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

MUMIA ABU-JAMAL, Petitioner, v. MARTIN HORN, Commissioner, Pennsylvania Department of Corrections, ET AL., Respondents.	: : : : : : : :	CIVIL ACTION NO. 99-5089

Memorandum and Order

YOHN, J. December ___, 2001

Mumia Abu-Jamal ("petitioner") seeks a writ of habeas corpus. He was arrested on December 9, 1981 and subsequently charged with the murder of Philadelphia Police Officer Daniel Faulkner. Following a much-publicized jury trial, petitioner was convicted and sentenced to death in early July, 1982. Having unsuccessfully sought relief on direct appeal to the Supreme Court of Pennsylvania, petitioner pursued relief in Pennsylvania post-conviction proceedings. Additional hearings were conducted and additional evidence presented to the Court of Common Pleas of Philadelphia County ("PCRA court"). That court denied petitioner relief. Following an appeal to the Supreme Court of Pennsylvania, and two additional evidentiary hearings before the PCRA court ordered by the state supreme court, the Supreme Court of Pennsylvania affirmed the denial of petitioner's PCRA petition. The United States Supreme Court denied review, and petitioner filed this action seeking federal habeas corpus relief pursuant to 28 U.S.C. § 2254.

Jamal[1] advances twenty-nine distinct claims, several of which contain numerous, unnumbered subparts. He separately has moved for an evidentiary hearing and/or discovery on some claims and for this court to wholly set aside as unreasonable the factual determinations of the state courts. The District Attorney for Philadelphia County has opposed the petition generally, as well as each motion.

The first twenty of petitioner's twenty-nine claims address alleged constitutional defects in the guilt phase of his trial. I have afforded each of these assertions careful review, yet upon considered analysis of petitioner's contentions I conclude that none of them are persuasive. Accordingly, Jamal's petition will be denied as to these claims, and a new trial will not be granted. The next eight claims advanced by petitioner concern alleged constitutional violations effected during the penalty phase of his trial. Upon considering the body of relevant precedent in general, and the holdings of the United States Supreme Court in *Mills v. Maryland*, 486 U.S. 367 (1988) and *Boyde v. California*, 494 U.S. 370 (1990) and of the United States Court of Appeals for the Third Circuit in *Banks v. Horn*, 2001 WL 1349369 (3d Cir. Oct. 31, 2001) and *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997) in particular, I am compelled to conclude that petitioner's twenty-fifth claim is meritorious. As explained more fully, *infra*, when the jury instructions and verdict sheet employed in Jamal's case are considered, it becomes apparent that there is a "reasonable likelihood that the jury has applied the . . . instruction [and form] in a way that prevents the consideration of constitutionally relevant evidence," *Boyde*, 494 U.S. at 380, regarding the existence of mitigating circumstances (i.e., those weighing against the imposition

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[1]Petitioner has been referred to in other contexts by the surname "Abu-Jamal." His counsel here have referred to him as "Jamal" and I will do likewise.

of the death penalty). Accordingly, the petition will be granted as to this claim. The balance of petitioner's eight claims relating to the sentencing phase of his trial consequently are rendered moot, and are not reached by the court. Petitioner's twenty-ninth claim concerns alleged constitutional violations stemming from his state court post-conviction proceedings. I conclude that this claim is unmeritorious.[2]

I. BACKGROUND[3]

On December 9, 1981, on Locust Street between 12th and 13th Streets in center city, Philadelphia, Officer Faulkner pulled over a vehicle driven by William Cook, petitioner's

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[2]Many will find it difficult to understand why this and numerous other capital cases are still under review almost twenty years after the trial and conviction. More important, it is clearly painful to the petitioner, his family and friends, and the family and friends of the victim to have this issue renewed and reinforced in their memories after the passage of so much time. Unfortunately, a number of factors have caused such delays in this and other cases in Pennsylvania. In the interests of closure and the expeditious administration of justice, however, these circumstances recently have been addressed by the judicial, executive and legislative branches so that they are unlikely to recur. Until 1996, neither federal nor state law imposed a statute of limitations on the filing of habeas petitions; now both entities have imposed a one year limit. Some governors of Pennsylvania have inordinately delayed their review of death penalty cases so that a writ of execution was not issued for years. Now time limits constrict that process as well. Decisional delays by the Supreme Court of Pennsylvania were not unusual a decade ago, but now that body manages its capital docket expeditiously. Many defendants in death penalty cases previously have felt that it was in their best interest to delay filing habeas petitions until they were forced to do so by the issuance of a death warrant. The imposition of time limits will curb that tactic as well. As a result of all of these changes, it seems clear that delays of the nature seen here will no longer result.

