No. ________

IN THE SUPREME COURT OF THE UNITED STATES

CALEB L. MCGILLVARY
Plaintiff/Appellant

v.

ATTORNEY GENERAL OF NJ, ADMINISTRATOR NJ STATE PRISON
Defendant/Appellee

On Petition for Writ of Certiorari to the United States Court of Appeals for the 3rd Circuit at Appeal Docket Number 25-2159

APPENDIX VOLUME I TO PETITION FOR WRIT OF CERTIORARI

CALEB L. MCGILLVARY
Third and Federal Street
New Jersey State Prison
Po Box 861
Trenton, NJ 08625-0861
In Propria Persona

TABLE OF APPENDIX

EXHIBIT A

Judgment of Conviction & Order for Commitment

Superior Court of New Jersey, UNION County

State of New Jersey v.

Last Name	First Name	Middle Name
MCGILLVARY	CALEB	L

Also Known As

Date of Birth	SBI Number	Date(s) of Offense
09/03/1988	102317G	05/12/2013

Date of Arrest	PROMIS Number	Date Ind / Acc / Complt Filed	Original Plea	Date of Original Plea
	13 001703-001	05/18/2016	☑ Not Guilty ☐ Guilty	05/23/2016

Adjudication By ☐ Guilty Plea ☑ Jury Trial Verdict ☐ Non-Jury Trial Verdict ☐ Dismissed / Acquitted Date: 04/24/2019

Original Charges

Ind / Acc / Complt	Count	Description	Statute	Degree
16-05-00344-I	1	MURDER - PURPOSELY	2C:11-3A(1)	1

Final Charges

Ind / Acc / Complt	Count	Description	Statute	Degree
16-05-00344-I	1	MURDER - PURPOSELY	2C:11-3A(1)	1

Sentencing Statement

It is, therefore, on 05/30/2019 **ORDERED** and **ADJUDGED** that the defendant is sentenced as follows:

The Defendant is remanded to the custody of the Commissioner of the Department of Corrections for a period of 57 YEARS.

Defendant must serve 85 % of this sentence until released in accordance with the No Early Release Act.

Defendant is subject to 5 years mandatory Parole Supervision upon release pursuant to the No Early Release Act.

☑ It is further ORDERED that the sheriff deliver the defendant to the appropriate correctional authority.

Total Custodial Term	Institution Name	Total Probation Term
057 Years 00 Months 000 Days	CARE COMMISS/CORR 0039a	00 Years 00 Months

State of New Jersey v.
MCGILLVARY, CALEB L

S.B.I. # 102317G Ind / Acc / Complt # 16-05-00344-I

DEDR (N.J.S.A. 2C:35-15 and 2C:35-5.11)

A mandatory Drug Enforcement and Demand Reduction (DEDR) penalty is imposed for each count. (Write in number of counts for each degree.)

☐ DEDR penalty reduction granted (N.J.S.A. 2C:35-15a(2))

	Standard	Doubled
1st Degree	____ @ $	____ @ $
2nd Degree	____ @ $	____ @ $
3rd Degree	____ @ $	____ @ $
4th Degree	____ @ $	____ @ $
DP or Petty DP	____ @ $	____ @ $

Total DEDR Penalty $

☐ The court further ORDERS that collection of the DEDR penalty be suspended upon defendant's entry into a residential drug program for the term of the program. (N.J.S.A. 2C:35-15e)

Forensic Laboratory Fee (N.J.S.A. 2C:35-20) ____ Offenses @ $ ____

Total Lab Fee $

VCCO Assessment (N.J.S.A. 2C:43-3.1)

Counts	Number		Amount
1	1	@	$ 50.00
		@	$
		@	$
		@	$

Total VCCO Assessment $ 50.00

Vehicle Theft / Unlawful Taking Penalty (N.J.S.A. 2C:20-2.1)

Offense

Mandatory Penalty $

Offense Based Penalties

Penalty

Amount $

Other Fees and Penalties

Law Enforcement Officers Training and Equipment Fund Penalty (N.J.S.A. 2C:43-3.3)
☑ $ 30.00

Safe Neighborhoods Services Fund Assessment (N.J.S.A. 2C:43-3.2)
☑ 1 Offenses @ $ 75.00
Total: $ 75.00

Probation Supervision Fee (N.J.S.A. 2C:45-1d)
☐ $

Statewide Sexual Assault Nurse Examiner Program Penalty (N.J.S.A. 2C:43-3.6)
☐ ____ Offenses @ $
Total $

Transaction Fee (N.J.S.A. 2C:46-1.1)
☑

Domestic Violence Offender Surcharge (N.J.S.A. 2C:25-29.4)
☐ $

Certain Sexual Offenders Surcharge (N.J.S.A. 2C:43-3.7)
☐ $

Fine
$

Sex Crime Victim Treatment Fund Penalty (N.J.S.A. 2C:14-10)
☐ $

Restitution $ Joint & Several ☐

Total Financial Obligation $ 155.00

Additional Conditions

☑ The defendant is hereby ordered to provide a DNA sample and ordered to pay the costs for testing of the sample provided (N.J.S.A. 53:1-20.20 and N.J.S.A. 53:1-20.29).

☐ The defendant is hereby sentenced to community supervision for life (CSL) if offense occurred before 1/14/04 (N.J.S.A. 2C:43-6.4).

☐ The defendant is hereby sentenced to parole supervision for life (PSL) if offense occurred on or after 1/14/04 (N.J.S.A. 2C:43-6.4).

☑ The defendant is hereby ordered to serve a 5 year term of parole supervision, pursuant to the No Early Release Act (NERA), which term shall begin as soon as the defendant completes the sentence of incarceration (N.J.S.A. 2C:43-7.2).

☐ The court imposes a Drug Offender Restraining Order (DORO) (N.J.S.A. 2C:35-5.7h). DORO expires

☐ The court continues/imposes a Sex Offender Restraining Order (SORO) if the offense occurred on or after 8/7/07 (Nicole's Law N.J.S.A. 2C:14-12 or N.J.S.A. 2C:44-8).

☐ The court imposes a Stalking Restraining Order (N.J.S.A. 2C:12-10.1).

☐ The defendant is prohibited from purchasing, owning, possessing, or controlling a firearm and from receiving or retaining a firearms purchaser identification card or permit to purchase a handgun (N.J.S.A. 2C:25-27c(1)).

Findings Per N.J.S.A. 2C:47-3

☐ The court finds that the defendant's conduct was characterized by a pattern of repetitive and compulsive behavior.

☐ The court finds that the defendant is amenable to sex offender treatment.

☐ The court finds that the defendant is willing to participate in sex offender treatment.

License Suspension

☐ CDS / Paraphernalia (N.J.S.A. 2C:35-16) ☐ Waived

☐ Auto Theft / Unlawful Taking (N.J.S.A. 2C:20-2.1)

☐ Eluding (N.J.S.A. 2C:29-2)

☐ Other

Number of Months ☐ Non-resident driving privileges revoked

Start Date End Date

Details

Driver's License Number Jurisdiction

If the court is unable to collect the license, complete the following:
Defendant's Address

City State Zip

Date of Birth Sex ☐M ☐F Eye Color

Details

0040a

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S.B.I. # 102317G Ind / Acc / Complt # 16-05-00344-I

Time Credits

Time Spent in Custody *R.* 3:21-8	Gap Time Spent in Custody *N.J.S.A.* 2C:44-5b(2)	Prior Service Credit
Date: From – To	Date: From – To	Date: From – To
05/16/2013 – 05/29/2019	Total Number of Days	
	Rosado Time Date: From – To	
	Total Number of Days	
Total Number of Days 2205		Total Number of Days

Statement of Reasons - Include all applicable aggravating and mitigating factors

The Court finds that aggravating factors 1, 3, 9 and 12 outweigh the mitigating factors 4 and 7.

Attorney for Defendant at Sentencing	Public Defender
JOHN G CITO	☑ Yes ☐ No
Prosecutor at Sentencing	**Deputy Attorney General**
SCOTT PETERSON	☐ Yes ☑ No
Judge at Sentencing	
Robert Kirsch, J.S.C.	
Judge (Signature)	**Date**
/s Robert Kirsch, J.S.C.	05/30/2019

004a

EXHIBIT B

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4519-18

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CALEB L. MCGILLVARY,

Defendant-Appellant.

Submitted May 12, 2021 – Decided August 4, 2021

Before Judges Alvarez and Geiger.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 16-05-0344.

Meyerson & O'Neill, attorneys for appellant (Matthew L. Miller, on the briefs).

Gurbir S. Grewal, Attorney General, attorney for respondent (Amanda G. Schwartz, Deputy Attorney General, of counsel and on the briefs).

Appellant filed pro se supplemental briefs.

PER CURIAM

Tried by a jury, defendant Caleb McGillvary was convicted of first-degree murder, N.J.S.A. 2C:11-3(a)(1), (2). On May 30, 2019, the court sentenced defendant to fifty-seven years of imprisonment, subject to the No Early Release Act's (NERA) eighty-five percent parole ineligibility. See N.J.S.A. 2C:43-7.2. He appeals by way of counseled and uncounseled briefs, alleging that the court committed prejudicial errors during trial, and that the representation he received was ineffective. We affirm.

The charges against defendant arose from the May 13, 2013 discovery of the victim, Joseph Galfy, Jr., a seventy-four-year-old attorney. Police found Galfy beaten to death, lying face-down on his bedroom floor. Officers collected a variety of items and swabs from the scene, including a one-way train ticket from Rahway to Asbury Park from the day before, Sunday, May 12, 2013. Following that lead, Union County Prosecutor's Office Homicide Task Force Sergeant Johnny Ho located surveillance footage from the New Jersey Transit Rahway station, in which Galfy is seen that morning accompanied by another person, later identified as defendant. The video depicted Galfy purchasing a ticket from a vending machine and handing it to defendant, who then hugged the victim. The two men walked towards a train platform.

Galfy's cell phone contact list included a number for "Kai" Lawrence, matching the telephone number on a piece of paper found in the bedroom. The victim and defendant exchanged calls on the evening of May 12, 2013. Galfy told defendant via text message at 5:33 p.m. that he would be at the train station in about ten minutes.

As a result, officers obtained a court order permitting the retrieval of defendant's phone and phone GPS records. However, the phone had been recently deactivated, and the final recorded location was Clark, the town where Galfy lived.

Defendant's last phone contact was with Kimberly Conley-Burns. She testified at trial that she contacted defendant on Facebook, as he was an internet personality, informing him that if he were ever in New Jersey, she could find him a place to stay. On Saturday, May 11, the day before the murder, defendant told Conley-Burns that he had met a man in Times Square who drove him to New Jersey, and was planning to stay in Newark, which defendant mistakenly believed was where the victim lived. Defendant mentioned that the person was older, his name was Joe, and that he was a lawyer.

In a voicemail and text exchange, Conley-Burns warned defendant that Newark was dangerous and that he needed to be careful. He responded that he had found someone: "a good person who put [him] up for the night."

Defendant and Conley-Burns planned to meet in Asbury Park on May 12, which was Mother's Day. Because of a family brunch, Conley-Burns did not appear when defendant arrived that morning, so they changed their plan, agreeing to go to Philadelphia the following day. Defendant texted Conley-Burns that he had "to head up to Newark."

Conley-Burns then received a series of calls from defendant, which she was unable to answer. He told her that the place in Newark "fell through," asking if she could pick him up.

At approximately 10:00 to 10:15 p.m., defendant appeared at the White Diamond Diner in Clark, where he encountered Robert McNamara and his brother, initiating conversation and showing them an online video of himself. Defendant asked for directions to Rahway.

Alexander McCue was working at a 7-11 in Clark at around 11:30 p.m. when he saw defendant, whom he recognized from the internet because of defendant's distinctive face tattoo. Defendant asked McCue for directions to the Rahway train station, and McCue told him he thought there might be a train station in Clark. Defendant interrupted him, saying he was not returning to Clark, and was looking for the quickest way out. McCue told defendant to walk across the street since that was the border of Rahway, and defendant left.

Robert Scully, a New Jersey Transit train conductor, testified that while working the night shift, traveling between Long Branch and New York City, he collected defendant's ticket, noticing it was for Asbury Park. Scully explained defendant needed to catch a connecting train at Long Branch but would have to wait since none operated at that hour. Defendant borrowed Scully's phone to ask his ride to meet him at Long Branch, although defendant had to place multiple calls, possibly because no one was answering at the other end. The train arrived in Long Branch shortly after 2:30 a.m.

The following day, Monday, May 13, defendant left another voicemail for Conley-Burns, describing his appearance so she could identify him when she arrived at the Asbury Park train station. Once they met, he immediately told her he had just been "raped." Defendant added that he had contacted police, but that they would not do anything because the assailant was an attorney. Defendant also told her that he had awakened to find that he had ejaculate in his mouth, on the side of his face, and on the side of his cheek. He said something to the perpetrator about it but Galfy denied that he did anything, so defendant just left. Defendant did not mention the rape again.

Conley-Burns saw no bruises, cuts, scratches, or scrapes on defendant's hands or face. Defendant told her he had cut his hair short, to about an inch or two, with a knife. He did not give a reason.

On the way to Philadelphia, Conley-Burns stopped to pick up a friend. She remembered defendant during that day as "very friendly," "talking to people," "rapping or beat boxing with these kids," "joking around," and "animated and playful." Defendant was "chatty. Off-beat. Quirky," and acted "weird." After spending time in Philadelphia, Conley-Burns drove defendant to the home of Marjory Erin Wagner, a friend who lived near Glassboro, because Wagner had agreed to let defendant stay there for the night.

Wagner testified that after Conley-Burns left, she, defendant, and her boyfriend spent the evening "listening to stories and drinking some beers." The following day, they drove defendant to a train station in Haddonfield around 7:00 or 8:00 in the evening. Defendant never said he had been raped, and she described his demeanor as "interesting" and "weird."

Defendant was eventually located in the Greyhound Bus terminal in Philadelphia on May 16, 2013, and taken to a precinct station. Ho and others arrived at approximately 9:00 p.m. and interviewed defendant after advising him that he was being charged with murder. Defendant waived his Miranda[1] rights and gave a lengthy recorded statement, ending when he requested counsel. The video was shown to the jury.

When officers questioned defendant initially about what happened, defendant asked: "he died?" Defendant then told Ho that he met Galfy in Times Square by the bus depot, and told Galfy he was headed to New Jersey. The two got dinner from a restaurant near Galfy's house, and at first defendant "thought [Galfy] was real nice and then he [f***ing] raped me." After dinner, they drank beer while watching television in the living room, and defendant said Galfy wanted to put defendant's beer in a glass instead of leaving it in the bottle. Defendant drank about five beers and felt kind of groggy but walked to the guest bedroom by himself.

Defendant told detectives that before going to bed, Galfy asked defendant to shower with him. Defendant refused and showered alone before going to sleep. He awakened with a metallic taste in his mouth, a bad headache, and when he looked in the mirror in the morning, he thought he saw dried ejaculate on the side of his face. He did not confront Galfy and said he did not "really

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

know what to think about it." Galfy drove him to a train station and purchased him a ticket to Asbury Park.

Defendant claimed that when he returned to Galfy's that night, they had dinner and a couple of beers. Defendant awakened on Galfy's bedroom floor, only to find Galfy pulling his pants. At that point, defendant began to hit him. Defendant could not remember how he struck Galfy. He said he "could have elbowed him. . . . kneed him. I don't know." He left the house, and remembered going to a diner and catching a train to Long Branch.

At trial, defendant explained his "home-free" lifestyle in which he played music and worked construction jobs when he needed money, but otherwise spent his time surfing. Around 2012 to 2013 he traveled from his home in Canada to the United States to continue this lifestyle. In February 2013, he achieved internet fame following an incident in California. He continued across the country, being offered food and places to stay by people who knew him from the internet.

Defendant testified that he encountered Galfy in New York City, that Galfy asked where he was headed, and remarked that he looked lost. Galfy put him up for the night, and he left after breakfast. Galfy told him to call if he was in the area and needed a place to stay. Defendant thanked Galfy and hugged him goodbye because he did not know "what he had done to [him] at the time." He gave Galfy his phone number and email address.

On the stand, defendant said he cut his hair short on May 12, 2013, because he was warm. He testified he was going to travel to Atlanta, and it would be "really hot" there. Defendant cut his jeans into shorts because he wanted to exercise.

After his original plans with Conley-Burns fell through, defendant decided to spend a second night at Galfy's house. He thought he was still in the greater Newark area, which Conley-Burns had described as a dangerous place. Defendant took the train to Long Branch, hoping that if he was geographically closer to Galfy, Galfy would be more likely to let him stay at his home. After getting off the train, defendant called and asked if Galfy could host him again. Galfy agreed but added he would have to wait to be picked up since Galfy was in New York City. Defendant waited approximately forty-five minutes.

Once back at Galfy's home, Galfy again gave defendant beer poured into a glass. After dinner and a few beers, defendant "was feeling like really warm and fuzzy and like relaxed." He recalled Galfy putting the dishes in the dishwasher; the last thing he remembered was hearing the Jeopardy theme song. He came to on the floor in Galfy's room on his back.

Defendant testified:

> [T]he next thing I knew he was shoving me into the bed and I was trying to get him away from me and then I was hitting him and then he shoved my head on the floor and body slammed me and I couldn't breathe. And I was trying to get out from underneath him and he kept humping and grinding me. And he, he was trying to put my dick in his mouth and I was trying to get him away from me. I -- that's, that's all I can remember.

After the incident, defendant could not recall how he left Galfy's house or where he went. He knew he "came to" in a parking lot, his muscles were sore, he had a headache, and a metal taste in his mouth. Defendant remembered going to the diner and the 7-11. At the diner, he went into the bathroom, dry heaved into a toilet, and splashed water on his face. He showed a video of himself on the internet to the other men in the diner, ate something, and went outside to smoke. Defendant had problems with his phone, and by the time he was on the train to Long Branch, had thrown it out because it smelled like urine and would not turn on.

Defendant could not recall the whereabouts of the things he wore during the alleged sexual assault, which he said were soaked in blood and urine. He wore different clothes when speaking to the detectives in Philadelphia, but "[a]t some point [he] had to have [changed] because when [he] came to," he was dressed differently. He also confirmed that in a photograph taken with an employee at the diner the night after the alleged sexual assault he was wearing different clothing. He claimed he was unaware that Galfy died until informed by the detectives.

Pre-trial, defendant unsuccessfully moved to suppress his initial statement, and to recuse the Union County criminal bench, or in the alternative, to be granted a change of venue. He also wanted to testify regarding Galfy's vacations outside the country, which he characterized as "kind of creepy" without further explanation, and to cross-examine a neighbor about a young man who had briefly lived with Galfy. We provide greater detail regarding those applications in the relevant sections. That motion was also denied.

Post-conviction, defense counsel filed a motion for a new trial, as did defendant pro se. Both motions were denied. Defendant unsuccessfully moved to represent himself during his sentencing.

Now on appeal, defendant claims the following errors:

> <u>POINT I</u>
>
> [DEFENDANT]'S CONVICTION FOR FIRST DEGREE MURDER WAS AGAINST THE WEIGHT OF THE EVIDENCE.
>
> A. The Evidence Adduced at Trial Was Not Sufficient to Establish Beyond a Reasonable Doubt that [Defendant] Killed Mr. Galfy Purposely or Knowingly.

POINT II

[DEFENDANT] IS ENTITLED TO A NEW TRIAL BECAUSE HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND THERE EXISTS A REASONABLE PROBABILITY THAT THE RESULT WOULD HAVE BEEN DIFFERENT BUT FOR COUNSEL'S ERRORS.

A. Trial Counsel's Failure to Move to Strike Inadmissible Portions of Dr. Shaikh's Testimony was a Clear and Prejudicial Error that Prevented [Defendant] From Receiving a Fair Trial.

B. Trial Counsel's Refusal to Cross-Examine a Key Witness Prejudiced [Defendant]'s Ability to Present His Defense.

C. Trial Counsel Contradicted [Defendant]'s Testimony in His Closing Statement.

POINT III

THE TRIAL COURT'S FAILURE TO STRIKE INADMISSIBLE AND HIGHLY PREJUDICIAL EXPERT TESTIMONY WAS A CLEAR ERROR THAT PREVENTED DEFENDANT FROM RECEIVING A FAIR TRIAL AND NECESSITATES REVERSAL ON APPEAL.

POINT IV

PROSECUTORIAL MISCONDUCT PREJUDICED [DEFENDANT]'S RIGHT TO A FAIR TRIAL.

A. The State Misconstrued and Exaggerated the Evidence Concerning the Manner in Which

Decedent Sustained His Injuries in Direct Contravention of the Record.

B. The State Mischaracterized [Defendant]'s Defense to Make it Appear Implausible and Absurd.

C. The Prosecutor's Improper Characterization of the Evidence and Defendant's Theory of the Case Contributed to the Cumulative Errors that Rendered this Trial Unreliable and Unfair.

POINT V

THE TRIAL COURT'S APPLICATION OF AGGRAVATING FACTOR [ONE] WAS IMPROPER BECAUSE IT DOUBLE COUNTED THE EVIDENCE USED TO ESTABLISH THE OFFENSE.

A. The Trial Court Improperly Applied Aggravating Factor [One].

POINT VI

THE TRIAL COURT ERRED BY BARRING [DEFENDANT]'S TESTIMONY CONCERNING THE ALLEGED 'CREEPINESS' OF MR. GALFY'S VACATIONS AND THE 'YOUNG FRIEND' HE HAD LIVING WITH HIM.

POINT VII

CUMULATIVE ERROR PREVENTED [DEFENDANT] FROM RECEIVING A FAIR TRIAL.

In his pro se brief, defendant raises the following claims of error:

POINT I

DENIAL OF [DEFENDANT]'S MOTION TO CHANGE THE VENUE WAS AN ABUSE OF DISCRETION AMOUNTING TO REVERSIBLE ERROR.

POINT II

CHARGING JURY BURDEN SHIFTING [N.J.S.A.] 2C:2-8(d) INSTRUCTION OVER [DEFENDANT]'S OBJECTION DEPRIVES HIM OF HIS SUBSTANTIAL RIGHT TO DUE PROCESS AND REQUIRES REVERSAL.

POINT III

IRREGULAR INFLUENCES ON THE JURY WERE PLAIN ERROR AFFECTING [DEFENDANT]'S SUBSTANTIVE DUE PROCESS RIGHTS AND REQUIRES REVERSAL AND A NEW TRIAL.

POINT IV

TRIAL COURT'S PROHIBITION ON CALLING OR CONFRONTING WITNESSES WAS STRUCTURAL ERROR REQUIRING REVERSAL.

POINT V

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO SUPPRESS [DEFENDANT'S] [MAY 16, 2013] STATEMENT; AND ITS ADMISSION AT TRIAL AND ALSO [DEFENDANT]'S TESTIMONY WERE FRUITS OF THE POISONOUS TREE.

POINT VI

TRIAL COURT ABUSED ITS DISCRETION BY NOT PROVIDING AN ADVERSE INFERENCE INSTRUCTION TO REMEDY [BRADY[2]] VIOLATIONS BY THE STATE, WHICH REQUIRES A NEW TRIAL.

POINT VII

DEFENSE COUNSEL['S] . . . PERFORMANCE AT TRIAL DEPRIVED [DEFENDANT] OF HIS SUBSTANTIAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, A STRUCTURAL ERROR REQUIRING REVERSAL.

POINT VIII

DENIAL OF [DEFENDANT]'S SUBSTANTIAL SIXTH AMENDMENT RIGHT TO SELF-REPRESENTATION WAS A STRUCTURAL ERROR REQUIRING REVERSAL OF [DEFENDANT]'S CONVICTION.

I.

We first address defendant's contention that the first-degree murder conviction was against the weight of the evidence. He posits that because the evidence did not demonstrate the requisite state of mind, the judge should have granted his motion for a new trial.

[2] Brady v. Maryland, 373 U.S. 83 (1963).

Rule 3:20-1 provides that a trial judge may grant such applications where "required in the interest of justice." However, the trial judge shall not "set aside the verdict of the jury as against the weight of the evidence unless, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a manifest denial of justice under the law." Ibid.

"[A] motion for a new trial is addressed to the sound discretion of the trial judge, and the exercise of that discretion will not be interfered with on appeal unless a clear abuse has been shown." State v. Armour, 446 N.J. Super. 295, 306 (App. Div. 2016) (alteration in original) (quoting State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000)). "There is no 'miscarriage of justice' when 'any trier of fact could rationally have found beyond a reasonable doubt that the essential elements of the crime were present.'" State v. Jackson, 211 N.J. 394, 413-14 (2012) (quoting State v. Afanador, 134 N.J. 162, 178 (1993)). We "weigh heavily the trial court's 'views of credibility of witnesses, their demeanor, and [its] general feel of the case.'" State v. Carter, 91 N.J. 86, 96 (1982) (alteration in original) (quoting State v. Sims, 65 N.J. 359, 373 (1974)).

