event, in that Pennsylvania law is designed to protect defendants from the improper imposition of the death penalty, which did not occur in this case. See 42 Pa. C.S. § 9711(c)(1)(iv) (if jury does not find that aggravating circumstances outweigh mitigating circumstances, the verdict must be for life imprisonment);

§ 9711(c)(1)(v) (if the jury cannot reach unanimous agreement, the trial judge must discharge the jury and sentence the defendant to life imprisonment). Had Petitioner been sentenced to death without the appropriate procedural safeguards of § 9711, he would have a claim, at least under Pennsylvania law. But no aspect of Pennsylvania law suggests that a trial court's failure to follow the procedures of § 9711 means that a sentence of life imprisonment cannot stand. Similarly, Petitioner argues that, pursuant to Pa.R.Crim.P. 802, aggravating circumstances cannot be weighed against mitigating circumstances unless such aggravating circumstances are filed against a defendant before the trial begins, but no such weighing occurred here. Therefore, as to this claim, the petition should be denied.

Claim Five: Judge Reilly's Status

In his last claim, Petitioner contends that Judge Reilly, who presided at his trial, was not officially a judge during the course of his trial in 2005. Respondents argue that the state courts decided this claim based upon an independent and adequate ground and that it is meritless in any event.

The Superior Court held that:

In support of his ... issue, Appellant essentially maintains that his trial judge, the Honorable John Reilly, was not in fact a judge during the trial and that this circumstance, *inter alia*, deprived him of due process. Appellant's Brief at 47-50. Appellant could have raised this issue before, during, or after his trial. Consequently, the issue is waived for purposes of the PCRA. See 42 Pa. C.S. § 9544(b) ("For purposes of this subchapter, an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding.").

(Answer Ex. 58 at 9) (APP 998). Respondents argue that this represented an independent and adequate state law ground for the decision. In addition, they contend that Petitioner's claim is meritless because Judge Reilly was retained in the November 1993 election (Answer Ex. 63) and assigned as a senior judge to hear cases in Allegheny County from January 1, 2005 to May 30,

2006 (Answer Ex. 64). Petitioner replies that the documents Respondents cite are suspect, as the column containing Judge Reilly's retention is handwritten, as opposed to all of the other retention questions, which are typed in. However, Petitioner but does not address the waiver issue (ECF No. 18 at 32-34).

The Supreme Court has held that federal courts:

will not review a question of federal law decided by a state court if the decision rests on a state law ground that is independent of the federal question and adequate to support the judgment. This rule applies whether the state law ground is substantive or procedural.

Coleman, 501 U.S. at 729. In this instance, the state courts held that this claim was waived, a state law ground that is independent of the federal question (if there is indeed a federal question presented at all) and adequate to support the judgment. Therefore, this claim is unreviewable.

For all the reasons cited above, Petitioner's first and fifth claims are procedurally barred from review and his remaining claim should be denied on the merits.

Certificate of Appealability

Additionally, a certificate of appealability should be denied. The decision whether to grant or deny a certificate of appealability is "[t]he primary means of separating meritorious from frivolous appeals." Barefoot v. Estelle, 463 U.S. 880, 893 (1983). If a certificate of appealability is granted, the Court of Appeals must consider the merits of the appeal. However, when the district court denies a certificate of appealability, the Court of Appeals can still grant one if it deems it appropriate. 28 U.S.C. § 2253.

"A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For the reasons addressed above, this petition does not present a substantial showing of the denial of a constitutional right. Accordingly, a certificate of appealability should be denied.

For these reasons, it is respectfully recommended that the petition for writ of habeas corpus (ECF No. 1) be denied and that a certificate of appealability be denied.

Litigants who seek to challenge this Report and Recommendation must seek review by the district judge by filing objections by March 27, 2017. Any party opposing the objections shall file a response by April 10, 2017. Failure to file timely objections will waive the right of appeal.

Respectfully submitted,

s/Robert C. Mitchell
ROBERT C. MITCHELL
United States Magistrate Judge

Dated: March 8, 2017

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

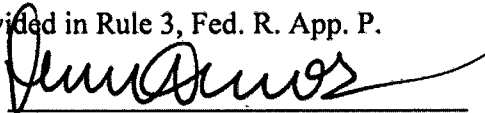
NEAL L. PATTON,	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 16-1413
	)	
	)	
CYNTHIA LINK, et al.,	)	
Respondents.	)	

ORDER

AND NOW, this 25th day of April, 2017, after the petitioner, Neal L. Patton, filed a petition for writ of habeas corpus, and after a Report and Recommendation was filed by the United States Magistrate Judge granting the parties a period of time after being served with a copy to file written objections thereto, and upon consideration of the objections filed by the petitioner along with the response filed by the respondents, and upon independent review of the petition and the record and upon consideration of the Magistrate Judge's Report and Recommendation (ECF No. 19), which is adopted as the opinion of this Court,

IT IS ORDERED that the petition for writ of habeas corpus submitted by petitioner (ECF No. 1) is denied and, because reasonable jurists could not conclude that a basis for appeal exists, a certificate of appealability is denied.

IT IS FURTHER ORDERED that pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure if the petitioner desires to appeal from this Order he must do so within thirty (30) days by filing a notice of appeal as provided in Rule 3, Fed. R. App. P.

A handwritten signature in black ink, appearing to read "Mark R. Hornak", written over a horizontal line.

Mark R. Hornak
United States District Judge

cc: Neal L. Patton
GF-1147
SCI Graterford
P.O. Box 244
Graterford, PA 19426