[3]The facts comprising the background of this memorandum are gleaned from the opinions of the state courts explaining their denial of petitioner's state-court petition for post-conviction relief. *See Pennsylvania v. Mumia Abu-Jamal*, 30 Phila. 1, 1995 Phila. City Rptr. Lexis 38 (C.P. Ct. Phila. Cty. Sept. 15, 1995) [hereafter "*PCRA Op.* ¶"]; *Pennsylvania v. Abu-Jamal*, Crim. No. 1357 Jan . Term 1982 (C.P. Ct. Phila. Cty. Nov. 1, 1996) [hereafter "*PCRA Jones Op.*"]; *Pennsylvania v. Abu-Jamal*, Crim. Nos. 1357-58 Jan. Term 1982 (C.P. Ct. Phila. Cty. July 24, 1997) (Pa. Doc. No. 93) [hereafter "*PCRA Jenkins Op.*"]; *Pennsylvania v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998) [hereafter "*PCRA Appeal Op.*"].

brother. *See PCRA Op.* ¶ 12. Faulkner called in, by radio, for backup. Cook exited his vehicle and scuffled with Faulkner. *See id.* ¶ 13. Seeing the altercation, petitioner ran to the scene from a parking lot across the street. *See id.* ¶ 14. As petitioner approached Faulkner, Jamal shot Faulkner in the back. *See id.* While falling, Faulkner fired at petitioner and struck him in the chest. *See id.* ¶ 15. Petitioner then stood over the fallen Faulkner and fired four more shots, the first of which entered Faulkner's brain between his eyes. *See id.* ¶ 16. Wounded, petitioner then walked several steps away from the dying officer and dropped down, sitting on the curb. *See id.* ¶ 17. William Cook remained on the scene standing near the wall of the adjacent building. *See id.* ¶ 17.

Within one minute of Faulkner's radio call, Officers Robert Shoemaker and James Forbes approached the scene, where a cab driver advised them that an officer had been shot. *See id.* ¶ 18. Additional officers arrived shortly thereafter. *See id.* Faulkner was taken to Jefferson Hospital immediately, and later was pronounced dead. *See id.* ¶ 19. As Shoemaker approached petitioner, petitioner reached for an unidentified object on the sidewalk. *See id.* ¶ 20. Despite Shoemaker's repeated orders to "freeze," petitioner continued to move toward the object. *See id.* Drawing closer, Shoemaker identified the object as firearm, and kicked petitioner in the chest to get him away from the gun, and then kicked the gun out of petitioner's reach. *See id.* As officers carried petitioner to a waiting police van, petitioner resisted arrest by striking and kicking the officers attempting to handcuff him. *See id.* ¶ 25. As petitioner was being apprehended, Officer Forbes frisked William Cook, who exclaimed "I ain't got nothing to do with this." *Id.* ¶ 21.

The Commonwealth presented four eye-witnesses at trial. Cynthia White testified that she witnessed petitioner run out of a parking lot on the other side of Locust Street as Officer

Faulkner attempted to subdue and handcuff Cook. *See id.* ¶ 14. Robert Chobert testified that he heard a shot, looked up, saw the victim fall, and then saw petitioner shoot Faulkner in the face. *See id.* at n.19 (citing 6/19/82 Tr. at 209-210). Michael Scanlon testified that he witnessed an assailant, whom he could not identify, attack and shoot Faulkner from behind, saw the officer fall, and then saw the assailant stand over the officer and shoot him in the face. *See* 6/25/82 Tr. at 8.6-8.8. Albert Magliton testified that he heard shots and then saw Faulkner on the ground, and petitioner on the curb. *See id.* (citing 6/25/82 Tr. at 8-76-8.78). Once Jamal had been subdued, Chobert was escorted to the police van at the scene where he was being held and immediately identified petitioner as the individual who shot Faulkner. *See id.* ¶ 26. Magliton also identified petitioner as the perpetrator, both at the scene and during the trial. *See PCRA Op.* at 86-87.

Forbes seized two handguns from within five feet of where petitioner was sitting on the curb following the shooting. *See id.* ¶ 22. One was a standard police-issue Smith and Wesson .38 caliber Police Special revolver with a six-inch barrel which was registered and issued to Faulkner. *See id.* ¶¶ 22-23. Faulkner's firearm contained six Remington .38 special cartridges, one of which had been fired. *See id.* ¶ 23. Ballistic testing later confirmed that the bullet that struck petitioner was fired from Officer Faulkner's revolver. *See id.* ¶ 15. The second firearm seized was a five-shot Charter Arms .38 caliber revolver with a two-inch barrel, purchased by petitioner on June 27, 1979 and registered to him. *See id.* ¶¶ 22 & 24. Petitioner's firearm contained five "Plus-P" high-velocity *spent* bullet shell casings. *See id.* ¶ 24. Officer Anthony L. Paul, supervisor of the Firearms Identification Unit in the Laboratory Division of the Philadelphia Police Department, testified at trial that the bullet recovered from Faulkner suffered

a great deal of mutilation and could not be matched with a specific firearm. *See* 6/23/82 Tr. at 6.102. Paul also testified that the bullet specimen had eight lands and grooves with a right hand direction of twist which was consistent with a Charter Arms revolver and that, conservatively, there were a million Charter Arms weapons in existence at the time. *See id.* at 6.168.