N.J.S.A. 2C:11-3(a) provides that "criminal homicide constitutes murder when: [] (1) The actor purposely causes death or serious bodily injury resulting in death; or [] (2) The actor knowingly causes death or serious bodily injury resulting in death . . . ." Thus, for serious bodily injury murder (SBI murder), the State needs to prove that a defendant "[(1)] knowingly or purposely inflicted serious bodily injury with actual knowledge that [(2)] the injury created a substantial risk of death, and that [(3)] it was 'highly probable' that death would result." State v. Wilder, 193 N.J. 398, 409 (2008) (alterations in original) (quoting State v. Jenkins, 178 N.J. 347, 363 (2004)). For purposeful SBI murder, the State must prove that "'defendant's conscious object [was] to cause serious bodily injury that then resulted in the victim's death' and that defendant 'knew that the injury created a substantial risk of death and that it was highly probable that death would result.'" Jenkins, 178 N.J. at 362 (alteration in original) (quoting State v. Cruz, 163 N.J. 403, 417-18 (2000)).

To sustain "'knowing' SBI murder, the State must make the same showing, except that, rather than proving that serious bodily injury was defendant's conscious objective, it need only demonstrate that he 'was aware that it was practically certain that his conduct would cause serious bodily injury.'" Id. at 362-63 (quoting Cruz, 163 N.J. at 418).

The Supreme Court has delineated the key differences between aggravated manslaughter and SBI murder. Wilder, 193 N.J. at 409; Jenkins, 178 N.J. at

362-63; Cruz, 163 N.J. at 417-18. A defendant commits aggravated manslaughter when "recklessly caus[ing] death under circumstances manifesting extreme indifference to human life." Wilder, 193 N.J. at 409 (alteration in original) (quoting N.J.S.A. 2C:11-4). Aggravated manslaughter differs in that it "does not require an intention to cause serious bodily injury or an awareness that death is 'practically certain' to follow." Ibid. (quoting Cruz, 163 N.J. at 417-18). Extreme indifference to human life focuses "not on the defendant's state of mind, but on the circumstances under which the defendant acted." Ibid. (quoting Cannel, N.J. Criminal Code Annotated, cmt. 2 on N.J.S.A. 2C:11-4 (2007)). Therefore, if a "defendant disregarded only a 'possibility' of death, the result is reckless manslaughter." Jenkins, 178 N.J. at 363.

In denying defendant's application, the judge noted the overwhelming proofs that defendant caused the victim's death, satisfying the first element necessary for first-degree murder. The extent of the injuries, established by the medical examiner's testimony, and corroborated by autopsy photographs and other medical records, included a "broken neck, broken ribs, and . . . the mauling of his head to the point where his ear" was torn, the cartilage visible. The judge opined the injuries demonstrated that the assault was far more than just an effort to thwart a sexual advance.

Moreover, defendant's conduct following the attack, including his change of clothing and hairstyle, and his "remarkable memory as to extraordinary details" demonstrated that defendant was not believable. Despite remembering everything regarding his first meeting with Galfy, and the topics of their conversation, he could not remember the whereabouts of his stained clothing. Defendant discarded his phone and falsely told Conley-Burns that he had reported the alleged assault to police. He left New Jersey and was on his way to Georgia. Thus no "manifest denial of justice under the law" occurred, much less one that required a new trial.

The judge's decision was sound, supported by the record, and not a clear abuse of discretion. The medical examiner testified that Galfy died from blunt force trauma from many blows over his body, including to his eyes, mouth, ears, the back of his head, his neck, his shoulders, arms, and ribs. Blood splatters in the bedroom surrounded the victim. Galfy was a seventy-four-year-old man, smaller in stature than defendant, and the severity and number of his injuries supported the jury's conclusion that defendant knew his actions created substantial risk of death, or that he was aware that death was practically certain to result. The repeated crushing blows demonstrated defendant's intent to cause serious bodily injury. See Wilder, 193 N.J. at 409.

The jury heard and rejected defendant's testimony regarding the defenses of involuntary intoxication and self-defense. The court instructed the jury as to their role as factfinders and their duty to determine the credibility of the witnesses, tracking the model jury charges. Model Jury Charges (Criminal), "Criminal Final Charge, Function of the Jury" (rev. May 12, 2014). It also instructed the jury on purposeful and knowing serious bodily injury murder, as well as the required elements of passion/provocation manslaughter and aggravated/reckless manslaughter.[3] The court further instructed on self-defense and involuntary intoxication.[4] Therefore, the jury was fully apprised and aware of their options to convict defendant of the lesser-included crimes but decided instead that the evidence supported SBI murder.

The record does not suggest a miscarriage of justice occurred. The jury assessed defendant's testimony and proffered defenses and rejected them. The judge did not abuse his discretion by denying defendant's motion for a new trial.

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[3] Defendant does not challenge these jury instructions.

[4] These instructions are challenged on appeal and will be addressed in Point VIII.

II.

Defendant asserts both in his counseled and uncounseled brief that he received ineffective assistance of counsel. He anchors this argument on trial counsel's examination of the medical examiner, decision not to cross-examine a State's witness, and discussion in summation of a portion of defendant's testimony. We do not comment on the merits of any of the claims, deferring to post-conviction review. These issues cannot be resolved based on the trial record alone. See State v. Hess, 207 N.J. 123, 145 (2011). Counsel's trial strategy, which informed the manner in which he conducted his examination of witnesses and the formulation of his closing statement, cannot be gleaned from this record. See ibid.

III.

Defendant claims that the court should have struck portions of the medical examiner's testimony sua sponte. Specifically, he objects to the following:

> Q. Could [the injury to Galfy's right ear] have been caused, say, from if Mr. Galfy was on the ground and a foot came down, hit the ear and came -- in a downward fashion, something of that nature?
>
> A. It could be consistent.
>
> . . . .

Q. Could [the swelling in Galfy's brain] have come from a knee hitting him somewhere on the head . . . ?

A. It's possible.

Q. Could it have come from a fist?

A. Yes.

Q. An elbow?

A. Yes, but I don't see any pattern injury where I can categorically say that it was one of those objects.

Q. What about a stomp?

Could it have come from a stomp?

A. Yes.

We review this claim employing the plain error standard of review, as defendant did not object at the time. Thus, defendant needs to establish that the error was "clearly capable of producing an unjust result." State v. Prall, 231 N.J. 567, 581 (2018) (quoting R. 2:10-2).

N.J.R.E. 702 informs our analysis. The answers defendant describes as unreliable were nothing more than responses given by the expert to hypothetical questions. After the hypotheticals were posed, defendant's attorney thoroughly cross-examined, exploring the expert's use of phrases such as "could have been" or "possibly," establishing that he was not rendering an opinion to a medical certainty. See State v. Martini, 131 N.J. 176, 259-60 (1993) (stating opposing counsel may cross-examine an expert witness to question the expert's opinions on hypothetical situations presented on direct).

The mere fact that the medical examiner responded to hypotheticals put to him by the prosecutor did not create error. He was conclusive regarding the injuries suffered by the victim, and that the injuries caused his death. That defense counsel appropriately elicited that the expert could not identify what part of the assailant's body caused which injuries, does not in any way weaken the foundation of his testimony—that the multiple injuries inflicted upon Galfy constituted homicide.

Furthermore, the trial court instructed the jury that it could either accept or reject expert testimony at its discretion. Model Jury Charges (Criminal), "Expert Testimony" (rev. Nov. 10, 2003). The court's failure to sua sponte strike the testimony was not clearly capable of producing an unjust result.

IV.

Defendant also contends that the prosecutor's summation unfairly mischaracterized his testimony and that of the medical examiner. If a prosecutor makes impermissible commentary in his or her summation, the court must weigh "the severity of the misconduct and its prejudicial effect on the defendant's right to a fair trial . . . ." State v. Wakefield, 190 N.J. 397, 437 (2007) (quoting State v. Papasavvas, 163 N.J. 565, 625 (2000)). The reviewing court will review a conviction based on prosecutorial misconduct if "the conduct was so egregious as to deprive defendant of a fair trial." Ibid. (quoting Papasavvas, 163 N.J. at 625).

For a prosecutor's comment to require a new trial, however, "there must have been 'some degree of possibility that [the prosecutor's comments] led to an unjust result.'" State v. McNeil-Thomas, 238 N.J. 256, 276 (2019) (alteration in original) (quoting State v. R.B., 183 N.J. 308, 330 (2005)). The possibility of an unjust result "must be real, one sufficient enough to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached." Ibid. (alteration in original) (quoting R.B., 183 N.J. at 330).

"Prosecutorial comments are deemed to have violated the defendant's right to a fair trial when they 'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.'" Jackson, 211 N.J. at 409 (alteration in original) (quoting State v. Koedatich, 112 N.J. 225, 338 (1988)). Whether the comments had the capacity to deprive defendant of a fair trial is decided "within the context of the trial as a whole." State v. Feaster, 156 N.J. 1, 64 (1998).

"In determining whether the prosecutor's comments were sufficiently egregious to deny defendant a fair trial," the reviewing court considers "the tenor of the trial and the responsiveness of counsel and the court to the improprieties when they occurred." State v. Timmendequas, 161 N.J. 515, 575 (1999). The consideration includes "whether defense counsel made a timely and proper objection, whether the remark was withdrawn promptly, and whether the court ordered the remarks stricken from the record and instructed the jury to disregard them." Id. at 575-76 (quoting State v. Ramseur, 106 N.J. 123, 322-23 (1987)).

Generally, if counsel does not object to the remarks at trial, "the remarks will not be deemed prejudicial." Id. at 576. By not making a timely objection, defense counsel indicates a belief that "the remarks were [not] prejudicial at the time they were made." Ibid. The lack of an objection "also deprives the court of the opportunity to take curative action." Ibid. Nevertheless, even if defense counsel does not object, the "prosecutor's remarks and actions must at all times be consistent with his or her duty to ensure that justice is achieved." Ibid. (quoting State v. Long, 119 N.J. 439, 483 (1990)).

Because defense counsel did not object to the prosecutor's summation statements, defendant must demonstrate plain error. See ibid. "Plain error is 'error possessing a clear capacity to bring about an unjust result and which substantially prejudiced the defendant's fundamental right to have the jury fairly evaluate the meris of his defense.'" Ibid. (quoting State v. Irving, 114 N.J. 427, 444 (1989)).

Defendant cites to the following as an example of prosecutorial misconduct:

> Ladies and gentlemen, as you watched Dr. Shaikh testify, there was a reason for this. There is a reason we went through every single mark. Every time I asked him, Doctor, could that have been a different hit? Absolutely, it could have been another hit . . . . Remember that over and over and over?

Additionally, defendant contends that the prosecutor presented the killing in an inflammatory manner, introducing the unfounded theory that defendant "stomped" the victim to death. We do not agree. The prosecutor's statements were reasonable inferences drawn from the medical examiner's testimony. It was up to the jury to accept or reject those inferences. See R.B., 183 N.J. at 330.

With regard to defendant's contention that the prosecutor mischaracterized defendant's testimony, he points us to the following:

> Now, let's just play the game this did happen. Why would [seventy-four]-year-old [Galfy], the heart condition [sic], then try in any way to drag a six-foot, 175 pound [defendant] -- whatever he weighs -- back to the bedroom? Why not just assault him where he lies? Wouldn't that be a heck of a lot easier than trying to get him to the bedroom? But not even in the bed, allegedly dump[ing] him on the floor? But we know who's found on the floor and it's not [defendant] because he's here. None of that makes sense. But the memory keeps getting better as last week's story continues.

These comments were unobjectionable.

At trial, defendant said he recalled sitting with the victim in the living room, "feeling warm and fuzzy, and the last thing [he] remember[ed] [was] hearing the Jeopardy theme and then [he] was on the floor of [Galfy's] room on [his] back." The prosecutor's comments pointed out to the jury the weakness in defendant's description of the manner in which the killing occurred. He drew permissible inferences from the evidence, which the jury was free to accept or reject.

V.

Defendant also contends that the trial court's application of aggravating factor one during sentencing was improper double counting of the evidence used to establish the offense. He argues that the nature of the attack, namely, a beating resulting in death, satisfied the statutory element for murder and therefore made the circumstances unavailable as support for aggravating factor one.

But as the Court said in State v. Fuentes, 217 N.J. 57, 75 (2014), "a sentencing court may justify the application of aggravating factor one, without double-counting, by reference to the extraordinary brutality involved in an offense." So long as the injuries exceeded those required to satisfy the statutory element, this factor is available because the conduct "extended to the extreme reaches of the prohibited behavior." Ibid. (quoting State v. Henry, 418 N.J. Super. 481, 493 (Law Div. 2010)).

In this case the injuries exceeded those necessary to cause death. Therefore, it was not error for the court to find aggravating factor one.

VI.

Defendant also contends that the court erred in barring testimony from him and others regarding the victim's vacations out of the country, which defendant described as "like kind of creepy." Additionally, defendant claims the victim told him about a "young friend" that lived with him and who, whenever guests were present, would become very intoxicated. Defendant asserts the testimony was relevant under N.J.R.E. 404(b) to help establish for the jury his reasonable belief of the need to defend himself from Galfy's sexual advances.

When considering the trial court's evidentiary rulings, we employ a deferential abuse of discretion standard, reviewing the rulings "only for a 'clear error in judgment.'" State v. Medina, 242 N.J. 397, 412 (2020) (quoting State v. Scott, 229 N.J. 469, 479 (2017)). An appellate court may "not substitute [its] judgment for the trial court's unless its 'ruling "was so wide of the mark that a manifest denial of justice resulted."'" Ibid. (quoting State v. Brown, 170 N.J. 138, 147 (2001)).

For evidence to be admissible at trial, it "must be relevant—that is, it must have 'a tendency in reason to prove or disprove any fact of consequence to the determination of the action.'" State v. Sanchez-Medina, 231 N.J. 452, 462 (2018) (quoting N.J.R.E. 401). The court's "inquiry focuses on 'the logical connection between the proffered evidence and a fact in issue,'" and "[e]vidence need not be dispositive or even strongly probative in order to clear the relevancy bar." State v. Buckley, 216 N.J. 249, 261 (2013) (quoting Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 15 (2004)). The court should ask "whether the thing sought to be established is more logical with the evidence than without it." Ibid. (quoting State v. Coruzzi, 189 N.J. Super. 273, 302 (App. Div. 1983)).

"Even if relevant, 'evidence may be excluded if its probative value is substantially outweighed by the risk of . . . undue prejudice, confusion of issues, or misleading the jury.'" Sanchez-Medina, 231 N.J. at 462 (alteration in original) (quoting N.J.R.E. 403). For evidence to be admissible it "must be 'relevant to a material issue,' and its probative value 'must not be outweighed by its apparent prejudice.'" Id. at 465 (quoting State v. Cofield, 127 N.J. 328, 338 (1992)).

The court did not err in keeping this testimony out. Barring cross-examination of a neighbor regarding a prior occupant of the victim's home, or defendant from testifying about Galfy's alleged "creepy" vacations was a reasonable exercise of discretion. The evidence was not of "other crimes, wrongs, or acts," N.J.R.E. 404(b), and was not relevant. It constituted highly speculative suggestions intended to bolster defendant's theory that he needed extreme force to fend off Galfy's alleged sexual overtures. Galfy's vacations and that he previously lived with a young man had little relevance to the trial issues. Any minimal probative value it had was substantially outweighed by the potential for undue prejudice or confusion. See Sanchez-Medina, 231 N.J. at 462; N.J.R.E. 403.

VII.

Defendant also argues that cumulative error prevented him from receiving a fair trial. Since we conclude no error occurred, the point does not warrant further discussion in a written opinion. R. 2:11-3(e)(2).

VIII.

Defendant in his uncounseled brief raises many points for which there is little support in the record. Overall, they do not warrant extended discussion in a written opinion. R. 2:11-3(e)(2).

Defendant revisits the denial of his motions for change of venue. The victim was a former law partner of the criminal presiding judge in the county where he was tried. The partnership ended some thirteen years before the trial. So long as that judge did not preside over any aspect of the matter, the Assignment Judge who heard defendant's motion did not consider removal necessary. See In re Advisory Letter No. 7-11 of the Sup. Ct. Comm., 213 N.J. 63, 77 (2013). We agree.

Additionally, the trial judge on the record commented that he had seen the video that launched defendant to internet fame. Defendant views this act as highly prejudicial but does not identify the prejudice.

Defendant asserts there were multiple times in the courtroom during which he claims he was treated disrespectfully. Occasionally, the record establishes the judge became frustrated with the proceedings, and with defendant's conduct in the courtroom. These instances were rare, did not affect the legal rulings, and could not have prejudiced the jury's verdict.

Defendant also seems to argue that the court erred in instructing the jury on involuntary intoxication because there was insufficient evidence to warrant the charge being given. During the charge conference, counsel said he wanted the instruction, but that his client did not. A trial judge may deliver a charge when a defendant objects to it only if the facts "clearly indicate" that the proposed charge is appropriate. State v. Choice, 98 N.J. 295, 298 (1985).

"[W]here counsel requests a charge on a defense, it will be given if there is a rational basis in the evidence to do so." State v. R.T., 205 N.J. 493, 509 (2011) (Long, J., concurring). The Supreme Court has also stated that "[t]rial courts must carefully refrain from preempting defense counsel's strategic and tactical decisions and possibly prejudicing defendant's chance of acquittal." State v. Perry, 124 N.J. 128, 162 (1991).

Applying these standards, the instruction was not error. Defendant testified that the victim served him beer, that he experienced an unusual taste in his mouth the following morning and felt "fuzzy" after consuming it. Although defendant did not explicitly say so, he was implying that Galfy drugged him so he could sexually assault him. The judge had to give the charge under these circumstances because the defense depended in part on that claim.

For the first time on appeal, defendant asserts he should have been permitted to call the prosecutor and the judge as witnesses. Defendant believes the State did not do sufficient testing on the material gathered from the crime scene, and that the judge denied seeing sheriff's officers laughing at his recorded statement when it was played to the jury. These requests are procedurally improper and have no foundation in the record.

Defendant requested and was denied an adverse inference instruction during the trial. He alleges the State should have administered a rape kit, tested a towel found at the crime scene for semen, and conducted forensic investigation to support his theory of the case. The adverse inference instruction, however, is appropriate when the alleged "spoliator destroyed or otherwise concealed [evidence that] would have been unfavorable . . . ." State v. Dabas, 215 N.J. 114, 140 n.12 (2013) (quoting Rosenblit v. Zimmerman, 166 N.J. 391, 401-02 (2001)). Failure to test does not, standing alone, justify or constitute a basis for the instruction.

Finally, defendant contends that he should have been permitted to represent himself. Defendant's motion to represent himself was denied on January 7, 2019, because of procedural missteps prior to the start of trial. Defendant never refiled even though the judge clearly explained to him that the issue would not be reached at that point.

Defendant also complains that his motion for self-representation at sentencing should have been granted. At that time, the judge did ask defendant some of the questions routinely posed to determine if defendant's decision was being made knowingly and intelligently. See State v. Reddish, 181 N.J. 553, 593-95 (2004) (explaining the court must make inquiries about defendant's knowledge regarding the implications concerning his right against self-incrimination, waiver of ineffective-assistance-of-counsel claims, and "the nature and consequences of his waiver," and that these questions must be "open-ended" so defendant describes his understanding "in his own words"); see also State v. King, 210 N.J. 2, 19-20 (2012).

During the oral argument on defendant's motion, the court stressed that defendant's conduct in the courtroom, and relationship with serial attorneys, demonstrated that his wish to proceed pro se was nothing short of an "attempt to manipulate the [c]ourt proceedings as he ha[d] attempted to do so throughout the entirety of the trial." In the judge's opinion, the application was a step taken only to delay the process. The judge noted that under State v. Drew, 383 N.J. Super. 185, 200 (App. Div. 2006), a defendant must demonstrate a willingness to comply with rules of procedure and courtroom protocol in order to effectively waive his right to counsel—which defendant had not.

The judge observed defendant had "been hostile, aggressive, noncompliant, ha[d] repeatedly ignored serial admonitions from [the] [c]ourt over and [over] again," and that "his conduct ha[d] been serially contemptuous" and "deviously calculating." As an example, the court cited defendant's reference to the viral video of his news interview during his testimony "knowing the great lengths [to which] the lawyers and the [c]ourt went . . . to ensure there would be no such reference to the clearly irrelevant[,] inadmissible and highly prejudicial video interview or the incident that led to the video." The judge referenced other instances where defendant outright disregarded the court's rulings. Additionally, during an "unrestrained outburst" outside the presence of the jury, defendant described his trial as a "kangaroo court." Even as the judge was rendering his decision on defendant's motion to represent himself, defendant continuously interrupted him. Accordingly, the judge's decision was not an abuse of discretion.

Any other claim of error not explicitly addressed in this opinion is too lacking in merit to warrant further discussion. R. 2:11-3(e)(2).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

EXHIBIT C

FILED, Clerk of the Supreme Court, 10 Dec 2021, 086174

SUPREME COURT OF NEW JERSEY
C-315 September Term 2021
086174

State of New Jersey,

Plaintiff-Respondent,

v.

ORDER

Caleb L. McGillvary,

Defendant-Petitioner.

A petition for certification of the judgment in A-004519-18 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.'

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 7th day of December, 2021.

Heather J. Baker
CLERK OF THE SUPREME COURT

EXHIBIT
19
PENGAD-Bayonne, N. J.

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CALEB L. MCGILLVARY,	)	1:22-CV-04185-MRH
Petitioner	)	MARK R. HORNAK Chief United States District Judge
v.	)	RICHARD A. LANZILLO Chief United States Magistrate Judge
THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, et al,	)	
Respondents	)	AMENDED REPORT AND RECOMMENDATION ON PETITION FOR WRIT OF HABEAS CORPUS [ECF No. 1][1]

I. Recommendation

It is respectfully recommended that the Petition for Writ of Habeas Corpus filed by Petitioner Caleb L. McGillvary [ECF No. 1] be denied and that no certificate of appealability issue.

II. Report

A. Introduction

Petitioner, an inmate confined at the New Jersey State Prison in Trenton, New Jersey, initiated this action by filing a *pro se* Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of New Jersey. ECF No. 1. Raising two separate grounds for relief, Petitioner challenges his first-degree

[1] This Amended Report and Recommendation corrects certain erroneous record and case citations included in the undersigned's original Report and Recommendation (ECF No. 55). It makes no substantive changes to the original.

murder conviction in the Superior Court of New Jersey, Law Division, Union County in criminal case number UNN-13-1703. For the following reasons, the Court should deny his petition.[2]

B. Factual Background

The Appellate Division of the Superior Court of New Jersey set forth the factual background of this case as follows:

> The charges against defendant arose from the May 13, 2013 discovery of the victim, Joseph Galfy, Jr., a seventy-four-year-old attorney. Police found Galfy beaten to death, lying face-down on his bedroom floor. Officers collected a variety of items and swabs from the scene, including a one-way train ticket from Rahway to Asbury Park from the day before, Sunday, May 12, 2013. Following that lead, Union County Prosecutor's Office Homicide Task Force Sergeant Johnny Ho located surveillance footage from the New Jersey Transit Rahway station, in which Galfy is seen that morning accompanied by another person, later identified as defendant. The video depicted Galfy purchasing a ticket from a vending machine and handing it to defendant, who then hugged the victim. The two men walked towards a train platform.
>
> Galfy's cell phone contact list included a number for "Kai" Lawrence, matching the telephone number on a piece of paper found in the bedroom. The victim and defendant exchanged calls on the evening of May 12, 2013. Galfy told defendant via text message at 5:33 p.m. that he would be at the train station in about ten minutes.
>
> As a result, officers obtained a court order permitting the retrieval of defendant's phone and phone GPS records. However, the phone had been recently deactivated, and the final recorded location was Clark, the town where Galfy lived.
>
> Defendant's last phone contact was with Kimberly Conley-Burns. She testified at trial that she contacted defendant on Facebook, as he was an internet personality, informing him that if he were ever in New Jersey, she could find him a place to stay. On Saturday, May 11, the day before the

[2] Pursuant to an Order issued by Chief Judge Michael A. Chagares of the United States Court of Appeals for the Third Circuit, this case has been specially assigned to Chief Judge Mark R. Hornak of the United States District Court for the Western District of Pennsylvania for intra-Circuit disposition pursuant to 28 U.S.C. § 292(b). ECF No. 40. The matter was subsequently referred to the undersigned United States Magistrate Judge, having been designated by Chief Judge Renee Marie Bumb of the District of New Jersey, in concurrence with Chief Judge Hornak, to perform any and all judicial duties contemplated under 28 U.S.C. § 636 in the District of New Jersey for such a period of time as necessary for the resolution of this matter, for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). ECF Nos. 41, 45.

murder, defendant told Conley-Burns that he had met a man in Times Square who drove him to New Jersey, and was planning to stay in Newark, which defendant mistakenly believed was where the victim lived. Defendant mentioned that the person was older, his name was Joe, and that he was a lawyer.