Petitioner was taken to Jefferson Hospital for treatment. *See id.* ¶ 27. Because he refused to walk, he was carried into the emergency room by officers. *See id.* The officers placed petitioner on the floor of the lobby at the entrance to the emergency room, and while waiting for treatment, petitioner was heard to twice say that "I shot the motherfucker, and I hope the motherfucker dies." *See id.* ¶ 28. The statement was heard by Priscilla Durham, a security guard on duty at Jefferson Hospital. *See id.* The statement also was heard by Officer Gary Bell, who responded that "if he dies, you die." *See id.* Petitioner was then taken into the emergency room for treatment. *See id.*

On December 15, 1981, Anthony Jackson, Esquire, was appointed as counsel for petitioner. *See id.* ¶ 4. On January 20, 1982, petitioner was arraigned before the Honorable Paul Ribner, who also handled pretrial matters. *See id.* ¶¶ 3 & 5.

For the ensuing five months, Jackson prepared for trial thoroughly and intensively. *See id.* ¶ 61. Nonetheless, on or about May 13, 1982, petitioner sought leave to represent himself. *See id.* ¶ 63. Judge Ribner permitted petitioner to proceed *pro se* and appointed Jackson as back-up counsel. *See id.* ¶¶ 6-7. A trial by jury commenced on June 7, 1982. *See id.* ¶ 6. Petitioner was uncooperative, hostile, and insisted regularly that John Africa, who was not an attorney, be appointed as counsel. *See, e.g., id.* ¶¶ 7-8, 10, 65, 68. His conduct caused him to be removed from *pro se* status for the remainder of the trial. *See id.* ¶¶ 10, 68. Although petitioner often was

physically removed from the courtroom, *see id.* ¶ 10, the jury was instructed against drawing negative inferences from his removal and Jackson kept petitioner fully informed of the proceedings. *See id.* ¶¶ 10-11.

During the trial, the Commonwealth presented a number of witnesses, each of whom was cross-examined thoroughly by Jackson. *See id.* ¶ 29. Petitioner also presented seventeen of his own witnesses, eight as to facts and nine as to character. *See id.* Neither petitioner nor his brother, William Cook, testified at trial. *See id.* On July 2, 1982, the jury found petitioner guilty of first degree murder and of possessing an instrument of crime. *See id.* ¶ 30.

On July 3, 1982, the jury heard evidence and argument in the penalty phase hearing. *See id.* ¶ 31. Petitioner did take the stand at the penalty hearing, but refused to be questioned by his attorney and instead chose to read a prepared statement. *See id.* ¶ 31. Petitioner did not permit counsel to call any mitigating witnesses. *See id.* Petitioner was cross-examined following his statement. The court instructed the jurors that they could consider all the trial testimony in their deliberations to determine aggravating and mitigating circumstances. *See id.* Later that same day, the jury returned with a unanimous sentence of death. It found one aggravating circumstance, killing a police officer acting in the line of duty, and one mitigating circumstance, petitioner's lack of a significant criminal record. *See id.* ¶ 32. Post-trial motions were denied on May 25, 1983, and a sentence of death was imposed by the trial court. *See id.* ¶ 33.

Marilyn J. Gelb, Esquire, was appointed to represent petitioner in his direct appeal to the Supreme Court of Pennsylvania. *See id.* ¶ 36. On direct appeal, thirteen issues were raised. *See id.* ¶ 36 n.6. The appeal was unsuccessful, however, and the Supreme Court of Pennsylvania affirmed the trial court's judgment of conviction and sentence on March 6, 1989. *See*

Pennsylvania v. Abu-Jamal, 555 A.2d 846 (1989). The Supreme Court thereafter denied rehearing. *See Pennsylvania v. Abu-Jamal*, 569 A.2d 915 (1990).

On October 1, 1990, the United States Supreme Court denied petitioner's petition for writ of certiorari. *See Abu-Jamal v. Pennsylvania*, 498 U.S. 881 (1990). On November 26, 1990, the United States Supreme Court denied petitioner's petition for rehearing. *See Abu-Jamal v. Pennsylvania*, 501 U.S. 1214 (1991). The Court denied a second request for rehearing on June 10, 1991. *See PCRA Op.* ¶ 37. On June 1, 1995, Pennsylvania Governor Thomas Ridge signed petitioner's writ of execution, to be carried out on August 17, 1995. *See id.* ¶ 38.

On June 5, 1995, petitioner, by his new, privately retained counsel, filed a Petition for Recusal of the court, a Petition for Stay of Execution, a Petition for Discovery, and a Petition for Post Conviction Relief. *See id.* ¶ 39. On July 12, 1995, the PCRA court denied the petition for recusal, granted the petition for an evidentiary hearing, and held the petition for stay of execution under advisement. *See id.* ¶ 41. Petitioner filed an emergency appeal to the Supreme Court of Pennsylvania from the denial of the petition for recusal. *See id.* The appeal was denied. *See id.* On July 14, 1995, the petition for discovery was denied. *See id.* ¶ 42.