In a voicemail and text exchange, Conley-Burns warned defendant that Newark was dangerous and that he needed to be careful. He responded that he had found someone: "a good person who put [him] up for the night."

Defendant and Conley-Burns planned to meet in Asbury Park on May 12, which was Mother's Day. Because of a family brunch, Conley-Burns did not appear when defendant arrived that morning, so they changed their plan, agreeing to go to Philadelphia the following day. Defendant texted Conley-Burns that he had "to head up to Newark."

Conley-Burns then received a series of calls from defendant, which she was unable to answer. He told her that the place in Newark "fell through," asking if she could pick him up.

At approximately 10:00 to 10:15 p.m., defendant appeared at the White Diamond Diner in Clark, where he encountered Robert McNamara and his brother, initiating conversation and showing them an online video of himself. Defendant asked for directions to Rahway.

Alexander McCue was working at a 7-11 in Clark at around 11:30 p.m. when he saw defendant, whom he recognized from the internet because of defendant's distinctive face tattoo. Defendant asked McCue for directions to the Rahway train station, and McCue told him he thought there might be a train station in Clark. Defendant interrupted him, saying he was not returning to Clark, and was looking for the quickest way out. McCue told defendant to walk across the street since that was the border of Rahway, and defendant left.

Robert Scully, a New Jersey Transit train conductor, testified that while working the night shift, traveling between Long Branch and New York City, he collected defendant's ticket, noticing it was for Asbury Park. Scully explained defendant needed to catch a connecting train at Long Branch but would have to wait since none operated at that hour. Defendant borrowed Scully's phone to ask his ride to meet him at Long Branch, although defendant had to place multiple calls, possibly because no one was answering at the other end. The train arrived in Long Branch shortly after 2:30 a.m.

The following day, Monday, May 13, defendant left another voicemail for Conley-Burns, describing his appearance so she could identify him when she arrived at the Asbury Park train station. Once they met, he immediately told her he had just been "raped." Defendant added that he had contacted police, but that they would not do anything because the assailant was an attorney. Defendant also told her that he had awakened to find that he had ejaculate in his mouth, on the side of his face, and on the side of his cheek. He said something to the perpetrator about it but Galfy denied that he did anything, so defendant just left. Defendant did not mention the rape again.

Conley-Burns saw no bruises, cuts, scratches, or scrapes on defendant's hands or face. Defendant told her he had cut his hair short, to about an inch or two, with a knife. He did not give a reason.

On the way to Philadelphia, Conley-Burns stopped to pick up a friend. She remembered defendant during that day as "very friendly," "talking to people," "rapping or beat boxing with these kids," "joking around," and "animated and playful." Defendant was "chatty. Off-beat. Quirky," and acted "weird." After spending time in Philadelphia, Conley-Burns drove defendant to the home of Marjory Erin Wagner, a friend who lived near Glassboro, because Wagner had agreed to let defendant stay there for the night.

Wagner testified that after Conley-Burns left, she, defendant, and her boyfriend spent the evening "listening to stories and drinking some beers." The following day, they drove defendant to a train station in Haddonfield around 7:00 or 8:00 in the evening. Defendant never said he had been raped, and she described his demeanor as "interesting" and "weird."

Defendant was eventually located in the Greyhound Bus terminal in Philadelphia on May 16, 2013, and taken to a precinct station. Ho and others arrived at approximately 9:00 p.m. and interviewed defendant after advising him that he was being charged with murder. Defendant waived his Miranda rights and gave a lengthy recorded statement, ending when he requested counsel. The video was shown to the jury.

When officers questioned defendant initially about what happened, defendant asked: "he died?" Defendant then told Ho that he met Galfy in Times Square by the bus depot, and told Galfy he was headed to New Jersey. The two got dinner from a restaurant near Galfy's house, and at first defendant "thought [Galfy] was real nice and then he [f***ing] raped me." After dinner, they drank beer while watching television in the living room, and defendant said Galfy wanted to put defendant's beer in a glass instead of leaving it in the bottle. Defendant drank about five beers and felt kind of groggy but walked to the guest bedroom by himself.

Defendant told detectives that before going to bed, Galfy asked defendant to shower with him. Defendant refused and showered alone before going to sleep. He awakened with a metallic taste in his mouth, a bad headache, and when he looked in the mirror in the morning, he thought he saw dried ejaculate on the side of his face. He did not confront Galfy and said he did not "really know what to think about it." Galfy drove him to a train station and purchased him a ticket to Asbury Park.

Defendant claimed that when he returned to Galfy's that night, they had dinner and a couple of beers. Defendant awakened on Galfy's bedroom floor, only to find Galfy pulling his pants. At that point, defendant began to hit him. Defendant could not remember how he struck Galfy. He said he "could have elbowed him.... kneed him. I don't know." He left the house, and remembered going to a diner and catching a train to Long Branch.

At trial, defendant explained his "home-free" lifestyle in which he played music and worked construction jobs when he needed money, but otherwise spent his time surfing. Around 2012 to 2013 he traveled from his home in Canada to the United States to continue this lifestyle. In February 2013, he achieved internet fame following an incident in California. He continued across the country, being offered food and places to stay by people who knew him from the internet.

Defendant testified that he encountered Galfy in New York City, that Galfy asked where he was headed, and remarked that he looked lost. Galfy put him up for the night, and he left after breakfast. Galfy told him to call if he was in the area and needed a place to stay. Defendant thanked Galfy and hugged him goodbye because he did not know "what he had done to [him] at the time." He gave Galfy his phone number and email address.

On the stand, defendant said he cut his hair short on May 12, 2013, because he was warm. He testified he was going to travel to Atlanta, and it would be "really hot" there. Defendant cut his jeans into shorts because he wanted to exercise.

After his original plans with Conley-Burns fell through, defendant decided to spend a second night at Galfy's house. He thought he was still in the greater Newark area, which Conley-Burns had described as a dangerous place. Defendant took the train to Long Branch, hoping that if he was geographically closer to Galfy, Galfy would be more likely to let him stay at his home. After getting off the train, defendant called and asked if Galfy could host him again. Galfy agreed but added he would have to wait to be picked up since Galfy was in New York City. Defendant waited approximately forty-five minutes.

> Once back at Galfy's home, Galfy again gave defendant beer poured into a glass. After dinner and a few beers, defendant "was feeling like really warm and fuzzy and like relaxed." He recalled Galfy putting the dishes in the dishwasher; the last thing he remembered was hearing the Jeopardy theme song. He came to on the floor in Galfy's room on his back.
>
> Defendant testified:
>
> > [T]he next thing I knew he was shoving me into the bed and I was trying to get him away from me and then I was hitting him and then he shoved my head on the floor and body slammed me and I couldn't breathe. And I was trying to get out from underneath him and he kept humping and grinding me. And he, he was trying to put my dick in his mouth and I was trying to get him away from me. I -- that's, that's all I can remember.
>
> After the incident, defendant could not recall how he left Galfy's house or where he went. He knew he "came to" in a parking lot, his muscles were sore, he had a headache, and a metal taste in his mouth. Defendant remembered going to the diner and the 7-11. At the diner, he went into the bathroom, dry heaved into a toilet, and splashed water on his face. He showed a video of himself on the internet to the other men in the diner, ate something, and went outside to smoke. Defendant had problems with his phone, and by the time he was on the train to Long Branch, had thrown it out because it smelled like urine and would not turn on.
>
> Defendant could not recall the whereabouts of the things he wore during the alleged sexual assault, which he said were soaked in blood and urine. He wore different clothes when speaking to the detectives in Philadelphia, but "[a]t some point [he] had to have [changed] because when [he] came to," he was dressed differently. He also confirmed that in a photograph taken with an employee at the diner the night after the alleged sexual assault he was wearing different clothing. He claimed he was unaware that Galfy died until informed by the detectives.

State v. McGillvary, 2021 WL 3378024, at **1-4 (N.J. Super. Ct. App. Div. Aug. 4, 2021).

C. Procedural history

A grand jury in Union County returned a one-count superseding indictment against McGillvary on May 18, 2016, charging him with first-degree murder. ECF No. 12-4. Attorney John G. Cito was appointed to represent him. ECF No. 1-7 at p. 7. Through counsel, McGillvary moved to dismiss the indictment, to suppress his initial statements, to recuse the Union County criminal bench, and to change the venue of his trial. ECF No. 12-43 at pp. 3-4. The trial court denied each of those motions. *Id.*

In addition to his counseled motions, McGillvary filed a *pro se* motion to dismiss the indictment on December 27, 2018, alleging a variety of *Brady* violations. ECF No. 1-7. Specifically, McGillvary argued that the police officers investigating Galfy's death had failed to properly investigate his claim of sexual assault or make a reasonable effort to preserve potentially exculpatory evidence that a sexual assault had taken place. *Id.* at 14. During a pretrial management conference on January 7, 2019, McGillvary, after identifying himself, stated: "For the record, Judge, I assert my Sixth Amendment right to litigate my motion pro se and I have requested pro se to argue my case." ECF No. 12-34 at p. 4. The following exchange then took place:

> The Court: The Court received on eCourts a filing of a motion pro se by the defendant. It's a motion to dismiss.
>
> First of all, while of course a motion to dismiss can be filed at any time, this matter has been pending for years. I know there was a prior motion to dismiss, I believe on different grounds, filed and Judge Caulfield had an evidentiary hearing and then issued a rather voluminous opinion on that. Correct, Mr. Cito?
>
> Mr. Cito: Yes, Your Honor.
>
> The Court: I was advised . . . that it was improperly filed in light of the fact that it was during basically a court hiatus with a skeletal staff. It was mistakenly filed. It would not have been filed – it never would have been filed on eCourts and I never would have known about it, frankly. It would have been returned to you, Mr. Cito.
>
> The Court will not accept the motion, will not entertain the motion. I am striking it.
>
> First of all, it didn't – it failed to comply with the rules. The filing itself. Secondly, Mr. Cito, any and all motions will be filed through you. Okay? So, I am striking it. I will issue an order to that effect.

I do note, Mr. Cito, the matter is going to be tried, I believe on April the 2nd. As a courtesy to you, I will allow you to review the pro se submission. Have you received a copy of it?

Mr. Cito: I've gotten three copies, Your Honor. Yes. And I spoke to my client about it. I have narrowed down the issue as to the dismissal. He's based it on a Brady violation. I'm going to refile with the appropriate language as to – which is a new ground separate and apart from the old motion.

The Court: I – listen, Mr. Cito. I will review whatever it is that you submit to me, but of course there has to be a basis in law and fact and the Rules of Professional Conduct for you to file a motion.

Mr. Cito: I understand, Your Honor.

ECF No. 12-34 at pp. 5-7.[3] An exacting review of the record indicates that McGillvary never reasserted a request to proceed pro se until after his trial.

McGillvary's trial commenced on April 9, 2019. ECF No. 12-38. On April 24, 2019, a Union County jury found him guilty of first-degree murder. ECF No. 12-5 at p. 1. Prior to sentencing, the trial court received a pro se application from McGillvary seeking to represent himself at the sentencing proceeding. ECF No. 12-47 at p. 4. That application consisted of an eight-page motion, with attachments, and a fifteen-page brief in support. *Id.* At a presentencing hearing held pursuant to *Feretta v. California*, McGillvary addressed the court and stated:

> Your honor, I unequivocally and clearly assert my Sixth Amendment right to represent myself, and I renounce and waive Cito as a counsel. I have terminated his . . . representation of me in writing with original signature, and I proffer that letter with the attached motions onto the court record now.

Id. at p. 3. After conducting a lengthy colloquy to test McGillvary's competence and general understanding of the law, the court recounted McGillvary's extensive history of disruptive,

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[3] The trial court amplified its reasoning in a subsequent filing, observing that McGillvary's oral request "specifically referenced his pro se motion and was not a clear and unequivocal invocation of his Sixth Amendment privilege to represent himself at trial." ECF No. 12-17 at p. 3 n. 1. The court also noted that "[McGillvary] did not raise the issue of self-representation again until after the conclusion of the trial and on the eve of sentencing, when he did so with formal written submissions." *Id.*

combative, manipulative, and obstructive conduct at every preceding stage of the proceedings. *Id.* at pp. 16-35. Noting that a trial judge retains the authority to deny self-representation to a defendant who deliberately engages in abusive or obstructionist behavior, the court denied McGillvary's motion. *Id.* at pp. 23-27, 35. McGillvary was ultimately sentenced to fifty-seven years in prison, with the requirement that he serve eighty-five percent of that term under the New Jersey No Release Act, followed by a five-year term of parole supervision. ECF No. 12-5 at p. 1

Through counsel, McGillvary filed a timely appeal. In his counseled brief, he presented several claims for review including sufficiency of the evidence, prosecutorial misconduct, ineffective assistance of trial counsel, and cumulative error. ECF No. 12-6. In a pro se brief, Petitioner raised several additional claims, only one of which is relevant to the instant petition: his argument that the "DENIAL OF APPELLANT'S SUBSTANTIAL SIXTH AMENDMENT RIGHT TO SELF-REPRESENTATION WAS STRUCTURAL ERROR REQUIRING REVERSAL OF APPELLANT'S CONVICTION." ECF No. 1-9. McGillvary also filed a motion to relieve appellate counsel. ECF No. 12-11.

Following a hearing, the trial court again denied McGillvary's request to proceed *pro se* based on his demonstrated inability to abide by the rules of courtroom decorum and dignity. ECF No. 12-17. Specifically, the trial court noted that, during McGillvary's testimony at trial, the court had been compelled to admonish or strike portions of his testimony on twenty-eight occasions because of his "hostile, aggressive, noncompliant, 'serially contemptuous,' and 'deviously calculating" behavior. *Id.* at p. 4. Other instances of misconduct included referring to the court as a "kangaroo court," comparing the court to the Ku Klux Klan, repeatedly engaging in profanity, and describing his own attorney as a "slovenly lawyer" and a "disgusting slob." *Id.* The Appellate

Division denied his motion to relieve appellate counsel based on the trial court's findings. ECF No. 18.

On August 4, 2021, the Appellate Division affirmed Petitioner's conviction and sentence. *McGillvary*, 2021 WL 3378024. Addressing his contention that the trial court had violated his right to self-representation, the Appellate Division held:

> Finally, defendant contends that he should have been permitted to represent himself. Defendant's motion to represent himself was denied on January 7, 2019, because of procedural missteps prior to the start of trial. Defendant never refiled even though the judge clearly explained to him that the issue would not be reached at that point.

Id. at *12. Notably, neither the trial court nor the Appellate Division had an opportunity to address the underlying *Brady* claim.

McGillvary filed a pro se petition for certification to the New Jersey Supreme Court raising, among other things, the following arguments:

1. THE TRIAL COURT'S DENIAL OF DEFENDANT'S JANUARY 7, 2019 SUA SPONTE MOTION DURING A HEARING IN OPEN COURT TO PROCEED PRO SE WAS SUBSTANTIAL AND STRUCTURAL ERROR WHICH REQUIRES REVERSAL.

2. THE TRIAL COURT'S REFUSAL TO REMEDY THE DESTRUCTION OF BRADY MATERIAL WITH AN ADVERSE INFERENCE JURY INSTRUCTION WAS SUBSTANTIAL ERROR REQUIRING REVERSAL.

ECF No. 1-10. The New Jersey Supreme Court denied certification on December 10, 2021, ECF No. 12-21, and denied Petitioner's subsequent motion for reconsideration on March 11, 2022. ECF No. 12-24.

On March 2, 2022, McGillvary filed a petition for writ of certiorari in the United States Supreme Court. ECF No. 12-25. He presented a single question:

> If Defendant's motion to self-represent is denied without a *Faretta* inquiry, does his cooperation thereafter with defense counsel constitute a waiver of his right to self-representation?

ECF No. 12-25. On April 18, 2022, the petition was denied. ECF No. 12-28.

The instant 2254 Petition ensued. As outlined above, McGillvary raises the following two grounds for relief:

> Ground One: THE TRIAL COURT'S JANUARY 7, 2019 DENIAL OF APPELLANT'S SUBSTANTIAL SIXTH AMENDMENT RIGHT TO SELF-REPRESENTATION WAS A STRUCTURAL ERROR REQUIRING REVERSAL OF APPELLANT'S CONVICTION THROUGH WRIT OF HABEAS CORPUS
>
> Ground Two: THE TRIAL COURT'S JANUARY 7, 2019 ORDER DENYING PETITIONER'S DECEMBER 27, 2019 PRO SE MOTION TO REMEDY THE DESTRUCTION OF <u>BRADY</u> MATERIALS; DEPRIVED PETITIONER OF HIS DUE PROCESS AND CONFRONTATION RIGHTS, IN VIOLATION OF THE 5TH, 6TH, AND 14TH AMENDMENTS OF THE US CONSTITUTION; WHICH REQUIRES REVERSAL OF HIS CONVICTION THROUGH ISSUANCE OF THE WRIT OF HABEAS CORPUS WITH DECLARATORY RELIEF TO REMEDY THE <u>BRADY</u> VIOLATIONS

ECF No. 1 at pp. 7, 10. In addition to his petition, McGillvary has filed a memorandum brief in support and several motions for summary judgment. *See* ECF Nos. 2, 15, 26, 44. Respondent, in turn, has filed an answer to the Petition and a response to McGillvary's motions for summary judgment. ECF Nos. 12, 46. McGillvary filed a reply brief, *see* ECF No. 16, rendering this matter ripe for adjudication.[4]

D. Applicable Legal Standard

The Court has jurisdiction pursuant to 28 U.S.C. § 2254, the federal habeas statute applicable to prisoners in custody pursuant to a state-court judgment. Under § 2254, a district court may entertain an application for a writ of habeas corpus filed by a person in state custody "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). It is the petitioner's burden to demonstrate that relief is warranted. *See, e.g., Vickers v. Sup't Graterford SCI*, 858 F.3d 841, 848-49 (3d Cir. 2017).

Habeas corpus is an "'extraordinary remedy' reserved for defendants who were 'grievously wronged' by the criminal proceedings." *Calderon v. Coleman*, 525 U.S. 141, 146 (1998). Where the merits of a habeas claim have been adjudicated at the state level, federal courts must give considerable deference to determinations made by state trial and appellate courts. 28 U.S.C. § 2254(d). *See also Renico v. Lett*, 599 U.S. 766, 773 (2010). In such circumstances, the habeas petitioner bears the burden of showing that the state court's decision was contrary to or an unreasonable application of United States Supreme Court precedent and/or an unreasonable determination of the facts. *Moreno v. Ferguson*, 2019 WL 4192459, at *3 (W.D. Pa. Sept. 4, 2019). On the other hand, "[if] a claim was not adjudicated on the merits in state court" – as in the instant case – then a federal court's review of "legal questions and mixed questions of law and fact" in a habeas petition is "*de novo*." *Bennett v. Superintendent Graterford SCI*, 886 F.3d 268, 281-82 (3d Cir. 2018). In either case, "the state court's factual determinations are still presumed

[4] Petitioner's motions for summary judgment should be dismissed as duplicative of the relief sought in the underlying habeas petition.

to be correct, rebuttable upon a showing of clear and convincing evidence." *Id.* (quoting *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001) (citing 28 U.S.C. § 2254(e)(1)).

E. Analysis[5]

Before addressing McGillvary's claims for relief, the Court notes that neither claim received an adjudication on the merits in the state courts. As recounted above, McGillvary filed his pro se motion to dismiss the indictment based on the alleged *Brady* violation shortly before the January 7, 2019 hearing. At the hearing, McGillvary interrupted the proceedings to address the trial judge and request an opportunity to personally argue his motion before the court. Because he was represented by counsel, the trial court struck his pro se motion as procedurally improper and never reached the merits of McGillvary's underlying *Brady* claim. And because the trial court did not perceive his request to argue his pro se motion as a demand to terminate his attorney and proceed alone, the court denied that request without a merits analysis. Consequently, because neither claim was adjudicated on the merits in state court, the Court will review each claim under a *de novo* standard of review.[6] *Bennett*, 886 F.3d at 281-82.

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[5] Before the Court can address the merits of Petitioner's petition, it must first decide whether it was timely filed. *Romansky v. Superintendent Green SCI*, 933 F.3d 293, 298 (3d Cir. 2019). Pursuant to AEDPA, a state prisoner must file his federal habeas claims within one year of the date his judgment of sentence became final. 28 U.S.C. § 2244(d)(1)(A). Because he pursued his direct appeal to the United States Supreme Court, Petitioner's sentence became final for purposes of the one-year PCRA statute of limitations and the one-year federal habeas statute of limitations on April 18, 2022, when the Supreme Court denied his petition for writ of certiorari. *See* 28 U.S.C. § 2244(d)(1)(A) (the one-year federal limitations period generally begins on the date the petitioner's judgment of sentence became final "by the conclusion of direct review or the expiration of the time for seeking such review"). The instant 2254 petition, filed approximately two months later, was timely by almost ten months.

[6] For the same reason – McGillvary's "failure to file a proper motion to raise a *Brady* violation and assert his right to self-representation" – Respondent also argues that McGillvary procedurally defaulted each of his claims. ECF No. 12 at p. 20-22. The doctrine of procedural default stems from the well-settled principle that a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address the merits of those claims "in the first instance." *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). Such claims may not ordinarily be reviewed in federal court. *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017) ("[A] federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule.") (citations omitted). However, several caveats exist, including the possibility that a petitioner can overcome procedural default by

1. Ground One

McGillvary first maintains that the trial court violated his Sixth Amendment right to self-representation when it denied his request to "litigate [his] motion [to dismiss] pro se" and to "pro se . . . argue [his] case." ECF No. 12-34 at p. 4. McGillvary relies on the legal principle that a criminal defendant has the right to "proceed without counsel when he voluntarily and intelligently elects to do so." *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013) (quoting *Faretta*, 422 U.S. at 807). Because the trial court failed to conduct a hearing before denying his motion, McGillvary maintains that the court's decision "was a structural error requiring reversal of [his] conviction through writ of habeas corpus." ECF No. 1 at p. 7. Respondent, in turn, argues that McGillvary never properly asserted his right to self-representation and that, even if he did, his behavior throughout the proceedings amounted to a waiver of that right.

Sixth Amendment claims based on an alleged denial of the constitutional right to self-representation are governed by the United States Supreme Court's decision in *Faretta v. California*, 422 U.S. 806 (1975). In *Faretta*, the trial court initially appointed a public defender to represent the defendant during his criminal trial. However, "[w]ell before the date of trial, . . . Faretta requested that he be permitted to represent himself. *Faretta*, 422 U.S. at 807. After initially granting his request, the trial court later reversed its decision and reappointed counsel after observing that Faretta appeared to lack knowledge "of certain rules of law" and "court practice

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demonstrating cause and prejudice or a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750. Because of the complexity of this analysis, the United States Supreme Court has acknowledged that a court need not resolve the more complex issue of procedural default if the underlying claim has no merit, even under a *de novo* review. *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) ("Judicial economy might counsel giving the [merits] question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law."). *See also Woods v. Lamas*, 631 Fed Appx. 96, 99 (3d Cir. 2015) ("Given the straightforward merits issues and comparatively difficult state procedural issues, we will . . . ignore the procedural default and decide the case on the merits.") (citing 28 U.S.C. § 2254(b)(2) (permitting a federal court to deny a habeas petition on the merits notwithstanding the applicant's failure to exhaust state remedies)). That course is followed here.

and procedure." *Buhl v. Cooksey*, 233 F.3d 783, 790 (3d Cir. 2000) (citing *Faretta*, 422 U.S. at 808). Proceeding with counsel, Faretta was ultimately convicted at trial.

Faretta appealed, arguing that he was entitled to a new trial because the trial judge had denied his Sixth Amendment right of self-representation by forcing him to proceed with counsel. *Faretta*, 422 U.S. at 807. The United States Supreme Court agreed. After "carefully reviewing the historical underpinnings of the right to counsel," the Court concluded "that a state may not force a criminal defendant to be represented by a lawyer if the defendant properly asserts his/her right to self-representation." *Buhl*, 233 F.3d at 790-91 (citing *Faretta*, 422 U.S. at 836). Accordingly, the Court vacated Faretta's conviction and remanded for a new trial. *Faretta*, 422 U.S. at 835-36.