The PCRA court scheduled the evidentiary hearing to commence on July 18, 1995. *See id.* ¶ 43. On July 18, 1995, the Supreme Court of Pennsylvania granted petitioner's emergency application for temporary stay of an evidentiary hearing, ordering that the hearing begin on July 26, 1995. *See id.* ¶¶ 44 & 46. The hearing did commence on July 26, 1995, and concluded on August 15, 1995. *See id.* ¶ 47. On August 7, 1995, the PCRA court granted petitioner's motion to stay his execution. *See id.* ¶ 50. On September 15, 1995, the PCRA court denied the petition for post-conviction relief and issued an opinion setting forth findings of fact and conclusions of

law. *See generally id.*

Petitioner appealed to the Supreme Court of Pennsylvania. *See Commonwealth v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998). While that appeal was pending, petitioner sought a remand for the purpose of taking additional testimony from Veronica Jones, who the defense alleged was a "newly available witness." *See id.* at 85. The state supreme court ordered the matter remanded to the PCRA court for an evidentiary hearing on the claim. *See id.* at 86. The PCRA court held an evidentiary hearing from October 1, 1996 to October 3, 1996. In an Opinion and Order of November 1, 1996, the PCRA court denied petitioner's motion to supplement the record with the testimony of Veronica Jones on the grounds that she was neither newly available nor credible. *See PCRA Jones Op.* at 14. Thereafter, petitioner sought remand to the PCRA court for three purposes: first, to elicit testimony from Pamela Jenkins; second, to conduct additional discovery of prosecution and police files in their entirety and to reassign the matter on remand to a different judge; and third, to supplement his *Batson v. Kentucky*, 476 U.S. 79 (1986), claim based upon a videotape released after his trial. *See PCRA Appeal Op.* at 86. On May 30, 1997, the Supreme Court of Pennsylvania denied the motions to conduct additional discovery, to reassign the matter on remand, and to supplement the *Batson* claim. *See id.* The court did, however, order remand for the limited purpose of taking additional testimony with respect to Pamela Jenkins. *See id.* The PCRA court conducted the evidentiary hearing between June 26, 1997 and July 1, 1997. By Opinion and Order of July 24, 1997, the PCRA court denied relief on the ground that Jenkins's testimony was not credible. *See PCRA Jenkins Op.* at 19.

On October 29, 1998, the Supreme Court of Pennsylvania issued an Opinion unanimously affirming the denial of post conviction relief, *see Pennsylvania v. Abu-Jamal*, 720 A.2d 79 (Pa.

1998),[4] and on November 25, 1998, that court denied petitioner's petition for reconsideration. *See* Pet. for Habeas Corpus Relief (Doc. No. 1) [hereafter "P1"] ¶ 10(i). On October 4, 1999, the United States Supreme Court denied petitioner's petition for a writ of certiorari. *See* P1 ¶ 10(j). On October 13, 1999, Governor Ridge signed a second warrant of execution for petitioner, to be carried out on December 2, 1999.

On October 15, 1999, petitioner filed in this court a 159-page petition for a writ of habeas corpus. *See* P1 (Doc. No. 1). Jamal also filed a contemporaneous emergency motion to stay his execution. *See* Doc. No. 2. On October 26, 1999, the court held a hearing with counsel for each party to determine the most just and efficient means of resolving the matter. *See* Doc. No. 6. That same day I granted Jamal's motion to stay his execution pending the court's disposition of his petition. *See* Doc. No. 5. The following day the court issued an order detailing the filing expectations and deadlines as discussed at the hearing. *See* Order of Oct. 27, 1999 (Doc. No. 8).

On December 8, 1999, petitioner filed a 97-page memorandum of law in support of his petition for writ of habeas corpus. *See* Doc. No. 14 [hereafter "P14"]. Because petitioner's memorandum indicated an intent to file additional motions as the litigation proceeded, even though the original briefing order was clearly intended to cover all briefs to be filed, the court held a hearing on January 14, 2000, to clarify scheduling expectations. In light of the legal and public nature of this action, the court granted petitioner leave to file two additional submissions. *See* Order of Jan. 20, 2000 (Doc. No. 17). The court also granted respondents a right of response

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[4]That same day Justice Castille of the Supreme Court of Pennsylvania issued an opinion denying petitioner's motion for Justice Castille to recuse himself from consideration of the appeal from the denial of post conviction relief. *See Pennsylvania v. Abu-Jamal*, 720 A.2d 121 (Pa. 1998).

to the expected filings, and granted petitioner permission to file a traverse. *See id.* On January 20, 2000, petitioner filed a 100-page motion to review the reasonableness of state court fact-findings. *See* Doc. No. 18 [hereafter "P18"]. Following an extension of time, petitioner filed a 19-page motion for an evidentiary hearing. *See* Doc. No. 27 [hereafter "P27"]. On March 30, 2000, the last of the scheduled briefs, respondents' brief opposing petitioner's motion for an evidentiary hearing, was filed. *See* Doc. No. 30 [hereafter "R30"].