In the wake of *Faretta*, the Court of Appeals for the Third Circuit has articulated several factors to consider when determining whether a request for self-representation has been "properly" asserted. First, the defendant's "request of self-representation . . . must be made clearly and unequivocally." *Buhl*, 233 F.3d at 792. This requirement "prevents defendants from making casual and ineffective requests to proceed pro se, and then attempting to upset adverse verdicts after trials at which they had been represented by counsel." *Id.* (internal quotation and quoting source omitted). It also protects defendants from inadvertently waiving counsel "based upon occasional musings on the benefits of self-representation." *Id.* (internal quotation and quoting source omitted).

Once a clear and unequivocal assertation of the right to dispense with counsel has been lodged, the trial court must next "undertake an appropriate inquiry under *Faretta*" to determine whether the request was knowing, intelligent, and voluntary. *Id.* at 794. The court must "make some inquiry about a defendant's reason for the request," *Buhl*, 233 F.3d at 798, and inform the defendant "of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Faretta*, 422 U.S. at 835. Specifically, the court should advise the defendant as to "the technical problems he may encounter in acting as his own attorney" and the "nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Buhl*, 233 F.3d at 799 (quoting *U.S. v. Welty*, 674 F.2d 185 (3d Cir. 1982)).

Finally, "[i]t is well established that a defendant can waive the right of self-representation after asserting it." *Id.* at 800 (collecting cases). "[C]ourts have commonly found waiver [of the right to self-representation] where the defendant has vacillated between being represented by counsel and self-representation, where defendant abandons his or her request for self-representation, and where the defendant elects to act as co-counsel." *Gaines v. D'llio*, 2019 WL 851592, at *18 (D.N.J. Feb. 22, 2019) (quoting *Flanker v. Warren*, 2013 WL 5937423, at *14-15 (D.N.J. Nov. 1, 2013)). A defendant may also waive the right by "deliberately engaging in serious and obstructionist misconduct." *Law v. May*, 2021 WL 3857634, at *6 (D. Del. Aug. 30, 2021) (citing *Buhl*, 233 F.3d at 800-01). On the other hand, a defendant's acquiescence following a trial judge's "categorical" denial of a request for self-representation "cannot be read to signify a waiver." *Williams v. Bartlett*, 44 F.3d 95, 101 (2d Cir.1994). Nor is a defendant "required continually to renew a request once it is conclusively denied or to make fruitless motions or forego cooperation with defense counsel" to avoid a waiver. *Buhl*, 233 F.3d at 803 (quoting *Orazio v. Dugger*, 876 F.2d 1508 (11th Cir. 1989)).

Applying these principles to the instant case, McGillvary's Sixth Amendment claim is deficient in several regards. First, he has failed to demonstrate that his comments at the hearing on January 7, 2019, amounted to a clear and unequivocal waiver of his right to counsel. As noted above, McGillvary had recently filed a pro se motion to dismiss the charges against him based on the alleged *Brady* violation. The wording of his verbal request – that he wanted to "litigate [his] motion pro se and . . . argue [his] case" – strongly suggests that his purpose in speaking up was to obtain a ruling on his pro se motion to dismiss.[7] The trial court expressly interpreted it as such. *See* ECF No. 1217 at p. 3 n. 1 (explaining that the trial court did not hold a *Faretta* hearing because McGillvary's oral request "specifically referenced his pro se motion and was not a clear and unequivocal invocation of his Sixth Amendment privilege to represent himself at trial"). *See also Walker v. Phelps*, 910 F.Supp.2d 734 (D. Del. Dec. 19, 2012) ("Considering that petitioner's initial motion was an unauthorized pro se filing by a represented defendant, the court could reasonably conclude that petitioner did not 'adequately' assert his right to self-representation."); *Barney v. D'Illio*, 2018 WL 2018054, at *11 (D.N.J. May 1, 2018) (contrasting the facts in *Buhl*, where it was "undisputed that Buhl filed a written motion to proceed pro se . . . and it [wa]s very clear that the trial court understood that Buhl was asserting [th]at right because the court held a hearing on that motion a month later," with an ambiguous letter written by the petitioner that the trial court "[n]ever read or understood" to be such a request). At no point during the remainder of that hearing, or, indeed, throughout the subsequent pretrial proceedings and the trial itself, did McGillvary make any attempt to clarify or correct the trial court's interpretation of his request.[8]

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[7] At a minimum, McGillvary's request was ambiguous. As noted by one Court of Appeals, a criminal defendant who files a pro se motion while represented by counsel "could be requesting to substitute new counsel, be seeking to proceed pro se entirely, or be requesting to present a particular motion pro se even though represented by counsel." *United States v. Cross*, 962 F.3d 892, 898 (7th Cir. 2020).

[8] While most defendants would likely be uncomfortable contradicting a trial judge's interpretation of a legal matter, McGillvary was one of the few with no such reservations. The transcripts from his state court proceedings are replete with examples of McGillvary lodging verbal objections, often vigorously, when he perceived that he was being mistreated or misunderstood. Based on a thorough review of the record, it is almost inconceivable that McGillvary would remain quiet while the trial court misconstrued his motion in such a fundamental manner.

See United States v. Torres, 2023 WL 3318567, at *3 (D.N.J. May 9, 2023) ("If the defendant equivocates, he is presumed to have requested the assistance of counsel."). Nor did he express dissatisfaction with his attorney's performance at that time. Indeed, after the trial court offered defense counsel time to review the motion with his client and refile it with appropriate language, McGillvary demonstrated his apparent satisfaction with that course of action by discussing the matter with Attorney Cito and allowing him an opportunity to refile the motion. ECF No. 12-34 at p. 21. *See Williams v. Bartlett*, 44 F.3d 95, 100 (2d Cir. 1994) (noting that, in the Sixth Amendment context, equivocation "takes into account conduct as well as other expressions of intent."). Nothing in the record supports McGillvary's claim that his focused remarks about his pro se motion cloaked a broader intent to take the drastic step of firing his attorney and representing himself at trial. *Compare U.S. v. Long*, 597 F.3d 720 (5th Cir. 2010) (request to fire a particular attorney did not amount to a clear and unequivocal request to proceed pro se), and *United States v. Cross*, 962 F.3d 892 (7th Cir. 2020) (ambiguous request to "terminate counsel" did not amount to a clear and unequivocal request to proceed alone), *with Brathwaite v. Phelps*, 418 Fed. Appx. 142 (3d Cir. 2011) (defendant explicitly requested "permission to exercise his constitutional right to proceed pro se" in a written motion), and *United States v. Stubbs*, 281 F.3d 109 (3d Cir. 2002) (defendant's statements that "I am going to represent myself as of now" and "I'm entitled to represent myself if I wish to" amounted to clear and unequivocal waiver).

A careful review of the complete record reinforces this conclusion. On each of the two subsequent occasions on which McGillvary sought to terminate his attorney and proceed alone, he declared his intentions in an exceedingly clear and unambiguous manner. Prior to sentencing, McGillvary announced to the court that he "unequivocally and clearly" asserted his Sixth Amendment right to represent himself and "renounce[d] and waive[d] Cito as a counsel." ECF

No. 12-47 at 3. He also submitted an eight-page motion, an appendix of exhibits, and a signed letter that he had mailed to counsel terminating his representation. *Id.* McGillvary's request to terminate appellate counsel was similarly formal, consisting of a motion and signed certification indicating that he had "formally discharged [his attorney] in writing and ended [his] representation" and "[would] appear pro se and substitute [himself] for [counsel] in this matter." ECF Nos. 12-12. While the Court recognizes that no "talismanic formula" or "magic words" are required to invoke *Faretta*, McGillvary's "casual and ineffective" remarks at the January 7, 2019 hearing contrast sharply with his clear and unambiguous requests during subsequent stages of the proceedings. *Buhl*, 233 F.3d at 792. Because McGillvary routinely voiced his requests in the plainest possible terms, the trial court reasonably concluded that his request on that occasion amounted to nothing more than a request for an adjudication on his pro se motion to dismiss.

For many of the same reasons, the Court alternatively concludes that, even if McGillvary's remarks did represent a clear and unequivocal request to represent himself, he abandoned that request through his subsequent conduct. As noted above, a defendant may waive the right to self-representation if the defendant "later vacillates or accepts the representation of counsel at trial." *Pitts v. Redman*, 776 F.Supp. 907, 915-916 (D. Del. 1991) (citing *Brown v. Wainwright*, 665 F.2d 607, 609-10 (5th Cir. 1982)). *See also McKaskle v. Wiggins*, 465 U.S. 168, 182 (1984) (defendant may waive right to proceed pro se by vacillating on his or her decision or "giving his or her 'express approval' to counsel's participation."). In this context, however, "acceptance" does not always equate to abandonment. Where a defendant accepts the assistance of counsel, perhaps reluctantly, because his request to proceed alone has already been "conclusively denied" by the trial court, he is not obligated to "continually . . . renew [the] request . . . or to make fruitless motions or forego cooperation with defense counsel in order to preserve the issue on appeal." *Buhl*, 233 F.3d at 803.

See also Orazio v. Dugger, 876 F.2d 1508, 1522 (11th Cir. 1989) (finding no waiver where defendant "acquiesced in being represented by counsel because his request to defend himself had already been denied."). On the other hand, a defendant who voluntarily elects to proceed with counsel after an ineffective, ambiguous, or unresolved request to represent himself will typically be found to have abandoned his self-representation efforts. *See, e.g.*, *Wilson v. Walker*, 204 F.3d 33, 38 (2d Cir. 2000) (defendant abandoned his attempt to proceed pro se by accepting the appointment of a different lawyer and failing to reassert the right after the trial court left the matter open for discussion); *Raulerson v. Wainwright*, 732 F.2d 803, 809 (11th Cir. 1984) (defendant waived his right to self-representation by proceeding with assigned counsel and walking out of a *Faretta* hearing); *Brown v. Wainwright*, 665 F.2d 607 (5th Cir. 1982) (defendant waived right to represent himself when, after the court deferred ruling on his request to conduct his own defense, he resolved his differences with counsel and allowed counsel to represent him at trial).

McGillvary's case falls into the latter category. After he informed the court that he wanted to argue his motion to dismiss "pro se," McGillvary accepted the court's suggestion that he confer with his attorney and refile the motion with the assistance of counsel. He then proceeded to trial without renewing his request to represent himself. As in *Wilson* and *Raulerson*, McGillvary's decision to continue with counsel after the court allegedly misinterpreted his request to proceed pro se amounted to an abandonment of the right. *Raulerson*, 732 F.2d at 809 (defendant who wishes to proceed pro se must "pursue the matter diligently"); *Buhl*, 233 F.3d at 790 (courts must "indulge every reasonable presumption against a waiver of counsel").

In short, McGillvary has failed to establish that the trial court's dismissal of his request to proceed pro se violated clearly established federal law. There is nothing in the record to indicate that he made a clear and unequivocal request to terminate his attorney, and even if he did, he abandoned that request by uncomplainingly proceeding to trial with counsel. No relief is warranted.

2. Ground Two

McGillvary next contends that the trial court deprived him of his Fourteenth Amendment right to due process when it "issued an order effectively denying [his] pro se *Brady* motion and striking it from the record" without adjudicating it on the merits. ECF No. 1 at p. 11. The underlying motion asserted a claim pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), based on McGillvary's contention that the police officers investigating Galfy's death failed to collect and preserve potentially exculpatory evidence. *Id.* at pp. 12-13.

Before turning to the merits of McGillvary's *Brady* claim, the Court notes that nothing in the "Constitution or laws of the United States" prevents a state court from striking motions filed by pro se individuals represented by counsel. *See McKaskle*, 465 U.S. 168 at 183 (no constitutional right to hybrid representation). As our Court of Appeals has noted, "[t]he Constitution does not confer a right to proceed simultaneously by counsel and pro se," and thus courts are not constitutionally obligated to consider pro se motions filed by individuals represented by counsel. *United States v. D'Amario*, 268 Fed. Appx. 179, 180 (3d Cir. 2008). Because McGillvary failed to raise his *Brady* claim in a procedurally appropriate motion, the trial court did not err in failing to consider the merits of that pro se claim. Nothing in the Constitution or laws of the United States counsels otherwise.

In any event, McGillvary's claim lacks merit. The core of his contention is that the investigating police officers failed to properly investigate and secure the crime scene, causing potentially exculpatory evidence to be lost or destroyed. ECF No. 1 at p. 11. At trial, McGillvary testified that Galfy served him dinner and a couple of beers on the night of the incident. The beers caused him to feel "really warm and fuzzy and like relaxed." He testified that the alcohol caused him to pass out and that, when he awoke, Galfy was attempting to sexually assault him. McGillvary maintained that he then attacked Galfy in self-defense. Given this version of events, McGillvary maintains that investigators violated *Brady* by: (1) failing to secure "the glassware in the dishwasher and the pill bottles from the fridge" in Galfy's home to test them for drug residue; (2) failing to determine "what bodily fluids or hair" may have been present in "the stains in the carpet" in Galfy's bedroom; and (3) failing to obtain video evidence from New Jersey Transit surveillance videos that would have shown "that petitioner cut his hair earlier in the day prior to the incident" rather than afterwards to change his appearance, as state witnesses testified at trial. *Id.* at 12.

Under *Brady*, the prosecution has a duty to disclose exculpatory evidence to a criminal defendant. *Brady*, 373 U.S. at 87. There are three components to a typical *Brady* violation: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). If all three components are established, the government's conduct violates due process "irrespective of the good faith or bad faith of the prosecution." *United States v. Henry*, 842 Fed. Appx. 809, 813 (3d Cir. 2021) (citing *Brady*, 373 U.S. at 87). *See also Arizona v. Youngblood*, 488 U.S. 51, 57 (1988) ("The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence.").

A different standard applies, however, when the government fails to preserve evidence that is only potentially exculpatory. *See Youngblood*, 488 U.S. at 57 (addressing a failure to preserve evidence that "could have been subjected to tests, the results of which might have exonerated the defendant.") (emphasis added). "To establish a due process violation based on law enforcement's failure to preserve potentially exculpatory evidence, a defendant must show: that the potentially exculpatory nature of the evidence was apparent at the time of destruction or loss; the lack of 'comparable evidence by other reasonably available means'; and that the government acted in 'bad faith.'" *Henry*, 842 Fed. Appx. 809 (quoting *Youngblood*, 488 U.S. at 58, and *California v. Trombetta*, 467 U.S. 479, 489 (1984)). Unless a criminal defendant can show bad faith on the part of police, "failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Youngblood*, 488 U.S. at 58.

Here, there is no question that the evidence targeted in McGillvary's petition was, at most, potentially exculpatory. The United States Supreme Court's decision in *Youngblood* is instructive. In *Youngblood*, the Arizona Court of Appeals overturned the defendant's conviction for sexual assault and related crimes because "the State had failed to preserve semen samples from the victim's body and clothing." 488 U.S. at 52. The Supreme Court reversed, opining that "there was no violation of the Due Process Clause" because "the failure of the police to refrigerate the clothing and to perform tests on the semen samples [collected from the victim] can at worst be described as negligent." *Id.* at 58. The Court explained that "the possibility that the semen samples could have exculpated respondent if preserved or tested is not enough to satisfy the standard of constitutional materiality" because the missing evidence was "simply an avenue of investigation that might have led in any number of directions," including, presumably, further incriminating the defendant. *Id.* at 56.

As in *Youngblood*, McGillvary's argument that police officers should have preserved and tested various items implicates the State's alleged failure to preserve "potentially useful evidence" that "might [have been] of conceivable evidentiary significance." *Id.* at 58 (emphasis added). McGillvary appears to concede this point. *See* ECF No. 1 at pp. 12-13 (discussing the bad faith requirement of his *Brady* claim). Consequently, he cannot prevail unless he can identify evidence suggesting "bad faith on the part of the police." *Id. See also U.S. v. Seibart*, 148 F.Supp.2d 559, 568 (E.D. Pa. 2001) (if petitioner can demonstrate "only negligence and not bad faith on the part of the police, there is no due process violation").

In determining whether police acted in bad faith, courts focus on "the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Griffin v. Spratt*, 969 F.2d 16, 20 (3d Cir. 1992) (quoting *Youngblood*, 488 U.S. at 51). "Mere negligence" or an "honest error" on the part of the police will not suffice. *Seibart*, 148 F.Supp.2d at 568 (citing *Youngblood*, 488 U.S. at 58); *Reed v. Davis*, 2023 WL 3775300, at *5 (D.N.J. June 2, 2023). Rather, the presence or absence of bad faith hinges on whether "officers actually knew . . . that they were destroying potentially exculpatory evidence." *Seibart*, 148 F.Supp.2d at 571 ("To show bad faith, Seibart must demonstrate that the PPD made a conscious effort to harm him or violate his rights.") (citing *Trombetta*, 467 U.S. at 488).

A careful review of his papers and the record indicates that McGillvary has failed to meet this burden. His allegations in this regard are entirely conclusory; for example, while he insists that "[a]ny of the containers and surfaces, including the unsearched cupboards and drawers . . . could have and should have been analyzed with a black light for drug residue and further analyzed with chemical tests for drug composition," he offers only the unsupported averment that "it was bad faith on the part of the investigators not to do so." ECF No. 1 at p. 12. He similarly opines, without support, that the police destroyed or failed to preserve New Jersey Transit surveillance videos "in bad faith, with knowledge that the video showed petitioner with short hair returning to the platform on the West side of the tunnel." *Id.* None of these averments is supported by citation to the record or evidence of bad faith. *See, e.g., Reed*, 2023 WL 3775300, at *3 (rejecting Brady claim based on deleted radio calls because the petitioner failed to produce evidence that they were destroyed in bad faith); *Seibart*, 148 F.Supp.2d at 571 ("To show bad faith, Seibart must demonstrate that the [police] made a conscious effort to harm him or violate his rights. Seibart has fallen short of making such a showing.") (internal citations omitted). In the absence of such evidence, the conduct of the police investigators "in no way demonstrates bad faith of the kind required by *Trombetta* and *Youngblood*." *Id.*

Nor is McGillvary entitled to an evidentiary hearing on this claim. When a petitioner has failed to develop the factual basis of a claim in state court, a district court cannot hold a hearing on that claim unless the petitioner shows that the claim relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or "a factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2). He must also show that "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. *Id. See also Shinn v. Ramirez*, 596 U.S. 366 (2022). McGillvary has not satisfied any of these standards. *Campbell v. Burris*, 515 F.3d 172, 184 (3d Cir. 2008) ("[B]ald assertions and conclusory allegations do not afford a sufficient ground for an evidentiary hearing.") (quoting *Mayberry v. Petsock*, 821 F.2d 179, 185 (3d Cir. 1987)).

Finally, the Court notes that McGillvary's claim is refuted by the record. At trial, crime scene investigator Adrian Gardner testified regarding the evidence that was gathered, the methods used to collect it, and the rationale behind the conduct of the investigative team. She explained that police do not collect everything from inside a crime scene because otherwise the investigation "would never end." ECF No. 12-38 at p. 97. She explained that the crime scene had been taped off and secured throughout the entire investigation and that investigators had collected a host of evidence including bedding, electronics, swabs of suspected blood, wine glasses, cups, a coffee mug, a towel, empty beer and alcohol bottles from the garbage, and a vodka bottle from the kitchen. *Id.* at pp. 62-63, 74, 113, 161-162. On a subsequent visit, police collected pill bottles, a toiletry bag, and daily pill containers from the master bathroom. *Id.* at pp. 118-119. The officers did not collect anything from the dishwasher because it was "clean and appeared to have all clean, recently washed dishes in it." *Id.* at p. 95. Similarly, the officers did not collect the pill bottles in the refrigerator because "[t]hey were vitamins." *Id.* at p. 166.

As to the stains on the floor, police investigators noted a pool of suspected blood beneath the victim's head but did not observe any sort of stain where the victim's penis would have been. *Id.* at p. 100. Officers did not collect the carpet underneath the victim's head because it appeared to be "just blood pooling from his head injury" and police did not think "it was necessary to cut it." *Id.* at pp. 143-144. Instead, police secured and tested the blood on a towel that had been recovered from beneath the victim's head. ECF No. 12-40 at p. 113. Finally, the police contacted the New Jersey Transit Authority to examine the surveillance footage related to the details found on a train ticket discovered in the victim's bedroom. ECF No. 12-38 at p. 218.

A crime scene analyst, testifying for the defense, opined as to the errors that he believed police made during their investigation. ECF No. 12-42 at pp. 4, 16. In the expert's opinion, the police failed to adequately cordon off the crime scene and neglected to test certain pieces of evidence that should have been tested. *Id.* For example, the expert explained that the carpet and towel under the victim's head should have been tested for body fluids and semen and that the glasses and bottles should have been tested for drug residue. *Id.* at pp. 19-23. Notably, however, he did not offer any evidence suggesting that those omissions stemmed from anything more than purportedly negligent police work.

Based on the foregoing, the Court is constrained to reject McGillvary's argument that the police investigation violated his right to due process. McGillvary has failed to show that police "actually knew," while investigating the crime scene, "that they were destroying potentially exculpatory evidence." *Seibart*, 148 F.Supp.2d at 572. Consequently, even if the failure to collect and test certain items might have been negligent, there is simply nothing in the record to suggest the type of bad faith required by *Trombetta* and *Youngblood.* This deficiency is fatal to his claim. *See Youngblood*, 488 U.S. at 58 ("[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.").

3. Certificate of Appealability

A certificate of appealability should be issued only when a petitioner has made a substantial showing of a denial of a constitutional right. 28 U.S.C. § 2254(c)(2). Where the district court has rejected a constitutional claim on its merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, "a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* Here, the undersigned concludes that jurists of reason would not find it debatable whether each of McGillvary's claims should be denied for the reasons given herein. Accordingly, a certificate of appealability should be denied.

III. Notice

In accordance with 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72, the parties may seek review by the district court by filing Objections to the Report and Recommendation within fourteen (14) days of the filing of this Report and Recommendation. Any party opposing the objections shall have fourteen (14) days from the date of service of Objections to respond thereto. *See* Fed. R. Civ. P. 72(b)(2). Failure to file timely objections may constitute a waiver of appellate rights. *See Brightwell v. Lehman*, 637 F.3d 187, 194 n.7 (3d Cir. 2011); *Nara v. Frank*, 488 F.3d 187 (3d Cir. 2007).

DATED this 15th day of May, 2025.

SUBMITTED BY:

RICHARD A. LANZILLO
CHIEF UNITED STATES MAGISTRATE JUDGE

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CALEB L. MCGILLVARY,	)	
	)	
Petitioner,	)	
	)	1:22-CV-04185-MRH
v.	)	
	)	
THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, et al.,	)	
	)	
	)	
Respondents.		

MEMORANDUM ORDER ADOPTING AMENDED REPORT & RECOMMENDATION AND DENYING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner brings this habeas action under 28 U.S.C. § 2254, alleging that he is currently in state custody in violation of the Constitution of the United States. Specifically, he asserts two grounds for relief. First, Petitioner claims that the state trial court violated his Sixth Amendment right to self-representation when it denied his request to "litigate [his] motion [to dismiss] pro se" and to "pro se . . . argue [his] case." (ECF No. 1 at 7).[1] And second, Petitioner claims that the trial court violated his Fourteenth Amendment due process rights when it denied his pro se *Brady* motion. (ECF No. 1 at 11-13).

The matter was referred to Magistrate Judge Richard A. Lanzillo for the making of reports and recommendations. The Magistrate Judge submitted a Report and Recommendation ("R&R") on November 5, 2024. (ECF No. 55). On May 15, 2025, the Magistrate Judge submitted an Amended R&R, which corrected certain citations but made no substantive changes. (ECF No. 62). The Magistrate Judge recommended that the Petition and the accompanying motion for summary judgment be denied without an evidentiary hearing. (ECF No. 55 at 12 n.4, 22, 26-29; ECF No. 62

[1] The page numbers herein refer to the pagination indicated in the ECF filing, not the page numbers on the native documents.

at 12 n.4, 20-21, 25-29). He also recommended that a certificate of appealability should not issue. (ECF No. 55 at 29; ECF No. 62 at 27-28). Petitioner has filed Objections to the R&R (ECF No. 58), and the Respondents have filed their response (ECF No. 61). Petitioner has also filed Objections to the Amended R&R (ECF No. 63). The matter is now ripe for adjudication.

The Court has carefully reviewed the R&R, the Objections, the Response to Objections, the Amended R&R, the Objections to the Amended R&R, and the other papers of record in this matter,[2] and has undertaken *de novo* review of the matters to which Objections were directed. Based on this review, the Court concludes that the disposition recommended by the Magistrate Judge is correct, and in accord with the record and the applicable law.

The Court offers the following additional observations, which will supplement the Amended R&R as the Opinion of this Court.

First, there is nothing in the Amended R&R to suggest that the Magistrate Judge "summarily ignore[d]" the Petitioner's Reply. The Magistrate Judge specifically notes that Petitioner filed a reply. (*See* ECF No. 55 at 12). The Magistrate Judge's failure to cite to it in his substantive discussion of Petitioner's habeas petition does not mean that its content was not considered, and in any case, this Court has considered the content of the Reply and adopts the Amended R&R.

Second, throughout his Objections, Petitioner argues that Respondents have admitted all facts contained in his Statement of Material Facts that accompanied his summary judgment motion. The Federal Rules of Civil Procedure do not automatically apply to § 2254 proceedings.

[2] The Court specifically notes that it considered, among other papers, the Petition (ECF No. 1), the supporting Memorandum of Law (ECF No. 2), Answer (ECF No. 12), the Reply (ECF No. 16), the Petitioner's motions for summary judgment (ECF Nos. 15, 26, 44), and the briefing that accompanied those motions.

Rules Governing § 2254 Cases, Rule 12 ("The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, *may be applied* to a proceeding under these rules." (emphasis added)). But even if the entirety of Rule 56 applied to habeas actions, that Rule provides only that the Court may consider the fact undisputed "for purposes of the motion." Fed. R. Civ. P. 56(e)(2); *see also* D.N.J. Civ. R. 56.1(a) ("[A]ny material fact not disputed shall be deemed undisputed for purposes of the summary judgment motion."). The rule does not provide that those facts are undisputed for the Court's merits determination on the Petition itself, which is what the Court has done here. Now that the Court has concluded that it should deny the Petition on the merits, the Court need not separately evaluate his Motion for Summary Judgment: Petitioner could not have been entitled to a judgment as a matter of law given that the Court has ruled against him on the merits.[3]

Third, as the Magistrate Judge correctly explains, understood in context, Petitioner's submission of a pro se motion at his state court trial to dismiss the charges in his underlying state-court case and his then-statement, "For the record, Judge, I assert my Sixth Amendment right to litigate my motion pro se and I have requested pro se to argue my case," (ECF No. 12-34 at 3), do not amount to a "clear[] and unequivocal[]" invocation of the right to self-representation, *Buhl v. Cooksey*, 233 F.3d 783, 792 (3d Cir. 2000). This Court agrees with the state trial court and the Magistrate Judge who both concluded that Petitioner's pro se motion and statement were attempts at hybrid representation, *i.e.*, attempts to proceed pro se only for the purposes of his motion to dismiss. (*See* ECF No. 12-17 at 3 n.1 ("The court denied Appellant's ore tenus motion to represent himself regarding the pro se motion to dismiss. Appellant's oral request specifically referenced his

[3] As our Court of Appeals has said in this very case, the Court is within its discretion to reach the merits of the petition before adjudicating Petitioner's Motion for Summary Judgment. *In re McGillvary*, No. 23-2660, 2023 WL 8229975 (3d Cir. Nov. 28, 2023).

pro se motion and was not a clear and unequivocal invocation of his Sixth Amendment privilege to represent himself at trial."); ECF No. 62 at 17 ("The wording of his verbal request . . . strongly suggests that his purpose in speaking up was to obtain a ruling on his pro se motion to dismiss.")). A represented defendant has no right to file or argue a particular motion pro se. *See McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984) (no right to hybrid representation); *United States v. Vampire Nation*, 451 F.3d 189, 206-07 & 207 n.17 (3d Cir. 2006); *United States v. D'Amario*, 268 F. App'x 179, 180 (3d Cir. 2008).

But even if Petitioner's statement to the state trial court were *best* understood as an effort to invoke his right to self-representation and a request to proceed pro se generally, Petitioner's request would nonetheless be ambiguous at the very least, and his *Faretta* claim could also be denied on this basis. *See United States v. Williams*, No. 21-2039, 2023 WL 2945900, at *1 (3d Cir. Apr. 14, 2023) ("[A] defendant must state his request to proceed pro se 'unambiguously to the court so that no reasonable person can say that the request was not made.'" (quoting *Buhl*, 233 F.3d at 790 n.9)), *cert. denied*, 144 S. Ct. 615 (2024).

Fourth, regarding the question of an evidentiary hearing before this Court, even if 28 U.S.C. § 2254(e) did not prohibit the Court from holding an evidentiary hearing in these circumstances, the Court would still be within its discretion to deny Petitioner's request for a hearing. As our Court of Appeals has held on a number of occasions, AEDPA "does not require that such a hearing be held." *Campbell v. Vaughn*, 209 F.3d 280, 287 (3d Cir. 2000). In determining whether a hearing is proper, the Court should consider "whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief," and whether "the record refutes the applicant's factual allegations." *Palmer v. Hendricks*, 592 F.3d

386, 393 (3d Cir. 2010). The central focus of this inquiry is determining whether a new hearing would advance the petitioner's claim. *Campbell*, 209 F.3d at 287.

Petitioner requests an evidentiary hearing in this Court to present expert testimony on what crime-scene and other evidence was not properly collected, to have the expert opine on the proper practices and what proper practices could have uncovered, and to have the expert opine on whether police officers acted in bad faith. (*See* ECF No. 1-5 at 3-4). The Court concludes that such a hearing would not meaningfully advance disposition of Petitioner's claims. First, as the Magistrate Judge noted, the state trial court did not violate the Constitution by failing to honor Petitioner's pro se request as to his motion to dismiss given that Petitioner was represented by counsel. (*See* ECF No. 55 at 23; ECF No. 62 at 21). An evidentiary hearing would not change the Court's analysis on this point. Second, the Petitioner has already had the incentive and the opportunity to challenge the diligence of the investigation, and he has, in fact, done so. At trial, Petitioner elicited testimony from the investigating officers about what steps they took (and failed to take) and the rationale behind their actions. (*See* ECF No. 61 at 5-6). Petitioner also called an expert to testify about proper police procedures. (*See* ECF No. 12-42 at 3-14). But for all the reasons discussed by the Magistrate Judge, Petitioner's evidence comes up short: the evidence that Petitioner presented at trial does not demonstrate that the police acted in bad faith. (*See* ECF No. 55 at 27-29; ECF No. 62 at 26-27; *see also* ECF No. 12-43 at 4-24). Rather, it demonstrates that any shortcomings in the investigation—to the extent there were any—would have been negligent at most, (*see* ECF No. 55 at 27-29; ECF No. 62 at 26-27), and as the Magistrate Judge explains, because the "lost" evidence was at most "potentially exculpatory," a finding that the police acted negligently would be insufficient to support Petitioner's claim. (*See* ECF No. 55 at 24-25; ECF No. 62 at 23-24). Petitioner has not demonstrated that a new hearing is likely to adduce facts lead to a different conclusion.

For these reasons and all those stated in the Amended R&R, Petitioner has not demonstrated that he is in state custody in violation of federal law. *See* 28 U.S.C. § 2254(a). The Court will not issue a certificate of appealability because "reasonably jurists" would not find the Court's assessment of Petitioner's claims "debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Accordingly, with the additions set out in this Memorandum Order, the Amended R&R (ECF No. 62) is **ADOPTED** as the Opinion of the Court. The Petition for Writ of Habeas Corpus (ECF No. 1) will be **DENIED**. A Certificate of Appealability **SHALL NOT ISSUE**.

By separate Order, the Court will enter Judgment consistent with the Amended R&R as supplemented by this Memorandum Order.

/s/ Mark R. Hornak
Mark R. Hornak
Chief United States District Judge

Dated: June 5, 2025

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CALEB L. MCGILLVARY, Petitioner, v. THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, et al., Respondents.	)))))))))	1:22-CV-04185-MRH

<u>JUDGMENT</u>

For the reasons stated in the Amended R&R (ECF No. 62) as supplemented by the Court's Memorandum Order of this date, the Petition for Writ of Habeas Corpus (ECF No. 1) is **DENIED**. **JUDGMENT** is **ENTERED** in favor of the Respondents and against the Petitioner. A Certificate of Appealability **SHALL NOT ISSUE**.

<u>/s/ Mark R. Hornak</u>
Mark R. Hornak
Chief United States District Judge

Dated: June 5, 2025

EXHIBIT F

***AMENDED DLD-215**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **25-2159**

CALEB L. MCGILLVARY, Appellant

VS.

ATTORNEY GENERAL NEW JERSEY, ET AL.

(D.N.J. Civ. No. 1:22-cv-04185)

Present: RESTREPO, FREEMAN, and NYGAARD, Circuit Judges

Submitted are:

(1) Appellant's motion for leave to proceed on the original record;

(2) Appellant's request for a certificate of appealability;

(3) Respondent's opposition to Appellant's request for certificate of appealability;

(4) Appellant's reply to Respondent's opposition; and

***(5) Appellant letter with supplemental authority**

in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing request for a certificate of appealability is denied. We may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Jurists of reason would not debate that McGillvary's claims lack arguable merit. See Strickler v. Greene, 527 U.S. 263, 281-82 (1999) (describing elements of a claim based on Brady); Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (holding that absent a showing of bad faith on the part of police, the failure to preserve potentially useful evidence is not a denial of due process); Buhl v. Cooksey, 233 F.3d 783, 790 (3d Cir. 2000) (holding that in order to overcome presumption against waiver of right to counsel, defendant must clearly and unequivocally request to proceed pro se). We have considered and rejected as unexhausted and lacking arguable merit McGillvary's allegations that he made a written request to proceed pro se and that the prosecution withheld evidence of payments to the medical examiner and Dr. Pandina. McGillvary's motion to proceed on the original record is granted.

By the Court,

s/Richard L. Nygaard
Circuit Judge

Dated: September 30, 2025
JK/cc: Caleb L. McGillvary
All Counsel of Record

A True Copy:

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

EXHIBIT G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 25-2159

CALEB L. MCGILLVARY, Appellant

VS.

ATTORNEY GENERAL NEW JERSEY and WARDEN NEW JERSEY STATE PRISON

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 1:22 cv-04185)
Chief District Judge: Honorable Mark R. Hornak

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, BOVE, and NYGAARD,* Circuit Judges

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* Pursuant to Third Circuit I.O.P. 9.5.3, Judge Richard L. Nygaard's vote is limited to panel rehearing.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Richard L. Nygaard
Circuit Judge

Dated: October 23, 2025
Gch/cc: Caleb L. McGillvary
Amanda G. Schwartz, Esq.

EXHIBIT H

28 U.S.C. 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

HISTORY:

June 25, 1948, ch 646, 62 Stat. 928; June 27, 1988, P. L. 100-352, 2(a), (b), 102 Stat. 662.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Based on title 28, U.S.C., 1940 ed., 346 and 347 (Mar. 3, 1911, ch. 231, 239, 240, 36 Stat. 1157; Feb. 13, 1925, ch. 229, 1, 43 Stat. 938; Jan. 31, 1928, ch. 14, 1, 45 Stat. 54; June 7, 1934, ch. 426, 48 Stat. 926).

Section consolidates sections 346 and 347 of title 28, U.S.C., 1940 ed.

Words or in the United States Court of Appeals for the District of Columbia and or of the United States Court of Appeals for the District of Columbia in sections 346 and 347 of title 28, U.S.C., 1940 ed., were omitted. (See section 41 of this title.).

The prefatory words of this section preceding paragraph (1) were substituted for subsection (c) of said section 347.

The revised section omits the words of section 347 of title 28, U.S.C., 1940 ed., and with like effect as if the case had been brought there with unrestricted appeal, and the words of section 346 of such title in the same manner as if it had been brought there by appeal. The effect of subsections (1) and (3) of the revised section is to preserve existing law and retain the power of unrestricted review of cases certified or brought up on certiorari. Only in subsection (2) is review restricted.

Changes were made in phraseology and arrangement.

Amendment Notes

1988.

Act June 27, 1988 (effective 90 days after enactment except as provided by 7 of such Act, which appears as a note to this section) in the section catchline, deleted appeal; following certiorari;; deleted para. (2) which read: By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;; and redesignated former para. (3) as para. (2).

Other provisions:

Effective date of Act June 27, 1988 amendments. Act June 27, 1988, P. L. 100-352, 7, 102 Stat. 664, provides: The amendments made by this Act [for full classification consult USCS Tables Volumes] shall take effect ninety days after the date of the enactment of this Act, except that such amendments shall not apply to cases pending in the Supreme Court on the effective date of such amendments or affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date..

28 U.S.C. 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 [28 USCS 2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such persons detention pending removal proceedings.

(c) **(1)** Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255 [28 USCS 2255].

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

HISTORY:
June 25, 1948, ch 646, 62 Stat. 967; May 24, 1949, ch 139, 113, 63 Stat. 105; Oct. 31, 1951, ch 655, 52, 65 Stat. 727; April 24, 1996, P. L. 104-132, Title I, 102, 110 Stat. 1217.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

1948 Act.

Based on title 28, U.S.C., 1940 ed., 463(a) and 466 (March 10, 1908, ch 76, 36 Stat. 40; Feb. 13, 1925, ch 229, 6, 13, 43 Stat. 940, 942; June 29, 1938, ch 806, 52 Stat. 1232).

This section consolidates paragraph (a) of section 463, and section 466 of title 28, U.S.C., 1940 ed.

The last two sentences of section 463(a) of title 28, U.S.C., 1940 ed., were omitted. They were repeated in section 452 of title 28, U.S.C., 1940 ed. (See revisers note under section 2241 of this title.).

Changes were made in phraseology.

1949 Act This section corrects a typographical error in the second paragraph of section 2253 of title 28.

Amendment Notes

1949.

Act May 24, 1949, in the second paragraph, substituted section 3042 for section 3041.

1951.

Act Oct. 31, 1951, in the second paragraph, substituted to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his for of removal issued pursuant to section 3042 of Title 18 or the.

1996.

Act April 24, 1996, substituted this section for one which read:

2253. Appeal.

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause..

28 U.S.C. 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 courts 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 courts 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].

HISTORY:

June 25, 1948, ch 646, 62 Stat. 967; Nov. 2, 1966, P. L. 89-711, 2, 80 Stat. 1105; April 24, 1996, P. L. 104-132, Title I, 104, 110 Stat. 1218.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

This section is declaratory of existing law as affirmed by the Supreme Court. (See *Ex parte Hawk* (1944) 321 U.S. 114, 88 L. Ed. 572, 64 S. Ct. 448.).

This section was enacted as amended by the Senate with the following explanation:

This amendment is proposed by the Judicial Conference of Senior Circuit Judges.

It has three purposes. The first is to eliminate from the prohibition of the section applications in behalf of prisoners in custody under authority of a State officer but whose custody has not been directed by the judgment of a State court. If the section were applied to applications by persons detained solely under authority of a State officer it would unduly hamper Federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty.

The second purpose is to eliminate, as a ground of Federal jurisdiction to review by habeas corpus judgments of State courts, the proposition that the State court has denied a prisoner a fair adjudication of the legality of his detention under the Constitution and laws of the United States. The Judicial Conference believes that this would be an undesirable ground for Federal jurisdiction in addition to exhaustion of State remedies or lack of adequate remedy in the State courts because it would permit proceedings in the Federal court on this ground before the petitioner had exhausted his State remedies. This ground would, of course, always be open to a petitioner to assert in the Federal court after he had exhausted his State remedies or if he had no adequate State remedy.

The third purpose is to substitute detailed and specific language for the phrase no adequate remedy available. That phrase is not sufficiently specific and precise, and its meaning should, therefore be spelled out in more detail in the section as is done by the amendment..

Amendment Notes

1966.

Act Nov. 2, 1966, in the section heading, substituted Federal for State; added subsec. (a); designated existing matter as subsecs. (b) and (c); and added subsecs. (d)(f).

1996.

Act April 24, 1996 substituted subsec. (b) for one which read: (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.; redesignated subsecs. (d)(f) as subsecs. (e)(g), respectively; added subsec. (d); substituted subsec. (e) for one which read:

(e) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.;

and added subsecs. (h) and (i).

D.N.J. Civ. RULE 56.1 SUMMARY JUDGMENT MOTIONS

(a) Statement of Material Facts Not in Dispute

On motions for summary judgment, the movant shall furnish a statement which sets forth material facts as to which there does not exist a genuine issue, in separately numbered paragraphs citing to the affidavits and other documents submitted in support of the motion. A motion for summary judgment unaccompanied by a statement of material facts not in dispute shall be dismissed. The opponent of summary judgment shall furnish, with its opposition papers, a responsive statement of material facts, addressing each paragraph of the movant's statement, indicating agreement or disagreement and, if not agreed, stating each material fact in dispute and citing to the affidavits and other documents submitted in connection with the motion; any material fact not disputed shall be deemed undisputed for purposes of the summary judgment motion. In addition, the opponent may also furnish a supplemental statement of disputed material facts, in separately numbered paragraphs citing to the affidavits and other documents submitted in connection with the motion, if necessary to substantiate the factual basis for opposition. The movant shall respond to any such supplemental statement of disputed material facts as above, with its reply papers. Each statement of material facts shall be a separate document (not part of a brief) and shall not contain legal argument or conclusions of law.

(b) Social Security Matters

In review of Social Security matters, briefs and administrative record submissions shall be governed by L. Civ. R. 9.1.

Amended: September 4, 2008; June 22, 2012.

FEDERAL RULES OF APPELLATE PROCEDURE
Rule 47. Local Rules by Courts of Appeals

(a) Local Rules.

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with but not duplicative of Acts of Congress and rules adopted under 28 U.S.C. 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(b) Procedure When There is No Controlling Law. A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

HISTORY: Amended April 27, 1995, eff. Dec. 1, 1995; April 24, 1998, eff. Dec. 1, 1998.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee. This rule continues the authority now vested in individual courts of appeals by 28 U.S.C. 2071 to make rules consistent with rules of practice and procedure promulgated by the Supreme Court.

Notes of Advisory Committee on 1995 amendments. *Note to Subdivision (a).* This rule is amended to require that a generally applicable direction regarding practice before a court of appeals must be in a local rule rather than an internal operating procedure or some other general directive. It is the intent of this rule that a local rule may not bar any practice that these rules explicitly or implicitly permit. Subdivision (b) allows a court of appeals to regulate practice in an individual case by entry of an order in the case. The amendment also reflects the requirement that local rules be consistent not only with the national rules but also with Acts of Congress. The amendment also states that local rules should not repeat national rules and Acts of Congress.

The amendment also requires that the numbering of local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering system would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.

Paragraph (2) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. The proscription of paragraph (2) is narrowly drawncovering only violations that are not willful and only those involving local rules directed to matters of form. It does not limit the courts power to impose substantive penalties upon a party if it or its attorney stubbornly or repeatedly violates a local rule, even one involving merely a matter of form. Nor does it affect the courts power to enforce local rules that involve more than mere matters of form.

Note to Subdivision (b). This rule provides flexibility to the court in regulating practice in a particular case when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under 28 U.S.C. 2072, and with the circuits local rules.

The amendment to this rule disapproves imposing any sanction or other disadvantage on a person for noncompliance with such a directive, unless the alleged violator has been furnished in a particular case with actual notice of the requirement. There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular court unless the party or attorney has actual notice of those requirements.

Notes of Advisory Committee on 1998 amendments. The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

FEDERAL RULES OF CIVIL PROCEDURE
Rule 7. Pleadings Allowed; Form of Motions and Other Papers

(a) Pleadings. Only these pleadings are allowed:

(1) a complaint;

(2) an answer to a complaint;

(3) an answer to a counterclaim designated as a counterclaim;

(4) an answer to a crossclaim;

(5) a third-party complaint;

(6) an answer to a third-party complaint; and

(7) if the court orders one, a reply to an answer.

(b) Motions and Other Papers.

(1) *In General.* A request for a court order must be made by motion. The motion must:

(A) be in writing unless made during a hearing or trial;

(B) state with particularity the grounds for seeking the order; and

(C) state the relief sought.

(2) *Form.* The rules governing captions and other matters of form in pleadings apply to motions and other papers.

HISTORY: As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963; April 28, 1983, eff. Aug. 1, 1983; April 30, 2007, eff Dec. 1, 2007.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee. 1. A provision designating pleadings and defining a motion is common in the State practice acts. See Ill. Rev. Stat. (1937), ch 110, 156 (Designation and order of pleadings); 2 Minn. Stat. (Mason, 1927) 9246 (Definition of motion); and N.Y.C.P.A. (1937) 113 (Definition of motion). Former Equity Rules 18 (PleadingsTechnical Forms Abrogated), 29 (DefensesHow Presented), and 33 (Testing Sufficiency of Defense) abolished technical forms of pleading, demurrers, and pleas, and exceptions for insufficiency of an answer.

2. *Note to Subdivision (a).* This preserves the substance of former Equity Rule 31 (ReplyWhen RequiredWhen Cause at Issue). Compare the English practice, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 23, r r 1, 2 (Reply to counterclaim; amended, 1933, to be subject to the rules applicable to defenses, O. 21). See O. 21, r r 114; O. 27, r 13 (When pleadings deemed denied and put in issue). Under the codes the pleadings are generally limited. A reply is sometimes required to an affirmative defense in the answer. 1 Colo. Stat. Ann. (1935) 66; Ore.

Code Ann. (1930) 1-614, 1-616. In other jurisdictions no reply is necessary to an affirmative defense in the answer, but a reply may be ordered by the court. N.C. Code Ann. (1935) 525; 1 S.D. Comp. Laws (1929) 2357. A reply to a counterclaim is usually required. Ark. Civ. Code. (Crawford, 1934) 123125; Wis. Stat. (1935) 263.20, 263.21. U.S.C. Title 28, former 45 (District courts; practice and procedure in certain cases) is modified insofar as it may dispense with a reply to a counterclaim.

For amendment of pleadings, see Rule 15 dealing with amended and supplemental pleadings.

3. All statutes which use the words petition, bill of complaint, plea, demurrer, and other such terminology are modified in form by this rule.

Notes of Advisory Committee on 1946 amendments. This amendment [to subdivision (a)] eliminates any question as to whether the compulsory reply, where a counterclaim is pleaded, is a reply only to the counterclaim or is a general reply to the answer containing the counterclaim. The Commentary, Scope of Reply Where Defendant Has Pleaded Counterclaim, 1939, 1 Fed. Rules Serv. 672; *Fort Chartres and Ivy Landing Drainage and Levee District No. Five v. Thompson,* 8 Fed. Rules Serv. 13.32, Case 1 (E.D. Ill. 1945).

Notes of Advisory Committee on 1963 amendments. Certain redundant words are eliminated and the subdivision is modified to reflect the amendment of Rule 14(a) which in certain cases eliminates the requirement of obtaining leave to bring in a third-party defendant.

Notes of Advisory Committee on 1983 amendments. One of the reasons sanctions against improper motion practice have been employed infrequently is the lack of clarity of Rule 7. That rule has stated only generally that the pleading requirements relating to captions, signing, and other matters of form also apply to motions and other papers. The addition of Rule 7(b)(3) makes explicit the applicability of the signing requirement and the sanctions of Rule 11, which have been amplified.

Notes of Advisory Committee on 2007 amendments. The language of Rule 7 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 7(a) stated that there shall be * * * an answer to a cross-claim, if the answer contains a cross-claim * * *. Former Rule 12(a)(2) provided more generally that [a] party served with a pleading stating a cross-claim against that party shall serve an answer thereto * * *. New Rule 7(a) corrects this inconsistency by providing for an answer to a crossclaim.

For the first time, Rule 7(a)(7) expressly authorizes the court to order a reply to a counterclaim answer. A reply may be as useful in this setting as a reply to an answer, a third-party answer, or a crossclaim answer.

Former Rule 7(b)(1) stated that the writing requirement is fulfilled if the motion is stated in a written notice of hearing. This statement was deleted as redundant because a single written document can satisfy the writing requirements both for a motion and for a Rule 6(c)(1) notice.

The cross-reference to Rule 11 in former Rule 7(b)(3) is deleted as redundant. Rule 11 applies by its own terms. The force and application of Rule 11 are not diminished by the deletion.

Former Rule 7(c) is deleted because it has done its work. If a motion or pleading is described as a demurrer, plea, or exception for insufficiency, the court will treat the paper as if properly captioned.

FEDERAL RULES OF CIVIL PROCEDURE
Rule 25. Substitution of Parties

(a) Death.

(1) *Substitution if the Claim Is Not Extinguished.* If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedents successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

(2) *Continuation Among the Remaining Parties.* After a partys death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties. The death should be noted on the record.

(3) *Service.* A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner. Service may be made in any judicial district.