On April 18, 2000, the Supreme Court announced decisions in two cases which clarified the proper construction of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132 § 104, 110 Stat. 1214, which amended several federal statutes governing the availability of habeas relief in the federal courts. *See Michael Wayne Williams v. Taylor*, 529 U.S. 420 (2000) [hereinafter *Michael Williams*]; *Terry Williams v. Taylor*, 529 U.S. 362 (2000) [hereinafter *Terry Williams*]. Because justice so required, petitioner was granted leave to file a brief regarding the impact of the Supreme Court decisions on this action, and respondents were granted the right of a response. *See* Order of May 12, 2000 (Doc. No. 36). Each party then filed a brief as permitted. *See* Petitioner's Supplemental Memorandum of Law (Doc. No. 37); Respondents' Response to Petitioner's Supplemental Memorandum of Law (Doc. No. 38).

By June 14, 2000, the parties had submitted to the court fifteen substantive filings exceeding 780 pages in length. These submissions addressed the factual and legal bases of twenty-nine claims for relief, the construction of controlling federal law, the deference due to state court fact-findings, the propriety of an evidentiary hearing, and the impact of the recent

Supreme Court decisions.[5]

The matter is now ripe for disposition.

II. STANDARD OF REVIEW

On April 24, 1996, the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") became effective, amending statutes delimiting the power of a federal court to grant an application for writ of habeas corpus. *See* Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, Ti. I, § 104, *reprinted at* 110 Stat. 1218, *amending* Act of Nov. 26, 1966, Pub. L. 89-711, § 2, *reprinted at* 80 Stat. 1165, *codified at* 28 U.S.C. § 2254 (1994). Because petitioner's petition for writ of habeas corpus was filed after the effective date of the AEDPA, the terms of the statute apply to his claims. *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997); *Weeks v. Snyder*, 219 F.3d 245 (3d Cir. 2000). That is important because the AEDPA codified the limited conditions under which federal courts may grant either a writ of habeas corpus or an evidentiary hearing on a petition for such a writ to a person in state custody. *See generally Terry Williams*, 529 U.S. 362; *Michael Williams*, 529 U.S. 420; *Werts v. Vaughn,* 228 F.3d 178, 196 (3d Cir. 2000); *Campbell v. Vaughn*, 209 F.3d 280, 286 (3d Cir. 2000).

The following sections clarify the relevant requirements of § 2254 and the standards of review that statute imposes upon a federal court.

A. Exhausted Remedies and Procedural Defaults

A federal court may consider a petition for habeas relief only if it has been filed on behalf of a person in custody pursuant to a state court judgment and it is based on one or more asserted

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[5]Petitioner has filed numerous other motions since that time which have been dealt with individually and are not here detailed.

violations of federal law. *See* § 2254(a). No application shall be granted "unless it appears that the applicant has exhausted the remedies available" in the state courts. § 2254(b)(1)(A).[6] The exhaustion requirement demands that petitioner "fairly present" each claim in his petition to each level of the state courts, including the highest state court empowered to consider it. *See O'Sullivan v. Boerckal*, 526 U.S. 838, 847 (1999); *Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Lines v. Larkins*, 208 F.3d 153, 159 (3d Cir. 2000). In order for a claim "to have been 'fairly presented' to the state courts, . . . it must be the substantial equivalent of that presented to the state courts. In addition, the state court must have available to it the same method of legal analysis as that to be employed in federal court." *Werts*, 228 F.3d at 192 (citation omitted); *see also McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999) (stating that in order to "fairly present" a claim, petitioner "must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted."); *Lines*, 208 F.3d at 159.

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[6]Amended § 2254(b) & (c) provide that:

> (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.
> (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.

28 U.S.C. § 2254(b),(c) (1994 & Supp. 2000).

The Third Circuit has delineated several ways in which a petitioner may fairly present a claim to the state courts without expressly asserting it as a federal constitutional claim: "(a) reliance on pertinent federal cases employing a constitutional analysis, (b) reliance on state cases employing a constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation." *McCandless*, 172 F.3d at 261-62 (citation omitted). Finally, petitioner bears the burden of demonstrating that each claim has been exhausted and that no additional state remedies exist for those claims. *See Werts,* 228 F.3d at 192; *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1998).

Notably, however, exhaustion is excused where there literally are no available state procedures to be exhausted (i.e. where exhaustion would be futile in a *de jure* sense), or where "circumstances exist that render such process ineffective to protect the rights of the applicant" (i.e. where exhaustion would be futile in a *de facto* sense). 28 U.S.C. § 2254(b)(1)(B); *see also Werts*, 228 F.3d at 192 (holding that the exhaustion requirement may be excused "if requiring exhaustion would be futile, *i.e.*, exhaustion is impossible due to procedural default and state law clearly forecloses review of the unexhausted claim") (citations omitted); *Doctor v. Walters*, 96 F.3d 675, 683 (3d Cir. 1996).