(b) Incompetency. If a party becomes incompetent, the court may, on motion, permit the action to be continued by or against the partys representative. The motion must be served as provided in Rule 25(a)(3).

(c) Transfer of Interest. If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3).

(d) Public Officers; Death or Separation from Office. An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officers successor is automatically substituted as a party. Later proceedings should be in the substituted partys name, but any misnomer not affecting the parties substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.

HISTORY: Amended Dec. 29, 1948, eff. Oct. 20, 1949; April 17, 1961, eff. July 19, 1961; Jan. 21, 1963, eff. July 1, 1963; March 2, 1987, eff. Aug. 1, 1987; April 30, 2007, eff. Dec. 1, 2007.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules. *Note to Subdivision (a).* 1. The first paragraph of this rule is based upon former Equity Rule 45 (Death of PartyRevivor) and USC, Title 28, former 778 (Death of parties; substitution of executor or administrator). The scire facias procedure provided for in the statute cited is superseded and the writ is abolished by Rule 81(b). Paragraph two states the content of USC, Title 28, former 779 (Death of one of several plaintiffs or defendants). With these two paragraphs compare generally English Rules Under the Judicature Act (The Annual Practice, 1937) O. 17, r r 110.

2. This rule modifies USC, Title 28, former 778 (Death of parties; substitution of executor or administrator), 779 (Death of one of several plaintiffs or defendants), and 780 (Survival of actions, suits, or proceedings, etc.) insofar as they differ from it.

Note to Subdivisions (b) and (c). These are a combination and adaptation of NYCPA (1937) 83 and Calif Code Civ Proc (Deering, 1937) 385; see also 4 Nev Comp Laws (Hillyer, 1929) 8561.

Note to Subdivision (d). With the first and last sentences compare USC, Title 28, former 780 (Survival of actions, suits, or proceedings, etc.). With the second sentence of this subdivision compare Ex parte La Prade, 289 US 444, 53 S Ct 682, 77 L Ed 1311 (1933).

Notes of Advisory Committee on 1948 amendments to Rules. The amendment effective October 19, 1949, inserted the words, the Canal Zone, a territory, an insular possession, in the first sentence of subdivision (d), and, in the same sentence, after the phrase or other governmental agency, deleted the words, or any other officer specified in the act of February 13, 1925, ch 229, 11 (43 Stat 941), formerly section 780 of this title.

Notes of Advisory Committee on 1961 amendments to Rules. *Note to Subdivision (d)(1).* Present Rule 25(d) is generally considered to be unsatisfactory. 4 Moores Federal Practice P 25.01 [7] (2d ed 1950); Wright, Amendments to the Federal Rules: The Function of a Continuing Rules Committee, 7 Vand L Rev 521, 529 (1954); Developments in the LawRemedies Against the United States and Its Officials, 70 Harv L Rev 827, 93134 (1957). To require, as a condition of substituting a successor public officer as a party to a pending action, that an application be made with a showing that there is substantial need for continuing the litigation, can rarely serve any useful purpose and fosters a burdensome formality. And to prescribe a short, fixed time period for substitution which cannot be extended even by agreement, see Snyder v Buck, 340 US 15, 19, 95 L Ed 15 (1950), with the penalty of dismissal of the action, makes a trap for unsuspecting litigants which seems unworthy of a great government. Vibra Brush Corp. v Schaffer, 256 F.2d 681, 684 (2d Cir 1958). Although courts have on occasion found means of undercutting the rule, e.g. Acheson v Furusho, 212 F.2d 284 (9th Cir 1954) (substitution of defendant officer unnecessary on theory that only a declaration of status was sought), it has operated harshly in many instances, e.g. Snyder v Buck, supra; Poindexter v Folsom, 242 F.2d 516 (3d Cir 1957).

Under the amendment, the successor is automatically substituted as a party without an application or showing of need to continue the action. An order of substitution is not required, but may be entered at any time if a party desires or the court thinks fit.

The general term public officer is used in preference to the enumeration which appears in the present rule. It comprises Federal, State, and local officers.

The expression in his official capacity is to be interpreted in its context as part of a simple procedural rule for substitution; care should be taken not to distort its meaning by mistaken analogies to the doctrine of sovereign immunity from suit or the Eleventh Amendment. The amended rule will apply to all actions brought by public officers for the government, and to any action brought in form against a named officer, but intrinsically against the government or the office or the incumbent thereof whoever he may be from time to time during the action. Thus the amended rule will apply to actions against officers to compel performance of official duties or to obtain judicial review of their orders. It will also apply to actions to prevent officers from acting in excess of their authority or under authority not validly conferred, cf. Philadelphia Co. v Stimson, 223 US 605, 56 L Ed 570 (1912), or from enforcing unconstitutional enactments, cf. Ex parte Young, 209 US 123, 52 L Ed 714 (1908); Ex parte La Prade, 289 US 444, 77 L Ed 1311 (1933). In general it will apply whenever effective relief would call for corrective behavior by the one then having official status and power, rather than one who has lost that status and power through ceasing to hold office. Cf. Land v Dollar, 330 US 731, 91 L Ed 1209, (1947); Larson v Domestic & Foreign Commerce Corp. 337 US 682, 93 L Ed 1628 (1949). Excluded from the operation of the amended rule will be the relatively infrequent actions which are directed to securing money judgments against the named officers enforceable against their personal assets; in these cases Rule 25(a)(1), not Rule 25(d), applies to the question of substitution. Examples are actions against officers seeking to make them pay damages out of their own pockets for defamatory utterances or other misconduct in some way related to the office, see Barr v Matteo, 360 US 564, 3 L Ed 2d 1434 (1959); Howard v Lyons, 360 US 593, 3 L Ed 2d 1454 (1959); Gregorie v Biddle, 177 F.2d 579 (2d Cir 1949), cert denied 339 US 949, 94 L Ed 1363 (1950). Another example is the anomalous action for a tax refund against a collector of internal revenue, see Ignelzi v Granger, 16 FRD 517 (WD Pa 1955), 28 USC 2006, 4Moore, supra, P 25.05, p 531; but see 28 USC 1346(a)(1) authorizing the bringing of such suits against the United States rather than the officer.

Automatic substitution under the amended rule, being merely a procedural device for substituting a successor for a past officeholder as a party, is distinct from and does not affect any substantive issues which may be involved in the action. Thus any defense of immunity from suit will remain in the case despite a substitution.

When the successor does not intend to pursue the policy of his predecessor which gave rise to the lawsuit, it will be open to him, after substitution, as plaintiff to seek voluntary dismissal of the action, or as defendant to seek to have the action dismissed as moot or to take other appropriate steps to avert a judgment or decree. Contrast Ex parte La Prade, supra; Allen v Regents of the University System, 304 US 439, 82 L Ed 1448 (1938); McGrath v National Assn. of Mfgrs. 344 US 804, 97 L Ed 627 (1952); Danenberg v Cohen, 213 F.2d 944 (7th Cir 1954).

As the present amendment of Rule 25(d)(1) eliminates a specified time period to secure substitution of public officers, the reference in Rule 6(b) (regarding enlargement of time) to Rule 25 will no longer apply to these public-officer substitutions.

As to substitution on appeal, the rules of the appellate courts should be consulted.

Note to Subdivision (d)(2). This provision, applicable in official capacity cases as described above, will encourage the use of the official title without any mention of the officer individually, thereby recognizing the intrinsic character of the action and helping to eliminate concern with the problem of substitution. If for any reason it seems necessary or desirable to add the individuals name, this may be done upon motion or on the courts initiative without dismissal of the action; thereafter the procedure of amended Rule 25(d)(1) will apply if the individual named ceases to hold office.

For examples of naming the office or title rather than the officeholder, see Annot, 102 ALR 943, 94852; Comment, 50 Mich L Rev 443, 450 (1952); cf. 26 USC 7484. Where an action is brought by or against a board or agency with continuity of existence, it has been often decided that there is no need to name the individual members and substitution is unnecessary when the personnel changes. 4 Moore, supra, P 25.09, p. 536. The practice encouraged by amended Rule 25(d)(2) is similar.

Notes of Advisory Committee on 1963 amendments to Rules. Present Rule 25(a)(1), together with present Rule 6(b), results in an inflexible requirement that an action be dismissed as to a deceased party if substitution is not carried out within a fixed period measured from the time of the death. The hardships and inequities of this unyielding requirement plainly appear from the cases. See, e.g., Anderson v Yungkau, 329 US 482, 67 S Ct 428, 91 L Ed 436 (1947); Iovino v

Waterson, 274 F.2d 41 (1959), cert denied Carlin v Sovino, 362 US 949, 80 S Ct 860, 4 L Ed 2d 867 (1960); Perry v Allen, 239 F.2d 107 (5th Cir 1956); Starnes v Pennsylvania R. R. 26 FRD 625 (ED NY), affd per curiam 295 F.2d 704 (2d Cir 1961), cert denied 369 US 813, 82 S Ct 688, 7 L Ed 2d 612 (1962); Zdanok v Glidden Co. 28 FRD 346 (SD NY 1961). See also 4 Moores Federal Practice P 25.01 [9] (Supp 1960); 2 Barron & Holtzoff, Federal Practice & Procedure 621, at 42021 (Wright ed 1961).

The amended rule establishes a time limit for the motion to substitute based not upon the time of the death, but rather upon the time information of the death is provided by means of a suggestion of death upon the record, i.e. service of a statement of the fact of the death. Cf. Ill Ann Stat, c. 110, 54(2) (Smith-Hurd 1956). The motion may not be made later than 90 days after the service of the statement unless the period is extended pursuant to Rule 6(b), as amended. See the Advisory Committees Note to amended Rule 6(b). See also the new Official Form 30.

A motion to substitute may be made by any party or by the representative of the deceased party without awaiting the suggestion of death. Indeed, the motion will usually be so made. If a party or the representative of the deceased party desires to limit the time within which another may make the motion, he may do so by suggesting the death upon the record.

A motion to substitute made within the prescribed time will ordinarily be granted, but under the permissive language of the first sentence of the amended rule (the court may order) it may be denied by the court in the exercise of a sound discretion if made long after the deathas can occur if the suggestion of death is not made or is delayedand circumstances have arisen rendering it unfair to allow substitution. Cf. Anderson v Yungkau, supra, 329 US at 485, 486, 91 L Ed 436, 67 S Ct at 430, 431, where it was noted under the present rule that settlement and distribution of the estate of a deceased defendant might be so far advanced as to warrant denial of a motion for substitution even though made within the time limit prescribed by that rule. Accordingly, a party interested in securing substitution under the amended rule should not assume that he can rest indefinitely awaiting the suggestion of death before he makes his motion to substitute.

Notes of Advisory Committee on 2007 amendments. The language of Rule 25 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 25(d)(2) is transferred to become Rule 17(d) because it deals with designation of a public officer, not substitution.

Notes of Advisory Committee on 1987 amendments to Rules. The amendments are technical. No substantive change is intended.

FEDERAL RULES OF CIVIL PROCEDURE
Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defenseor the part of each claim or defenseon which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) *Supporting Factual Positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another partys assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materialsincluding the facts considered undisputedshow that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material factincluding an item of damages or other reliefthat is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the courtafter notice and a reasonable time to respondmay order the submitting party to pay the other party the reasonable expenses, including attorneys fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

HISTORY: Amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963; March 2, 1987, eff. Aug. 1, 1987; April 30, 2007, eff. Dec. 1, 2007; March 26, 2009, eff. Dec. 1, 2009; April 28, 2010, eff. Dec. 1, 2010.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee. This rule is applicable to all actions, including those against the United States or an officer or agency thereof.

Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. It has been extensively used in England for more than 50 years and has been adopted in a number of American states. New York, for example, has made great use of it. During the first nine years after its adoption there, the records of New York county alone show 5,600 applications for summary judgments. Report of the Commission on the Administration of Justice in New York State (1934), p. 383. See also Third Annual Report of the Judicial Council of the State of New York (1937), p. 30.

In England it was first employed only in cases of liquidated claims, but there has been a steady enlargement of the scope of the remedy until it is now used in actions to recover land or chattels and in all other actions at law, for liquidated or unliquidated claims, except for a few

designated torts and breach of promise of marriage. English Rules Under the Judicature Act (The Annual Practice, 1937) O. 3, r. 6; Orders 14, 14A, and 15; see also O. 32, r. 6, authorizing an application for judgment at any time upon admissions. In Michigan (3 Comp. Laws (1929) 14260) and Illinois (Smith-Hurd Ill. Stats. c. 110, 181, 259.15, 259.16), it is not limited to liquidated demands. New York (N.Y.R.C.P (1937) Rule 113; see also Rule 107) has brought so many classes of actions under the operation of the rule that the Commission on Administration of Justice in New York State (1934) recommend that all restrictions be removed and that the remedy be available in any action (p. 287). For the history and nature of the summary judgment procedure and citations of state statutes, see Clark and Samenow, The Summary Judgment (1929), 38 Yale L.J. 423.

Note to Subdivision (d). See Rule 16 (Pre-Trial Procedure; Formulating Issues) and the Note thereto.

Note to Subdivisions (e) and (f). These are similar to rules in Michigan. Mich. Court Rules Ann. (Searl, 1933) Rule 30.

Notes of Advisory Committee on 1946 Amendments. *Note to Subdivision (a).* The amendment allows a claimant to move for a summary judgment at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. This will normally operate to permit an earlier motion by the claimant than under the original rule, where the phrase at any time after the pleading in answer thereto has been served operates to prevent a claimant from moving for summary judgment, even in a case clearly proper for its exercise, until a formal answer has been filed. Thus in *Peoples Bank v. Federal Reserve Bank of San Francisco,* 58 F. Supp. 25 (N.D. Cal. 1944), the plaintiffs countermotion for a summary judgment was stricken as premature, because the defendant had not filed an answer. Since Rule 12(a) allows at least 20 days for an answer, that time plus the 10 days required in Rule 56(c) means that under original Rule 56(a) a minimum period of 30 days necessarily has to elapse in every case before the claimant can be heard on his right to a summary judgment. An extension of time by the court or the service of preliminary motions of any kind will prolong that period even further. In many cases this merely represents unnecessary delay. See *United States v. Adlers Creamery, Inc.,* 107 F.2d 987 (2d Cir. 1939). The changes are in the interest of more expeditious litigation. The 20-day period, as provided, gives the defendant an opportunity to secure counsel and determine a course of action. But in a case where the defendant himself makes a motion for summary judgment within that time, there is no reason to restrict the plaintiff and the amended rule so provides.

Note to Subdivision (c). The amendment of Rule 56(c), by the addition of the final sentence, resolves a doubt expressed in *Sartor v. Arkansas Natural Gas Corp.* 321 U.S. 620, 88 L. Ed. 967, 64 S. Ct. 724 (1944). See also Commentary, Summary Judgment as to Damages, 1944, 7 Fed. R. Serv. 974; *Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co.,* 147 F.2d 399 (2d Cir. 1945), cert. denied, 325 U.S. 861, 89 L. Ed. 1982, 65 S. Ct. 1201 (1945). It makes clear that although the question of recovery depends on the amount of damages, the summary judgment rule is applicable and summary judgment may be granted in a proper case. If the case is not fully adjudicated it may be dealt with as provided in subdivision (d) of Rule 56, and the right to summary recovery determined by a preliminary order, interlocutory in character, and the precise amount of recovery left for trial.

Note to Subdivision (d). Rule 54(a) defines judgment as including a decree and any order from which an appeal lies. Subdivision (d) of Rule 56 indicates clearly, however, that a partial summary judgment is not a final judgment, and, therefore, that it is not appealable, unless in the particular case some statute allows an appeal from the interlocutory order involved. The partial summary judgment is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case. This adjudication is more nearly akin to the preliminary order under Rule 16, and likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact. See *Leonard v. Socony-Vacuum Oil Co.,* 130 F.2d 535 (7th Cir. 1942); *Biggins v. Oltmer Iron Works,* 154 F.2d 214 (7th Cir. 1946); 3 Moores Federal Practice, 1938, 31903192. Since interlocutory appeals are not allowed, except where specifically provided by statute, see 3 Moore, op. cit. supra, 31553156, this interpretation is in line with that policy, *Leonard v. Socony-Vacuum Oil Co.,* supra. See also *Audi Vision, Inc. v. RCA Mfg. Co.,* 136 F.2d 621 (2d Cir. 1943); *Toomey v. Toomey,* 80 U.S. App DC 77, 149 F.2d 19 (D.C. Cir. 1945); *Biggins v. Oltmer Iron Works,* supra; *Catlin v. United States,* 324 U.S. 229, 89 L. Ed. 911, 65 S. Ct. 631 (1945).

Notes of Advisory Committee on 1963 Amendments. *Note to Subdivision (c).* By the amendment answers to interrogatories are included among the materials which may be considered on motion for summary judgment. The phrase was inadvertently omitted from the rule, see 3 Barron & Holtzoff, Federal Practice and Procedure 15960 (Wright ed. 1958), and the courts have generally reached by interpretation the result which will hereafter be required by the text of the amended rule. See Annot, 74 A.L.R.2d 984 (1960).

Note to Subdivision (e). The words answers to interrogatories are added in the third sentence of this subdivision to conform to the amendment of subdivision (c).

The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are well-pleaded, and not supposititious, conclusory, or ultimate. See *Frederick Hart & Co., Inc. v. Recordgraph Corp.,* 169 F.2d 580 (3d Cir. 1948); *United States ex rel. Kolton v. Halpern,* 260 F.2d 590 (3d Cir. 1958); *United States ex rel. Nobles v. Ivey Bros. Constr. Co., Inc.,* 191 F. Supp. 383 (D. Del. 1961); *Jamison v. Pennsylvania Salt Mfg. Co.,* 22 F.R.D. 238 (W.D. Pa. 1958); *Bunny Bear, Inc. v. Dennis Mitchell Industries,* 139 F. Supp. 542 (E.D. Pa. 1956); *Levy v. Equitable Life Assur. Society,* 18 F.R.D. 164 (E.D. Pa. 1955).

The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. See 6 Moores Federal Practice 2069 (2d ed. 1953); 3 Barron & Holtzoff, supra, 1235.1.

It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.

The amendment is not intended to derogate from the solemnity of the pleadings. Rather it recognizes that, despite the best efforts of counsel to make his pleadings accurate, they may be overwhelmingly contradicted by the proof available to his adversary.

Nor is the amendment designed to affect the ordinary standards applicable to the summary judgment motion. So, for example:

Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. And summary judgment may be inappropriate where the party opposing it shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition.

Notes of Advisory Committee on 2007 amendments. The language of Rule 56 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 56(a) and (b) referred to summary-judgment motions on or against a claim, counterclaim, or crossclaim, or to obtain a declaratory judgment. The list was incomplete. Rule 56 applies to third-party claimants, intervenors, claimants in interpleader, and others. Amended Rule 56(a) and (b) carry forward the present meaning by referring to a party claiming relief and a party against whom relief is sought.

Former Rule 56(c), (d), and (e) stated circumstances in which summary judgment shall be rendered, the court shall if practicable ascertain facts existing without substantial controversy, and if appropriate, shall enter summary judgment. In each place shall is changed to should. It is established that although there is no discretion to enter summary judgment when there is a genuine issue as to any material fact, there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256257 (1948). Many lower court decisions are gathered in 10A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, 2728. Should in amended Rule 56(c) recognizes that courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact. Similarly sparing exercise of this discretion is appropriate under Rule 56(e)(2). Rule 56(d)(1), on the other hand, reflects the more open-ended discretion to decide whether it is practicable to determine what material facts are not genuinely at issue.

Former Rule 56(d) used a variety of different phrases to express the Rule 56(c) standard for summary judgmentthat there is no genuine issue as to any material fact. Amended Rule 56(d) adopts terms directly parallel to Rule 56(c).

Notes of Advisory Committee on 2009 amendments. The timing provisions for summary judgment are outmoded. They are consolidated and substantially revised in new subdivision (c)(1). The new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action. If the motion seems premature both subdivision (c)(1) and Rule 6(b) allow the court to extend the time to respond. The rule does set a presumptive deadline at 30 days after the close of all discovery.

The presumptive timing rules are default provisions that may be altered by an order in the case or by local rule. Scheduling orders are likely to supersede the rule provisions in most cases, deferring summary-judgment motions until a stated time or establishing different deadlines. Scheduling orders tailored to the needs of the specific case, perhaps adjusted as it progresses, are likely to work better than default rules. A scheduling order may be adjusted to adopt the parties agreement on timing, or may require that discovery and motions occur in stagesincluding separation of expert-witness discovery from other discovery.

Local rules may prove useful when local docket conditions or practices are incompatible with the general Rule 56 timing provisions.

If a motion for summary judgment is filed before a responsive pleading is due from a party affected by the motion, the time for responding to the motion is 21 days after the responsive pleading is due.

Notes of Advisory Committee on 2010 amendments. Rule 56 is revised to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts. The standard for granting summary judgment remains unchanged. The language of subdivision (a) continues to require that there be no genuine dispute as to any material fact and that the movant be entitled to judgment as a matter of law. The amendments will not affect continuing development of the decisional law construing and applying these phrases.

Note to Subdivision (a). Subdivision (a) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one wordgenuine issue becomes genuine dispute. Dispute better reflects the focus of a summary-judgment determination. As explained below, shall also is restored to the place it held from 1938 to 2007.

The first sentence is added to make clear at the beginning that summary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense. The subdivision caption adopts the common phrase partial summary judgment to describe disposition of less than the whole action, whether or not the order grants all the relief requested by the motion.

Shall is restored to express the direction to grant summary judgment. The word shall in Rule 56 acquired significance over many decades of use. Rule 56 was amended in 2007 to replace shall with should as part of the Style Project, acting under a convention that prohibited any use of shall. Comments on proposals to amend Rule 56, as published in 2008, have shown that neither of the choices available under the Style Project conventionsmust or shouldis suitable in light of the case law on whether a district court has discretion to deny summary judgment when there appears to be no genuine dispute as to any material fact. Compare *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986) (Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case in which there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.,* 334 U.S. 249 * * *(1948)), with *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986) (In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that partys case, and on which that party will bear the burden of proof at trial.). Eliminating shall created an unacceptable risk of changing the summary-judgment standard. Restoring shall avoids the unintended consequences of any other word.

Subdivision (a) also adds a new direction that the court should state on the record the reasons for granting or denying the motion. Most courts recognize this practice. Among other advantages, a statement of reasons can facilitate an appeal or subsequent trial-court proceedings. It is particularly important to state the reasons for granting summary judgment. The form and detail of the statement of reasons are left to the courts discretion.

The statement on denying summary judgment need not address every available reason. But identification of central issues may help the parties to focus further proceedings.

Note to Subdivision (b). The timing provisions in former subdivisions (a) and (c) are superseded. Although the rule allows a motion for summary judgment to be filed at the commencement of an action, in many cases the motion will be premature until the nonmovant has had time to file a responsive pleading or other pretrial proceedings have been had. Scheduling orders or other pretrial orders can regulate timing to fit the needs of the case.

Note to Subdivision (c). Subdivision (c) is new. It establishes a common procedure for several aspects of summary-judgment motions synthesized from similar elements developed in the cases or found in many local rules.

Subdivision (c)(1) addresses the ways to support an assertion that a fact can or cannot be genuinely disputed. It does not address the form for providing the required support. Different courts and judges have adopted different forms including, for example, directions that the support be included in the motion, made part of a separate statement of facts, interpolated in the body of a brief or memorandum, or provided in a separate statement of facts included in a brief or memorandum.

Subdivision (c)(1)(A) describes the familiar record materials commonly relied upon and requires that the movant cite the particular parts of the materials that support its fact positions. Materials that are not yet in the recordincluding materials referred to in an affidavit or declarationmust be placed in the record. Once materials are in the record, the court may, by order in the case, direct that the materials be gathered in an appendix, a party may voluntarily submit an appendix, or the parties may submit a joint appendix. The appendix procedure also may be established by local rule. Pointing to a specific location in an appendix satisfies the citation requirement. So too it may be convenient to direct that a party assist the court in locating materials buried in a voluminous record.

Subdivision (c)(1)(B) recognizes that a party need not always point to specific record materials. One party, without citing any other materials, may respond or reply that materials cited to dispute or support a fact do not establish the absence or presence of a genuine dispute. And a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact.

Subdivision (c)(2) provides that a party may object that material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. The objection functions much as an objection at trial, adjusted for the pretrial setting. The burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated. There is no need to make a separate motion to strike. If the case goes to trial, failure to challenge admissibility at the summary-judgment stage does not forfeit the right to challenge admissibility at trial.