Another condition necessarily satisfied by a federal habeas petitioner is that the claim may not be procedurally defaulted. *See Coleman v. Thompson*, 501 U.S. 722, 729-32 (1991) (holding 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 those claims in the first instance," and accordingly, as a matter of comity and federalism, generally

cannot proceed in federal court); *Caswell v. Ryan*, 953 F.2d 853, 857 (3d Cir. 1992). Applicants are considered to have procedurally defaulted their claims when "the state court refuses to hear the merits of the claim because either (1) the defendant waived a PCRA claim [he] could have raised in an earlier proceeding but failed to do so; or (2) some other procedural bar exists, such as a statute of limitations." *Lambert*, 134 F.3d at 518 (citation omitted); *see also Werts*, 228 F.3d at 192 n.9 (citation omitted). In other words, the court must ask whether the state procedural rule furnishes an independent and adequate state ground for denying relief.

"A state rule provides an independent and adequate basis for precluding federal review of a state prisoner's habeas claims only if: (1) the state procedural rule speaks in unmistakable terms; (2) all state appellate courts refused to review the petitioner's claims on the merits; and (3) the state courts' refusal in this instance is consistent with other decisions." *Doctor*, 96 F.3d at 683-84; *see also Ford v. Stepanik*, No. 97-2116, 1998 U.S. Dist. Lexis 8436, at *13 (E.D. Pa. June 2, 1998) (holding that state waiver provision which depended on federal law was not independent). *Cf. Hameen v. Delaware*, 212 F.3d 226, 247 (3d Cir. 2000) (explaining that an exhausted but unadjudicated claim would be reviewed where the statutory ground upon which the state court relied in denying relief depended upon a construction of a federal constitutional case). "While the state rule should be applied 'evenhandedly to all similar claims,' state courts only need demonstrate that in the 'vast majority of cases,' the rule was applied in a 'consistent and regular' manner." *Doctor*, 96 F.3d at 684 (citations omitted); *see also Cabrera*, 175 F.3d at 313.

Although a petitioner who has procedurally defaulted his federal claims in state court is not precluded from asserting them in federal court per se, the showings necessarily made by such

a litigant are quite stringent. In order to advance such claims he must first show "cause" for defaulting his claims, and second, he must demonstrate prejudice attributable to his inability to otherwise have the claim considered on its merits. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) ("We . . . require a prisoner to demonstrate cause for his state-court default of *any* federal claim, and prejudice therefrom, before the federal habeas court will consider the merits of that claim.") (emphasis original). Alternatively, in extreme cases, if a petitioner can establish that a "fundamental miscarriage of justice" would result if he is precluded from advancing his federal claims, the default will be excused. *Werts*, 228 F.3d at 192 (citing *Lines,* 208 F.3d at 160) (additional citations omitted); *see also McCandless*, 172 F.3d at 260; *Doctor*, 96 F.3d at 683.

In order to demonstrate "cause" for the procedural default, the petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *see also Werts*, 228 F.3d at 192-93. In order to satisfy the prejudice requirement, "the habeas petitioner must prove 'not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions.'" *Werts,* 222 F.3d at 193 (quoting *Murray*, 477 U.S. at 488) (internal quotations and additional citations omitted). In other words, petitioner must prove that "he was denied 'fundamental fairness' at trial." *Id*. (citation omitted).

As for the possibility of demonstrating a "fundamental miscarriage of justice," the Third Circuit has held that this exception to the procedural default rule applies only in "extraordinary cases . . . 'where a constitutional violation has probably resulted in the conviction of one who is actually innocent . . . .'" *Werts*, 228 F.3d at 193 (quotation and citations omitted). Moreover, the

Supreme Court has set forth the following standard: "when a prisoner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claim," the "petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 326-27 (1995). A district court must not use its independent judgment as to whether, in light of new evidence, reasonable doubt exists. Rather, the district court must "make a probabilistic determination about what reasonable, properly instructed jurors would do." *Id.* at 329.

B. Granting the Writ

A petitioner seeking a writ based on a claim that was both exhausted and adjudicated on the merits in the state courts may have his application granted only if the state court decision: (1) was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States"; (2) "involved an unreasonable application of" such established federal law; or (3) was the result of "an unreasonable determination of the facts in light of the evidence presented" in state court. § 2254(d).[7] To clarify the circumstances in which the writ may be granted, it is

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[7]After enactment of the AEDPA, amended § 2254(d) provides:

(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.

28 U.S.C. § 2254(d) (1994 & Supp. 2000).

necessary to review the parameters of these statutory phrases.