Subdivision (c)(3) reflects judicial opinions and local rules provisions stating that the court may decide a motion for summary judgment without undertaking an independent search of the record. Nonetheless, the rule also recognizes that a court may consider record materials not called to its attention by the parties.

Subdivision (c)(4) carries forward some of the provisions of former subdivision (e)(1). Other provisions are relocated or omitted. The requirement that a sworn or certified copy of a paper referred to in an affidavit or declaration be attached to the affidavit or declaration is omitted as unnecessary given the requirement in subdivision (c)(1)(A) that a statement or dispute of fact be supported by materials in the record.

A formal affidavit is no longer required. 28 U.S.C. 1746 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

Note to Subdivision (d). Subdivision (d) carries forward without substantial change the provisions of former subdivision (f).

A party who seeks relief under subdivision (d) may seek an order deferring the time to respond to the summary-judgment motion.

Note to Subdivision (e). Subdivision (e) addresses questions that arise when a party fails to support an assertion of fact or fails to properly address another partys assertion of fact as required by Rule 56(c). As explained below, summary judgment cannot be granted by default even if there is a complete failure to respond to the motion, much less when an attempted response fails to comply with Rule 56(c) requirements. Nor should it be denied by default even if the movant completely fails to reply to a nonmovants response. Before deciding on other possible action, subdivision (e)(1) recognizes that the court may afford an opportunity to properly support or address the fact. In many circumstances this opportunity will be the courts preferred first step.

Subdivision (e)(2) authorizes the court to consider a fact as undisputed for purposes of the motion when response or reply requirements are not satisfied. This approach reflects the deemed admitted provisions in many local rules. The fact is considered undisputed only for purposes of the motion; if summary judgment is denied, a party who failed to make a proper Rule 56 response or reply remains free to contest the fact in further proceedings. And the court may choose not to consider the fact as undisputed, particularly if the court knows of record materials that show grounds for genuine dispute.

Subdivision (e)(3) recognizes that the court may grant summary judgment only if the motion and supporting materialsincluding the facts considered undisputed under subdivision (e)(2)show that the movant is entitled to it. Considering some facts undisputed does not of itself allow summary judgment. If there is a proper response or reply as to some facts, the court cannot grant summary judgment without determining whether those facts can be genuinely disputed. Once the court has determined the set of factsboth those it has chosen to consider undisputed for want of a proper response or reply and any that cannot be genuinely disputed despite a procedurally proper response or replyit must determine the legal consequences of these facts and permissible inferences from them.

Subdivision (e)(4) recognizes that still other orders may be appropriate. The choice among possible orders should be designed to encourage proper presentation of the record. Many courts take extra care with pro se litigants, advising them of the need to respond and the risk of losing by summary judgment if an adequate response is not filed. And the court may seek to reassure itself by some examination of the record before granting summary judgment against a pro se litigant.

Note to Subdivision (f). Subdivision (f) brings into Rule 56 text a number of related procedures that have grown up in practice. After giving notice and a reasonable time to respond the court may grant summary judgment for the nonmoving party; grant a motion on legal or factual grounds not raised by the parties; or consider summary judgment on its own. In many cases it may prove useful first to invite a motion; the invited motion will automatically trigger the regular procedure of subdivision (c).

Note to Subdivision (g). Subdivision (g) applies when the court does not grant all the relief requested by a motion for summary judgment. It becomes relevant only after the court has applied the summary-judgment standard carried forward in subdivision (a) to each claim, defense, or part of a claim or defense, identified by the motion. Once that duty is discharged, the court may decide whether to apply the summary-judgment standard to dispose of a material fact that is not genuinely in dispute. The court must take care that this determination does not interfere with a partys ability to accept a fact for purposes of the motion only. A nonmovant, for example, may feel confident that a genuine dispute as to one or a few facts will defeat the motion, and prefer to avoid the cost of detailed response to all facts stated by the movant. This position should be available without running the risk that the fact will be taken as established under subdivision (g) or otherwise found to have been accepted for other purposes.

If it is readily apparent that the court cannot grant all the relief requested by the motion, it may properly decide that the cost of determining whether some potential fact disputes may be eliminated by summary disposition is greater than the cost of resolving those disputes by other means, including trial. Even if the court believes that a fact is not genuinely in dispute it may refrain from ordering that the fact be treated as established. The court may conclude that it is better to leave open for trial facts and issues that may be better illuminated by the trial of related facts that must be tried in any event.

Note to Subdivision (h). Subdivision (h) carries forward former subdivision (g) with three changes. Sanctions are made discretionary, not mandatory, reflecting the experience that courts seldom invoke the independent Rule 56 authority to impose sanctions. *See* Cecil & Cort, Federal Judicial Center Memorandum on Federal Rule of Civil Procedure 56(g) Motions for Sanctions (April 2, 2007). In addition, the rule text is expanded to recognize the need to provide notice and a reasonable time to respond. Finally, authority to impose other appropriate sanctions also is recognized.

Changes Made After Publication and Comment. Subdivision (a). [S]hould grant was changed to shall grant.

FEDERAL RULES OF EVIDENCE
Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial courts territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

HISTORY: Jan. 2, 1975, P. L. 93-595, 1, 88 Stat. 1930; April 26, 2011, eff. Dec. 1, 2011.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules. ***Subdivision (a).*** **This is the only evidence rule on the subject of judicial notice. It deals only with judicial notice of adjudicative facts. No rule deals with judicial notice of legislative facts. Judicial notice of matters of foreign law is treated in Rule 44.1 of the Federal Rules of Civil Procedure and Rule 26.1 of the Federal Rules of Criminal Procedure.**

The omission of any treatment of legislative facts results from fundamental differences between adjudicative facts and legislative facts. Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body. The terminology was coined by Professor Kenneth Davis in his article An Approach to Problems of Evidence in the Administrative Process, 55 Harv.L.Rev. 364, 404407 (1942). The following discussion draws extensively upon his writings. In addition, see the same authors Judicial Notice, 55 Colum.L.Rev. 945 (1955);

Administrative Law Treatise, ch. 15 (1958); A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69 (1964).

The usual method of establishing adjudicative facts in through the introduction of evidence, ordinarily consisting of the testimony of witnesses. If particular facts are outside of reasonable controversy, this process is dispensed with as unnecessary. A high degree of indisputability is the essential prerequisite.

Legislative facts are quite different. As Professor Davis says:

My opinion is that judge-made law would stop growing if judges, in thinking about questions of law and policy, were forbidden to take into account the facts they believe, as distinguished from facts which are clearly . . . within the domain of the indisputable. Facts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable. A System of Judicial Notice Based on Fairness and Convenience, *supra,* at 82.

An illustration is *Hawkins v. United States*, 358 U.S. 74, 79 S. Ct. 136, 3 L. Ed. 2d 125 (1958), in which the Court refused to discard the common law rule that one spouse could not testify against the other, saying, Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage. This conclusion has a large intermixture of fact, but the factual aspect is scarcely indisputable. See Hutchins and Slesinger, Some Observations on the Law of EvidenceFamily Relations, 13 Minn.L.Rev. 675 (1929). If the destructive effect of the giving of adverse testimony by a spouse is not indisputable, should the Court have refrained from considering it in the absence of supporting evidence?

If the Model Code or the Uniform Rules had been applicable, the Court would have been barred from thinking about the essential factual ingredient of the problems before it, and such a result would be obviously intolerable. What the law needs as its growing points is more, not less, judicial thinking about the factual ingredients of problems of what the law ought to be, and the needed facts are seldom clearly indisputable. Davis, *supra,* at 83.

Professor Morgan gave the following description of the methodology of determining domestic law:

In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present. . . . [T]he parties do no more than to assist; they control no part of the process. Morgan, Judicial Notice, 57 Harv.L.Rev. 269, 270271 (1944).

This is the view which should govern judicial access to legislative facts. It renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level. It should, however, leave open the possibility of introducing evidence through regular channels in appropriate situations. See Bordens Farm Products Co. v. Baldwin, 293 U.S. 194, 55 S. Ct. 187, 79 L. Ed. 281 (1934), where the cause was remanded for the taking of evidence as to the economic conditions and trade practices underlying the New York Milk Control Law.

Similar considerations govern the judicial use of nonadjudicative facts in ways other than formulating laws and rules. Thayer described them as a part of the judicial reasoning process.

In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved; and the capacity to do this with competent judgment and efficiency, is imputed to judges and juries as part of their necessary mental outfit. Thayer, Preliminary Treatise on Evidence 279280 (1898).

As Professor Davis points out, A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, 73 (1964), every case involves the use of hundreds or thousands of non-evidence facts. When a witness in an automobile accident case says car, everyone, judge and jury included, furnishes, from non-evidence sources within himself, the supplementing information that the car is an automobile, not a railroad car, that it is self-propelled, probably by an internal combustion engine, that it may be assumed to have four wheels with pneumatic rubber tires, and so on. The judicial process cannot construct every case from scratch, like Descartes creating a world based on the postulate *Cogito, ergo sum.* These items could not possibly be introduced into evidence, and no one suggests that they be. Nor are they appropriate subjects for any formalized treatment of judicial notice of facts. See Levin and Levy, Persuading the jury with Facts Not in Evidence: The Fiction-Science Spectrum, 105 U.Pa.L.Rev. 139 (1956).

Another aspect of what Thayer had in mind is the use of non-evidence facts to appraise or assess the adjudicative facts of the case. Pairs of cases from two jurisdictions illustrate this use and also the difference between non-evidence facts thus used and adjudicative facts. In *People v. Strook*, 347 Ill. 460, 179 N.E. 821 (1932), venue in Cook County had been held not established by testimony that the crime was committed at 7956 South Chicago Avenue, since judicial notice would not be taken that the address was in Chicago. However, the same court subsequently ruled that venue in Cook County was established by testimony that a crime occurred at 8900 South Anthony Avenue, since notice would be taken of the common practice of omitting the name of the city when speaking of local addresses, and the witness was testifying in Chicago. *People v. Pride*, 16 Ill.2d 82, 156 N.E.2d 551 (1951). And in *Hughes v. Vestal*, 264 N.C. 500, 142 S.E.2d 361 (1965), the Supreme Court of North Carolina disapproved the trial judges admission in evidence of a state-published table of automobile stopping distances on the basis of judicial notice, though the court itself had referred to the same table in an earlier case in a rhetorical and illustrative way in determining that the defendant could not have stopped her car in time to avoid striking a child who suddenly appeared in the highway and that a non-suit was properly granted. *Ennis v. Dupree*, 262 N.C. 224, 136 S.E.2d 702 (1964). See also *Brown v. Hale*, 263 N.C. 176, 139 S.E.2d 210 (1964); *Clayton v. Rimmer*, 262 N.C. 302, 136 S.E.2d 562 (1964). It is apparent that this use of non-evidence facts in evaluating the adjudicative facts of the case is not an appropriate subject for a formalized judicial notice treatment.

In view of these considerations, the regulation of judicial notice of facts by the present rule extends only to adjudicative facts.

What, then, are adjudicative facts? Davis refers to them as those which relate to the parties, or more fully:

When a court or an agency finds facts concerning the immediate partieswho did what, where, when, how, and with what motive or intentthe court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts.

. . .

Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses. 2 Administrative Law Treatise 353.

Subdivision (b). With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy. This tradition of circumspection appears to be soundly based, and no reason to depart from it is apparent. As Professor Davis says:

The reason we use trial-type procedure, I think, is that we make the practical judgment, on the basis of experience, that taking evidence, subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts, that is, facts pertaining to the parties. The reason we require a determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunals attention, and the appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation, and argument (either written or oral or both). The key to a fair trial is opportunity to use the appropriate weapons (rebuttal evidence, cross-examination, and argument) to meet adverse materials that come to the tribunals attention. A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, 93 (1964).

The rule proceeds upon the theory that these considerations call for dispensing with traditional methods of proof only in clear cases. Compare Professor Davis conclusion that judicial notice should be a matter of convenience, subject to requirements of procedural fairness. Id., 94.

This rule is consistent with Uniform Rule 9(1) and (2) which limit judicial notice of facts to those so universally known that they cannot reasonably be the subject of dispute, those so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute, and those capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy. The traditional textbook treatment has included these general categories (matters of common knowledge, facts capable of verification), McCormick 324, 325, and then has passed on into detailed treatment of such specific topics as facts relating to the personnel and records of the court, Id. 327, and other governmental facts, Id. 328. The California draftsmen, with a background of detailed statutory regulation of judicial notice, followed a somewhat similar pattern. California Evidence Code 451, 452. The Uniform Rules, however, were drafted on the theory that these particular matters are included within the general categories and need no specific mention. This approach is followed in the present rule.

The phrase propositions of generalized knowledge, found in Uniform Rule 9(1) and (2) is not included in the present rule. It was, it is believed, originally included in Model Code Rules 801 and 802 primarily in order to afford some minimum recognition to the right of the judge in his legislative capacity (not acting as the trier of fact) to take judicial notice of very limited categories of generalized knowledge. The limitations thus imposed have been discarded herein as undesirable, unworkable, and contrary to existing practice. What is left, then, to be considered, is the status of a proposition of generalized knowledge as an adjudicative fact to be noticed judicially and communicated by the judge to the jury. Thus viewed, it is considered to be lacking practical significance. While judges use judicial notice of propositions of generalized knowledge in a variety of situations: determining the validity and meaning of statutes, formulating common law rules, deciding whether evidence should be admitted, assessing the sufficiency and effect of evidence, all are essentially nonadjudicative in nature. When judicial notice is seen as a significant vehicle for progress in the law, these are the areas involved, particularly in developing fields of scientific knowledge. See McCormick 712. It is not believed that judges now instruct juries as to propositions of generalized knowledge derived from encyclopedias or other sources, or that they are likely to do so, or, indeed, that it is desirable that they do so. There is a vast difference between ruling on the basis of judicial notice that radar evidence of speed is admissible and explaining to the jury its principles and degree of accuracy, or between using a table of stopping distances of automobiles at various speeds in a judicial evaluation of testimony and telling the jury its precise application in the case. For cases raising doubt as to the propriety of the use of medical texts by lay triers of fact in passing on disability claims in administrative proceedings, see *Sayers v. Gardner*, 380 F.2d 940 (6th Cir. 1967); *Ross v. Gardner*, 365 F.2d 554 (6th Cir. 1966); *Sosna v. Celebrezze,* 234 F.Supp. 289 (E.D.Pa. 1964); *Glendenning v. Ribicoff*, 213 F.Supp. 301 (W.D.Mo. 1962).

Subdivisions (c) and (d). Under subdivision (c) the judge has a discretionary authority to take judicial notice, regardless of whether he is so requested by a party. The taking of judicial notice is mandatory, under subdivision (d), only when a party requests it and the necessary information is supplied. This scheme is believed to reflect existing practice. It is simple and workable. It avoids troublesome distinctions in the many situations in which the process of taking judicial notice is not recognized as such.

Compare Uniform Rule 9 making judicial notice of facts universally known mandatory without request, and making judicial notice of facts generally known in the jurisdiction or capable of determination by resort to accurate sources discretionary in the absence of request but mandatory if request is made and the information furnished. But see Uniform Rule 10(3), which directs the judge to decline to take judicial notice if available information fails to convince him that the matter falls clearly within Uniform Rule 9 or is insufficient to enable him to notice it judicially. Substantially the same approach is found in California Evidence Code 451453 and in New Jersey Evidence Rule 9. In contrast, the present rule treats alike all adjudicative facts which are subject to judicial notice.

Subdivision (e). Basic considerations of procedural fairness demand an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed. The rule requires the granting of that opportunity upon request. No formal scheme of giving notice is provided. An adversely affected party may learn in advance that judicial notice is in contemplation, either by virtue of being served with a copy of a request by another party under subdivision (d) that judicial notice be taken, or through an advance indication by the judge. Or he may have no advance notice at all. The likelihood of the latter is enhanced by the frequent failure to recognize judicial notice as such. And in the absence of advance notice, a request made after the fact could not in fairness be considered untimely. See the provision for hearing on timely request in the Administrative Procedure Act, 5 U.S.C. 556(e). See also Revised Model State Administrative Procedure Act (1961), 9C U.L.A. 10(4) (Supp. 1967).

Subdivision (f). In accord with the usual view, judicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal. Uniform Rule 12; California Evidence Code 459; Kansas Rules of Evidence 60-412; New Jersey Evidence Rule 12; McCormick 330, p. 712.

Subdivision (g). Much of the controversy about judicial notice has centered upon the question whether evidence should be admitted in disproof of facts of which judicial notice is taken.

The writers have been divided. Favoring admissibility are Thayer, Preliminary Treatise on Evidence 308 (1898); 9 Wigmore 2567; Davis, A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law, 69, 7677 (1964). Opposing admissibility are Keeffe, Landis and Shaad, Sense and Nonsense about Judicial Notice, 2 Stan.L.Rev. 664, 668 (1950); McNaughton, Judicial NoticeExcerpts Relating to the Morgan-Whitmore Controversy, 14 Vand.L.Rev. 779 (1961); Morgan, Judicial Notice, 57 Harv.L.Rev. 269, 279 (1944); McCormick

710711. The Model Code and the Uniform Rules are predicated upon indisputability of judicially noticed facts.

The proponents of admitting evidence in disproof have concentrated largely upon legislative facts. Since the present rule deals only with judicial notice of adjudicative facts, arguments directed to legislative facts lose their relevancy.

Within its relatively narrow area of adjudicative facts, the rule contemplates there is to be no evidence before the jury in disproof. The judge instructs the jury to take judicially noticed facts as established. This position is justified by the undesirable effects of the opposite rule in limiting the rebutting party, though not his opponent, to admissible evidence, in defeating the reasons for judicial notice, and in affecting the substantive law to an extent and in ways largely unforeseeable. Ample protection and flexibility are afforded by the broad provision for opportunity to be heard on request, set forth in subdivision (e).

Authority upon the propriety of taking judicial notice against an accused in a criminal case with respect to matters other than venue is relatively meager. Proceeding upon the theory that the right of jury trial does not extend to matters which are beyond reasonable dispute, the rule does not distinguish between criminal and civil cases. *People v. Mayes*, 113 Cal. 618, 45 P. 860 (1896); *Ross v. United States*, 374 F.2d 97 (8th Cir. 1967). *Cf. State v. Main*, 94 R.I. 338, 180 A.2d 814 (1962); *State v. Lawrence*, 120 Utah 323, 234 P.2d 600 (1951).

Note on Judicial Notice of Law. By rules effective July 1, 1966, the method of invoking the law of a foreign country is covered elsewhere. Rule 44.1 of the Federal Rules of Civil Procedure; Rule 26.1 of the Federal Rules of Criminal Procedure. These two new admirably designed rules are founded upon the assumption that the manner in which law is fed into the judicial process is never a proper concern of the rules of evidence but rather of the rules of procedure. The Advisory Committee on Evidence, believing that this assumption is entirely correct, proposes no evidence rule with respect to judicial notice of law, and suggests that those matters of law which, in addition to foreign-country law, have traditionally been treated as requiring pleading and proof and more recently as the subject of judicial notice be left to the Rules of Civil and Criminal Procedure.

Notes of Committee on the Judiciary, House Report No. 93-650. Rule 201(g) as received from the Supreme Court provided that when judicial notice of a fact is taken, the court shall instruct the jury to accept that fact as established. Being of the view that mandatory instruction to a jury in a criminal case to accept as conclusive any fact judicially noticed is inappropriate because contrary to the spirit of the Sixth Amendment right to a jury trial, the Committee adopted the 1969 Advisory Committee draft of this subsection, allowing a mandatory instruction in civil actions and proceedings and a discretionary instruction in criminal cases.

Notes of Advisory Committee on 2011 amendments. The language of Rule 201 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

FEDERAL RULES OF EVIDENCE
Rule 406. Habit; Routine Practice

Evidence of a persons habit or an organizations routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

HISTORY: Jan. 2, 1975, P. L. 93-595, 1, 88 Stat. 1932; April 26, 2011, eff. Dec. 1, 2011.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules. An oft-quoted paragraph, McCormick, 162, p. 340, describes habit in terms effectively contrasting it with character:

Character and habit are close akin. Character is a generalized description of ones disposition, or of ones disposition in respect to a general trait, such as honesty, temperance, or peacefulness. Habit, in modern usage, both lay and psychological, is more specific. It describes ones regular response to a repeated specific situation. If we speak of character for care, we think of the persons tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the persons regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic.

Equivalent behavior on the part of a group is designated routine practice of an organization in the rule.

Agreement is general that habit evidence is highly persuasive as proof of conduct on a particular occasion. Again quoting McCormick 162, p. 341:

Character may be thought of as the sum of ones habits though doubtless it is more than this. But unquestionably the uniformity of ones response to habit is far greater than the consistency with which ones conduct conforms to character or disposition. Even though character comes in only exceptionally as evidence of an act, surely any sensible man in investigating whether X did a particular act would be greatly helped in his inquiry by evidence as to whether he was in the habit of doing it.

When disagreement has appeared, its focus has been upon the question what constitutes habit, and the reason for this is readily apparent. The extent to which instances must be multiplied and consistency of behavior maintained in order to rise to the status of habit inevitably gives rise to differences of opinion. Lewan, Rationale of Habit Evidence, 16 Syracuse L.Rev. 39, 49 (1964). While adequacy of sampling and uniformity of response are key factors, precise standards for measuring their sufficiency for evidence purposes cannot be formulated.

The rule is consistent with prevailing views. Much evidence is excluded simply because of failure to achieve the status of habit. Thus, evidence of intemperate habits is generally excluded when offered as proof of drunkenness in accident cases, Annot., 46 A.L.R.2d 103, and evidence of other assaults is inadmissible to prove the instant one in a civil assault action, Annot., 66 A.L.R.2d 806. In *Levin v. United States*, 119 U.S.App.D.C. 156, 338 F.2d 265 (1964), testimony as to the religious habits of the accused, offered as tending to prove that he was at home observing the Sabbath rather than out obtaining money through larceny by trick, was held properly excluded;

It seems apparent to us that an individuals religious practices would not be the type of activities which would lend themselves to the characterization of invariable regularity. [1 Wigmore 520.] Certainly the very volitional basis of the activity raises serious questions as to its invariable nature, and hence its probative value. *Id.* at 272.

These rulings are not inconsistent with the trend towards admitting evidence of business transactions between one of the parties and a third person as tending to prove that he made the same bargain or proposal in the litigated situation. Slough, Relevancy Unraveled, 6 Kan.L.Rev. 3841 (1957). Nor are they inconsistent with such cases as *Whittemore v. Lockheed Aircraft Corp.*, 65 Cal.App.2d 737, 151 P.2d 670 (1944), upholding the admission of evidence that plaintiffs intestate had on four other occasions flown planes from defendants factory for delivery to his employer airline, offered to prove that he was piloting rather than a guest on a plane which crashed and killed all on board while en route for delivery.

A considerable body of authority has required that evidence of the routine practice of an organization be corroborated as a condition precedent to its admission in evidence. Slough, Relevancy Unraveled, 5 Kan.L.Rev. 404, 449 (1957). This requirement is specifically rejected by the rule on the ground that it relates to the sufficiency of the evidence rather than admissibility. A similar position is taken in New Jersey Rule 49. The rule also rejects the requirement of the absence of eyewitnesses, sometimes encountered with respect to admitting habit evidence to prove freedom from contributory negligence in wrongful death cases. For comment critical of the requirements see *Frank, J., in Cereste v. New York, N.H. & H.R. Co.*, 231 F.2d 50 (2d Cir. 1956), cert. denied 351 U.S. 951, 76 S. Ct. 848, 100 L.Ed 1475, 10 Vand.L.Rev. 447 (1957); McCormick 162, p. 342. The omission of the requirement from the California Evidence Code is said to have effected its elimination. Comment, Cal.Ev.Code 1105.

Notes of Advisory Committee on 2011 amendments. The language of Rule 406 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

FEDERAL RULES OF EVIDENCE
Rule 1004. Admissibility of Other Evidence of Content

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;

(b) an original cannot be obtained by any available judicial process;

(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or

(d) the writing, recording, or photograph is not closely related to a controlling issue.

HISTORY: Jan. 2, 1975, P. L. 93-595, 1, 88 Stat. 1946; March 2, 1987, eff. Oct. 1, 1987; April 26, 2011, eff. Dec. 1, 2011.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules. Basically the rule requiring the production of the original as proof of contents has developed as a rule of preference: if failure to produce the original is satisfactory explained, secondary evidence is admissible. The instant rule specifies the circumstances under which production of the original is excused.

The rule recognizes no degrees of secondary evidence. While strict logic might call for extending the principle of preference beyond simply preferring the original, the formulation of a hierarchy of preferences and a procedure for making it effective is believed to involve unwarranted complexities. Most, if not all, that would be accomplished by an extended scheme of preferences will, in any event, be achieved through the normal motivation of a party to present the most convincing evidence possible and the arguments and procedures available to his opponent if he does not. Compare McCormick 207.