1. § 2254(d): A Claim "Adjudicated on the Merits in State Court Proceedings"

The Supreme Court has not offered a detailed explanation of what a state court must do to adjudicate a claim on the merits for purposes of § 2254(d). *Cf. Weeks v. Angelone*, 528 U.S. 225, 237 (2000) (summarily affirming holding that claim was adjudicated on the merits). Most courts of appeals to consider the question directly have held that a claim was adjudicated on the merits when the state court disposition of the claim was substantive rather than procedural. *See, e.g., Simpson v. Matesanz*, 175 F.3d 200, 205-06 (1st Cir. 1999); *Thomas v. Davis*, 192 F.3d 445, 455 (4th Cir. 1999); *Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000); *Moore v. Parke*, 148 F.3d 705, 708 (7th Cir. 1998); *Aycox v. Lytle*, 196 F.3d 1174, 1177 (10th Cir. 1999). The Third Circuit has held that a claim was not adjudicated on the merits where the state court "did not pass on" the constitutional claim and did not take "into account controlling Supreme Court decisions." *Hameen*, 212 F.3d at 248.[8] The parameters of the *Hameen* holding appear consistent with the earlier cited circuit court holdings drawing a distinction between procedural and substantive resolution of claims. Therefore, I conclude that the critical question is whether the state court

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[8]It is not clear, however, that the Third Circuit would require the state court to discuss specifically the relevant federal precedent. Moreover, courts of appeals for several other circuits have held that an adjudication on the merits does not require that federal case law be cited, but rather only that the law identified by the state court not be contrary to clearly established federal law at the time of the decision. *See, e.g., Whitmore v. Kemna*, 213 F.3d 431, 434 (8th Cir. 2000); *Aycox*, 196 F.3d at 1177; *Van Woudenberg v. Gibson*, 211 F.3d 560, 569-70 (10th Cir. 2000) (finding summary statement without citation "to state or federal law" was adjudication on the merits); *Berdecia v. Lacy*, Civ. No. 99-11309, 2000 WL 1072306, at *4 (S.D.N.Y. Aug. 2, 2000).

relied on a procedural ground to resolve the claim or upon substantive grounds.

2. § 2254(d)(1): "A Decision That Was Contrary to, or Involved an Unreasonable Application of Clearly Established Federal Law"

Initially, the courts of appeals were divided concerning the interpretation of amended section 2254(d)(1). *See Matteo v. SCI Albion*, 171 F.3d 877, 888-90 (3d Cir. 1999) (describing various standards of review under § 2254(d)(1)). On April 18, 2000, the Supreme Court issued its *Terry Williams* decision, wherein the Court construed the proper standard of review under that section.[9]

In *Terry Williams*, the Court explained that a state court decision falls within the prohibition of the "contrary to" clause if it is "substantially different from the relevant precedent" of the Supreme Court, or if it "applies a rule that contradicts the governing law set forth" in Supreme Court opinions. *Terry Williams*, 529 U.S. at 405. "A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Id.* at 406. In other words, "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Id.* at 412-13.

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[9] Justice Stevens wrote an opinion for the Court of which Parts I, III and IV commanded a majority vote. Justice O'Connor wrote a separate opinion of which Part II commanded a majority vote, except that Justice Scalia did not join in a footnote considering the legislative history of § 2254(d)(1). Because Part II of Justice O'Connor's opinion articulated the majority view as to the proper construction of § 2254(d)(1), it provides the standard of review by which the court is bound.

When the Supreme Court clarified the scope of § 2254(d)(1), it also addressed the proper standard of review under the "unreasonable application" clause. *See Terry Williams*, 529 U.S. at 407-13. The Court explained that "when a state-court decision unreasonably applies the law of this Court to the facts of a prisoners's case, a federal court applying § 2254(d)(1) may conclude that the state-court decision falls within the provision's 'unreasonable application' clause." *Id.* at 409. The Court then cautioned federal habeas courts against insufficiently deferential review of state court decisions. "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* Moreover, "the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 410 (emphasis in original). In short, "[u]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principles from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. It is important to recognize that AEDPA requires of federal habeas courts greater deference to state court applications of law to fact than did prior law. *See id.* at 403-04 (discussing the AEDPA's restriction of independent federal review).

Contributing to the pre-*Terry Williams* conflict among the courts of appeals regarding the standard set forth under § 2254(d)(1) was a disagreement regarding the proper relationship between the "contrary to" and "unreasonable application of" clauses.[10] Prior to that decision, the

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[10]It is possible that petitioner explicitly may have waived review under the "unreasonable application" clause. In his memorandum in support of his petition, petitioner explained that an "inquiry into the unreasonableness of the application of federal authority has no place in this litigation." P14 at 5. At the time, the parties and the court were bound by the rule of *Matteo*, which appeared to suggest a sequential inquiry rather than a substantive inquiry based on the

Third Circuit held that the revised section contained two independent clauses, mandating a two-part inquiry:

> First, the federal habeas court must determine whether the state court decision was 'contrary to' Supreme Court precedent that governs the petitioner's claim. . . . In the absence of such a showing, the federal habeas court must ask whether the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified.