Paragraph (1). Loss or destruction of the original unless due to bad faith of the proponent, is a satisfactory explanation of nonproduction. McCormick 201.

Paragraph (2). When the original is in the possession of a third person, inability to procure it from him by resort to process or other judicial procedure is sufficient explanation of nonproduction. Judicial procedure includes subpoena duces tecum as an incident to the taking of a deposition in another jurisdiction. No further showing is required. See McCormick 202.

Paragraph (3). A party who has an original in his control has no need for the protection of the rule if put on notice that proof of contents will be made. He can ward off secondary evidence by offering the original. The notice procedure here provided is not to be confused with orders to produce or other discovery procedures, as the purpose of the procedure under this rule is to afford the opposite party an opportunity to produce the original, not to compel him to do so. McCormick 203.

Paragraph (4). While difficult to define with precision, situations arise in which no good purpose is served by production of the original. Examples are the newspaper in an action for the price of publishing defendants advertisement, Foster-Holcomb Investment Co. v. Little Rock Publishing Co., 151 Ark. 449, 236 S.W. 597 (1922), and the streetcar transfer of plaintiff claiming status as a passenger, Chicago City Ry. Co. v. Carroll, 206 Ill. 318, 68 N.E. 1087 (1903). Numerous cases are collected in McCormick 200, p. 412, n. 1.

Notes of Committee on the Judiciary, House Report No. 93-650. The Committee approved Rule 1004(1) in the form submitted to Congress. However, the Committee intends that loss or destruction of an original by another person at the instigation of the proponent should be considered as tantamount to loss or destruction in bad faith by the proponent himself.

Notes of Advisory Committee on 1987 amendments. The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 2011 amendments. The language of Rule 1004 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NEW JERSEY COURT RULES
Rule 1:6-2. Form of Motion; Hearing.

(a) Generally. An application to the court for an order shall be by motion, or in special cases, by order to show cause. A motion, other than one made during a trial or hearing, shall be by notice of motion in writing unless the court permits it to be made orally. Every motion shall state the time and place when it is to be presented to the court, the grounds upon which it is made and the nature of the relief sought, and, as to motions filed in the Law Division-Civil Part only, the discovery end date or a statement that no such date has been assigned. The motion shall be accompanied by a proposed form of order in accordance with R. 3:1-4(a) or R. 4:42-1(a)(4) and (e), as applicable. The form of order shall note whether the motion was opposed or unopposed. If the motion or response thereto relies on facts not of record or not subject of judicial notice, it shall be supported by affidavit made in compliance with R. 1:6-6. The motion shall be deemed uncontested and there shall be no right to argue orally in opposition unless responsive papers are timely filed and served stating with particularity the basis of the opposition to the relief sought. If the motion is withdrawn or the matter settled, counsel shall forthwith inform the court.

(b) Civil Motions in Chancery Division and Specially Assigned Cases; Affidavit of Non-Involvement in Medical Malpractice Actions.

(1) Generally. When a civil action has been specially assigned to an individual judge for case management and disposition of all pretrial and trial proceedings and in all cases pending in the Superior Court, Chancery Division, the judge, on receipt of motion papers, shall determine the mode and scheduling of the disposition of the motion. Except as provided in R. 5:5-4, motions filed in causes pending in the Superior Court, Chancery Division, Family Part, shall be governed by this paragraph.

(2) Motion for Dismissal Pursuant to N.J.S.A. 2A:53A-40. A party moving for dismissal of the action on the ground of non-involvement in the cause of action pursuant to N.J.S.A. 2A:53A-40 of the New Jersey Medical Care Access and Responsibility and Patients First Act, N.J.S.A. 2A:53A-37 to 42, shall annex to the notice of motion an affidavit of non-involvement that complies with Rule 1:6-6. In the absence of opposition filed in accordance with Rule 1:6-3, the court shall enter an order dismissing the action as to the moving party. If opposition is filed, the court shall proceed in accordance with this rule.

(c) Civil and Family Part Discovery and Calendar Motions. Every motion in a civil case or a case in the Chancery Division, Family Part, not governed by paragraph (b), involving any aspect of pretrial discovery or the calendar, shall be listed for disposition only if accompanied by a certification stating that the attorney for the moving party has either (1) personally conferred orally or has made a specifically described good faith attempt to confer orally with the attorney for the opposing party in order to resolve the issues raised by the motion by agreement or consent order and that such effort at resolution has been unsuccessful, or (2) advised the attorney for the opposing party by letter, after the default has occurred, that continued non-compliance with a discovery obligation will result in an appropriate motion being made without further attempt to resolve the matter. A motion to extend the time for discovery shall have annexed thereto either a copy of all prior orders

granting or denying an extension of the discovery period or a certification that there have been no such prior orders. The moving papers shall also set forth the date of any scheduled pretrial conference, arbitration proceeding scheduled pursuant to R. 4:21A, calendar call or trial, or state that no such dates have been fixed. Discovery and calendar motions shall be disposed of on the papers unless, on at least two days notice, the court specifically directs oral argument on its own motion or, in its discretion, on a partys request. A movants request for oral argument shall be made either in the moving papers or reply; a respondents request for oral argument shall be made in the answering papers.

(d) Civil and Family Part Motions-Oral Argument. Except as otherwise provided by R. 5:5-4 (family actions), no motion shall be listed for oral argument unless a party requests oral argument in the moving papers or in timely-filed answering or reply papers, or unless the court directs. A party requesting oral argument may, however, condition the request on the motion being contested. If the motion involves pretrial discovery or is directly addressed to the calendar, the request shall be considered only if accompanied by a statement of reasons and shall be deemed denied unless the court otherwise advises counsel prior to the return day. As to all other motions, the request shall be granted as of right.

(e) Oral Argument-Mode. The court in civil matters, on its own motion or on a partys request, may direct argument of any motion by telephone conference without court appearance. A verbatim record shall be made of all such telephone arguments and the rulings thereon.

(f) Order; Record Notation. If the court has made findings of fact and conclusions of law explaining its disposition of the motion, the order shall indicate whether the findings and conclusions were written or oral and the date on which they were rendered. However, if the motion was argued and the court intends to place its findings on the record at a later date, it shall give all parties one days notice, which may be telephonic, of the time and place it shall do so. If no such findings have been made, the court shall append to the order a statement of reasons for its disposition if it concludes that explanation is either necessary or appropriate. If the order directs a plenary or other evidential hearing, it shall specifically describe the issues to be so tried. A written order or record notation shall be entered by the court memorializing the disposition made on a telephone motion.

HISTORY: Source-R.R. 3:11-2, 4:8-5(a) (second sentence). Amended July 14, 1972 to be effective September 5, 1972; amended November 27, 1974 to be effective April 1, 1975; amended July 24, 1978 to be effective September 11, 1978; former rule; amended and redesignated as paragraph (a) and paragraphs (b), (c), (d), and (e) adopted July 16, 1981 to be effective September 14, 1981; paragraph (c) amended July 15, 1982 to be effective September 13, 1982; paragraph (c) amended July 22, 1983 to be effective September 12, 1983; paragraph (b) amended December 20, 1983 to be effective December 31, 1983; paragraphs (a) and (c) amended and paragraph (f) adopted November 1, 1985 to be effective January 2, 1986; ; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (c) amended and paragraph (d) caption and text amended June 29, 1990 to be effective September 4, 1990; paragraph (d) amended July 14, 1992 to be effective September 1, 1992; paragraph (c) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended July 13, 1994 to be effective January 1, 1995; paragraphs (a) and (f) amended January 21, 1999 to be effective April 5, 1999; paragraphs (c) and (d) amended July 5, 2000 to be effective September 5, 2000;

paragraph (a) amended July 28, 2004 to be effective September 1, 2004; paragraphs (b), (c), and (f) amended July 27, 2006 to be effective September 1, 2006; paragraph (b) caption amended, former text of paragraph (b) captioned and redesignated as subparagraph (b)(1), and new subparagraph (b)(2) adopted July 9, 2008 to be effective September 1, 2008; paragraph (c) amended July 23, 2010 to be effective September 1, 2010; paragraph (a) amended July 9, 2013 to be effective September 1, 2013; paragraph (a) amended August 5, 2022 to be effective September 1, 2022.

Amendment Notes

2006 amendment, rewrote the first sentence of (b), which formerly read: When a civil action, by reason of its complexity or other good cause, has been specially assigned prior to trial to an individual judge for disposition of all pretrial and trial proceedings and in all cases pending in the Superior Court, Chancery Division, all motions therein shall be made directly to the judge assigned to the cause, who shall determine the mode and scheduling of their disposition; inserted the second sentence of (c); and in (f), substituted indicate for so note indicating in the first sentence, and inserted the second sentence.

2008 amendment, added (b)(2) and designated the former provisions of (b) as (b)(1), and added Affidavit of Non-Involvement in Medical Malpractice Actions in the caption to (b).

2010 amendment, in the second sentence of (c), substituted orders granting or denying an extension of for orders extending.

2013 amendment, in the second sentence of (a), deleted for bail pursuant to R. 3:26-2(d) or following A motion, other than.

RULES GOVERNING SECTION 2254 CASES
Rule 4. Preliminary Review; Serving the Petition and Order

The clerk must promptly forward the petition to a judge under the courts assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order. In every case, the clerk must serve a copy of the petition and any order on the respondent and on the attorney general or other appropriate officer of the state involved.

HISTORY: As amended April 26, 2004, eff. Dec. 1, 2004.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules. Rule 4 outlines the options available to the court after the petition is properly filed. The petition must be promptly presented to and examined by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits attached thereto that the petitioner is not entitled to relief in the district court, the judge must enter an order summarily dismissing the petition and cause the petitioner to be notified. If summary dismissal is not ordered, the judge must order the respondent to file an answer or to otherwise plead to the petition within a time period to be fixed in the order. 28 USC 2243 requires that the writ shall be awarded, or an order to show cause issued, unless it appears from the application that the applicant or person detained is not entitled thereto. Such consideration may properly encompass any exhibits attached to the petition, including, but not limited to, transcripts, sentencing records, and copies of state court opinions. The judge may order any of these items for his consideration if they are not yet included with the petition. See 28 USC 753(f) which authorizes payment for transcripts in habeas corpus cases.

It has been suggested that an answer should be required in every habeas proceeding, taking into account the usual petitioners lack of legal expertise and the important functions served by the return. See Developments in the LawFederal Habeas Corpus, 83 Harv L Rev 1038, 1178 (1970). However, under 2243 it is the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer. *Allen v Perini,* 424 F.2d 134, 141 (6th Cir. 1970). In addition, notice pleading is not sufficient, for the petition is expected to state facts that point to a real possibility of constitutional error. See *Aubut v State of Maine,* 431 F.2d 688, 689 (1st Cir. 1970).

In the event an answer is ordered under rule 4, the court is accorded greater flexibility than under 2243 in determining within what time period an answer must be made. Under 2243, the respondent must make a return within three days after being so ordered, with additional time of up to forty days allowed under the Federal Rules of Civil Procedure, rule 81(a)(2), for good cause. In view of the widespread state of work overload in prosecutors offices (see, e.g., *Allen,*424 F.2d at 141), additional time is granted in some jurisdictions as a matter of course. Rule 4, which contains no fixed time requirement, gives the court the discretion to take into account various factors such as the respondents workload and the availability of transcripts before determining a time within which an answer must be made.

Rule 4 authorizes the judge to take such other action as the judge deems appropriate. This is designed to afford the judge flexibility in a case where either dismissal or an order to answer may be inappropriate. For example, the judge may want to authorize the respondent to make a motion to dismiss based upon information furnished by respondent, which may show that petitioners claims have already been decided on the merits in a federal court; that petitioner has failed to exhaust state remedies; that the petitioner is not in custody within the meaning of 28 USC 2254; or that a decision in the matter is pending in state court. In these situations, a dismissal may be called for on procedural grounds, which may avoid burdening the respondent with the necessity of filing an answer on the substantive merits of the petition. In other situations, the judge may want to consider a motion from respondent to make the petition more certain. Or the judge may want to dismiss some allegations in the petition, requiring the respondent to answer only those claims which appear to have some arguable merit.

Rule 4 requires that a copy of the petition and any order be served by certified mail on the respondent and the attorney general of the state involved. See 28 USC 2252. Presently, the respondent often does not receive a copy of the petition unless the court directs an answer under 28 USC 2243. Although the attorney general is served, he is not required to answer if it is more appropriate for some other agency to do so. Although the rule does not specifically so provide, it is assumed that copies of the court orders to respondent will be mailed to petitioner by the court.

Notes of Advisory Committee on 2004 amendments. The language of Rule 4 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

The amended rule reflects that the response to a habeas petition may be a motion.

The requirement that in every case the clerk must serve a copy of the petition on the respondent by certified mail has been deleted. In addition, the current requirement that the petition be sent to the Attorney General of the state has been modified to reflect practice in some jurisdictions that the appropriate state official may be someone other than the Attorney General, for example, the officer in charge of a local confinement facility. This comports with a similar provision in 28 U.S.C. 2252, which addresses notice of habeas corpus proceedings to the states attorney general or other appropriate officer of the state.

RULES GOVERNING SECTION 2254 CASES

Rule 5. The Answer and the Reply

(a) When required. The respondent is not required to answer the petition unless a judge so orders.

(b) Contents: addressing the allegations; stating a bar. The answer must address the allegations in the petition. In addition, it must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations.

(c) Contents: transcripts. The answer must also indicate what transcripts (of pretrial, trial, sentencing, or post-conviction proceedings) are available, when they can be furnished, and what proceedings have been recorded but not transcribed. The respondent must attach to the answer parts of the transcript that the respondent considers relevant. The judge may order that the respondent furnish other parts of existing transcripts or that parts of untranscribed recordings be transcribed and furnished. If a transcript cannot be obtained, the respondent may submit a narrative summary of the evidence.

(d) Contents: briefs on appeal and opinions. The respondent must also file with the answer a copy of:

(1) any brief that the petitioner submitted in an appellate court contesting the conviction or sentence, or contesting an adverse judgment or order in a post-conviction proceeding;

(2) any brief that the prosecution submitted in an appellate court relating to the conviction or sentence; and

(3) the opinions and dispositive orders of the appellate court relating to the conviction or the sentence.

(e) Reply. The petitioner may file a reply to the respondents answer or other pleading. The judge must set the time to file unless the time is already set by local rule.

HISTORY: As amended April 26, 2004, eff. Dec. 1, 2004; April 25, 2019, eff. Dec. 1, 2019.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules. Rule 5 details the contents of the answer. (This is a change in terminology from return, which is still used below when referring to prior practice.) The answer plays an obviously important role in a habeas proceeding:

The return serves several important functions: it permits the court and the parties to uncover quickly the disputed issues; it may reveal to the petitioners attorney grounds for release that the petitioner did not know; and it may demonstrate that the petitioners claim is wholly without merit.

Developments in the LawFederal Habeas Corpus, 83 Harv L Rev 1083, 1178 (1970).

The answer must respond to the allegations of the petition. While some districts require this by local rule (see, e.g., E.D.N.C.R. 17(B)), under 28 USC 2243 little specificity is demanded. As a result, courts occasionally receive answers which contain only a statement certifying the true cause of detention, or a series of delaying motions such as motions to dismiss. The requirement of the proposed rule that the answer shall respond to the allegations of the petition is intended to ensure that a responsive pleading will be filed and thus the functions of the answer fully served.

The answer must also state whether the petitioner has exhausted his state remedies. This is a prerequisite to eligibility for the writ under 28 USC 2254(b) and applies to every ground the petitioner raises. Most form petitions now in use contain questions requiring information relevant to whether the petitioner has exhausted his remedies. However, the exhaustion requirement is often not understood by the unrepresented petitioner. The attorney general has both the legal expertise and access to the record and thus is in a much better position to inform the court on the matter of exhaustion of state remedies. An alleged failure to exhaust state remedies as to any ground in the petition may be raised by a motion by the attorney general, thus avoiding the necessity of a formal answer as to that ground.

The rule requires the answer to indicate what transcripts are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. This will serve to inform the court and petitioner as to what factual allegations can be checked against the actual transcripts. The transcripts include pretrial transcripts relating, for example, to pretrial motions to suppress; transcripts of the trial or guilty plea proceeding; and transcripts of any post-conviction proceedings which may have taken place. The respondent is required to furnish those portions of the transcripts which he believes relevant. The court may order the furnishing of additional portions of the transcripts upon the request of petitioner or upon the courts own motion.

Where transcripts are unavailable, the rule provides that a narrative summary of the evidence may be submitted.

Rule 5 (and the general procedure set up by this entire set of rules) does not contemplate a traverse to the answer, except under special circumstances. See advisory committee note to rule 9. Therefore, the old common law assumption of verity of the allegations of a return until impeached, as codified in 28 USC 2248, is no longer applicable. The meaning of the section, with its exception to the assumption to the extent that the judge finds from the evidence that they (the allegations) are not true, has given attorneys and courts a great deal of difficulty. It seems that when the petition and return pose an issue of fact, no traverse is required; *Stewart v Overholser,* 186 F.2d 339 (D.C. Cir. 1950).

> We read 2248 of the Judicial Code as not requiring a traverse when a factual issue has been clearly framed by the petition and the return or answer. This section provides that the allegations of a return or answer to an order to show cause shall be accepted as true if not traversed, except to the extent the judge finds from the evidence that they are not true. This contemplates that where the petition and return or answer do present an issue of fact material to the legality of detention, evidence is required to resolve that issue despite the absence of a traverse. This reference to evidence assumes a hearing on issues raised by the allegations of the petition and the return or answer to the order to show cause. 186 F.2d at 342, n. 5.

In actual practice, the traverse tends to be a more pro forma refutation of the return, serving little if any expository function. In the interests of a more streamlined and manageable habeas corpus procedure, it is not required except in those instances where it will serve a truly useful purpose. Also, under rule 11 the court is given the discretion to incorporate Federal Rules of Civil Procedure when appropriate, so civil rule 15(a) may be used to allow the petitioner to amend his petition when the court feels this is called for by the contents of the answer.

Rule 5 does not indicate who the answer is to be served upon, but it necessarily implies that it will be mailed to the petitioner (or to his attorney if he has one). The number of copies of the answer required is left to the courts discretion. Although the rule requires only a copy of petitioners brief on appeal, respondent is free also to file a copy of respondents brief. In practice, courts have found it helpful to have a copy of respondents brief.

Notes of Advisory Committee on 2004 amendments. The language of Rule 5 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

Revised Rule 5(a), which provides that the respondent is not required to file an answer to the petition, unless a judge so orders, is taken from current Rule 3(b). The revised rule does not address the practice in some districts, where the respondent files a pre-answer motion to dismiss the petition. But revised Rule 4 permits that practice and reflects the view that if the court does not dismiss the petition, it may require (or permit) the respondent to file a motion.

Rule 5(b) has been amended to require that the answer address not only failure to exhaust state remedies, but also procedural bars, non-retroactivity, and any statute of limitations. Although the latter three matters are not addressed in the current rule, the Committee intends no substantive change with the additional new language. *See, e.g.,*28 U.S.C. 2254(b)(3). Instead, the Committee believes that the explicit mention of those issues in the rule conforms to current case law and statutory provisions. *See, e.g.*28 U.S.C. 2244(d)(1).

Revised Rule 5(d) includes new material. First, Rule 5(d)(2), requires a respondentassuming an answer is filedto provide the court with a copy of any brief submitted by the prosecution to the appellate court. And Rule 5(d)(3) now provides that the respondent also file copies of any opinions and dispositive orders of the appellate court concerning the conviction or sentence. These provisions are intended to ensure that the court is provided with additional information that may assist it in resolving the issues raised, or not raised, in the petition.

Finally, revised Rule 5(e) adopts the practice in some jurisdictions of giving the petitioner an opportunity to file a reply to the respondents answer. Rather than using terms such as traverse, *see*28 U.S.C. 2248, to identify the petitioners response to the answer, the rule uses the more general term reply. The Rule prescribes that the court set the time for such responses and in lieu of setting specific time limits in each case, the court may decide to include such time limits in its local rules.

Notes of Advisory Committee on 2019 amendments. The petitioner has a right to file a reply. Subsection (e), added in 2004, removed the discretion of the court to determine whether or not to allow the petitioner to file a reply in a case under 2254. The current amendment was prompted by decisions holding that courts nevertheless retained the authority to bar a reply.

As amended, the first sentence of subsection (e) makes it even clearer that the petitioner has a right to file a reply to the respondent's answer or pleading. It retains the word may, which is used throughout the federal rules to mean is permitted to or has a right to. No change in meaning is intended by the substitution of file for submit.

As amended, the second sentence of the rule retains the court's discretion to decide when the reply must be filed (but not whether it may be filed). To avoid uncertainty, the amended rule requires the court to set a time for filing if that time is not already set by local rule. Adding a reference to the time for the filing of any reply to the order requiring the government to file an answer or other pleading provides notice of that deadline to both parties.

RULES GOVERNING SECTION 2254 CASES
Rule 7. Expanding the Record

(a) In general. If the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the petition. The judge may require that these materials be authenticated.

(b) Types of materials. The materials that may be required include letters predating the filing of the petition, documents,exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record.

(c) Review by the opposing party. The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

HISTORY: As amended April 26, 2004, eff. Dec. 1, 2004.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules. This rule provides that the judge may direct that the record be expanded. The purpose is to enable the judge to dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing. An expanded record may also be helpful when an evidentiary hearing is ordered.

The record may be expanded to include additional material relevant to the merits of the petition. While most petitions are dismissed either summarily or after a response has been made, of those that remain, by far the majority require an evidentiary hearing. In the fiscal year ending June 30, 1970, for example, of 8,423 2254 cases terminated, 8,231 required court action. Of these, 7,812 were dismissed before a prehearing conference and 469 merited further court action (e.g., expansion of the record, prehearing conference, or an evidentiary hearing). Of the remaining 469 cases, 403 required an evidentiary hearing, often time-consuming, costly, and, at least occasionally, unnecessary. See Director of the Administrative Office of the United States Courts, Annual Report, 245a245c (table C4) (1970). In some instances these hearings were necessitated by slight omissions in the state record which might have been cured by the use of an expanded record.

Authorizing expansion of the record will, hopefully, eliminate some unnecessary hearings. The value of this approach was articulated in *Raines v United States,* 423 F.2d 526, 529530 (4th Cir 1970):

Unless it is clear from the pleadings and the files and records that the prisoner is entitled to no relief, the statute makes a hearing mandatory. We think there is a permissible intermediate step that may avoid the necessity for an expensive and time consuming evidentiary hearing in every Section 2255 case. It may instead be perfectly appropriate, depending upon the nature of the allegations, for the district court to proceed by requiring that the record be expanded to include letters, documentary evidence, and, in an appropriate case, even affidavits. *United States v Carlino,* 400 F.2d 56 (2nd Cir 1968); *Mirra v United States,* 379 F.2d 782 (2nd Cir 1967); *Accardi v United States,* 379 F.2d 312 (2nd Cir 1967). When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive, but that is not to say they may not be helpful.

In *Harris v Nelson,* 394 US 286, 300 (1969), the court said:

> At any time in the proceedings . . . *either on [the courts] own motion* or upon cause shown by the petitioner, it may issue such writs and take or authorize such proceedings . . . *before* or in conjunction with the hearing of the facts . . . . [emphasis added].

Subdivision (b) specifies the materials which may be added to the record. These include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath directed to written interrogatories propounded by the judge. Under this subdivision affidavits may be submitted and considered part of the record. Subdivision (b) is consistent with 28 USC 2246 and 2247 and the decision in *Raines* with regard to types of material that may be considered upon application for a writ of habeas corpus. See *United States v Carlino,* 400 F.2d 56, 58 (2d Cir 1968), and *Machibroda v United States,* 368 US 487 (1962).

Under subdivision (c) all materials proposed to be included in the record must be submitted to the party against whom they are to be offered.

Under subdivision (d) the judge can require authentication if he believes it desirable to do so.

Notes of Advisory Committee on 2004 amendments. The language of Rule 7 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as noted below.

Revised Rule 7(a) is not intended to restrict the courts authority to expand the record through means other than requiring the parties themselves to provide the information. Further, the rule has been changed to remove the reference to the merits of the petition in the recognition that a court may wish to expand the record in order to assist it in deciding an issue other than the merits of the petition.

The language in current Rule 7(d), which deals with authentication of materials in the expanded record, has been moved to revised Rule 7(a).

UNITED STATES CONSTITUTION

Amendment 6 Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.