Matteo, 171 F.3d at 891. Our court of appeals further explained that in order to prove entitlement to habeas relief under the "contrary to" clause, "it is not sufficient for the petitioner to show merely that his interpretation of Supreme Court precedent is more plausible than the state court's; rather, the petitioner must demonstrate that Supreme Court precedent *requires* the contrary outcome." *Matteo*, 171 F.3d at 888 (emphasis in original); *see also Werts,* 228 F.3d at

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form of the question presented. *See supra*, II.B.2. Even under *Matteo*, petitioner's decision may have constituted a waiver of an inquiry which, perhaps, was otherwise required by the Third Circuit. *See Matteo*, 171 F.3d at 889 ("If the federal habeas court determines that the state court decision was not 'contrary to' the applicable body of Supreme Court law . . . *then the federal habeas court should undertake the second step* of analyzing whether the decision was based on an 'unreasonable application of' Supreme Court precedent.") (emphasis added). When the Supreme Court announced its decision in *Terry Williams*, the parties were granted leave to brief the import of the decision. Petitioner in that brief explains that *Terry Williams* "infused most of the analytical muscle into the 'unreasonable application' clause." P37 at 4-5. Petitioner's counsel then explain that although of no import on the record presented in this matter, "the vast majority of claims presented by habeas petitioners will only invoke the 'unreasonable application' clause." *See id.* at 5. Moreover, counsel for petitioner explain that "Jamal's legal analysis presented in the two previous Memoranda filed with the Court do not hinge on" a construction of the statute which did not distinguish between the "contrary to" and the "unreasonable application" clauses. *See id.* at 2 n.2.

Nonetheless, because of the nature of this case and because is is not clear that petitioner can waive review under the latter clause contained within the statutory subsection, the court will consider relief pursuant to both the "contrary to" and "unreasonable application of" clauses of § 2254(d)(1).

197 (citing *Matteo*). The court of appeals also held that the appropriate question under the "unreasonable application clause" is "whether the state court's application of Supreme Court precedent was objectively unreasonable." *Matteo*, 171 F.3d at 889-90; *see also Werts*, 228 F.3d at 197.

In *Terry Williams*, as indicated above, the Supreme Court held that the "contrary to" and "unreasonable application of" clauses should be considered as having independent meaning, *see Terry Williams*, 529 U.S. at 405-06, and the Third Circuit has affirmed that the standard articulated in *Matteo* is in accord with this construction of § 2254(d)(1). *See Werts*, 228 F.3d at 197. Accordingly, if the habeas court "determine[s] that the state court decision is not 'contrary to' the applicable Supreme Court precedent, then we are required to advance to the second step in the analysis--whether the state court decision was based on an 'unreasonable application of' Supreme Court precedent." *See Werts*, 228 F.3d at 197 (citing *Matteo*, 171 F.3d at 888). Furthermore, "[t]he federal habeas court should not grant the petition unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." *Matteo*, 171 F.3d at 890. In making this determination, however, the habeas court may not "grant the writ merely because it disagrees with the state court's decision, or because left to its own devices, it would have reached a different result." *Id.* at 889 (internal quotations and citations omitted).

3. § 2254(d)(2): A Decision "Based on an Unreasonable Determination of the Facts in Light of the Evidence Presented"

By its terms, § 2254(d)(2) permits a federal court to grant an application for a writ of habeas corpus where the state court's decision was based on an "unreasonable determination of

the facts in light of the evidence presented in the State court proceedings." § 2254(d)(2). Neither the Supreme Court nor the Third Circuit has yet needed to explicate the scope of this provision. In the absence of any authority to the contrary, and in light of both the plain meaning of the statutory terms and the case law to date, I conclude that § 2254(d)(2) requires a review of the record to determine whether, "in light of the evidence presented" the state court unreasonably determined the facts. First, the terms of the section limit an inquiry into the reasonableness of the factual determination to "the evidence presented." The plain meaning of the terms suggests that a federal habeas court confine its § 2254(d)(2) review to an analysis of evidence in the record.

Second, federal courts applying § 2254(d)(2) have reviewed the state court record to assess the reasonableness of the state court's factual determinations. *See, e.g.*, *Campbell*, 209 F.3d at 288-89 (finding relief unwarranted under § 2254(d)(2) where testimony was conflicting and state court made credibility determination); *Bryson v. Ward*, 187 F.3d 1193, 1204 (10th Cir. 1999) (denying writ under § 2254(d)(2) because "the record does not contradict the trial court's assessment" of a factual issue).

Finally, my determination is informed by section 2254(e)(1) which requires federal courts to apply a presumption of correctness to factual determinations made by the state court. *See* 28 U.S.C. § 2254(e)(1). Indeed, the Third Circuit recently stressed that a habeas court "must afford state courts' factual findings a presumption of correctness, which the petitioner can overcome only by clear and convincing evidence." *Duncan v. Morton*, 256 F.3d 189, 196 (3d Cir. 2001) (citing 28 U.S.C. § 2254(e)(1)). This presumption applies to the factual determinations of both state trial and appellate courts. *See id.* (citation omitted). Furthermore, a finding that is well-

supported and subject to the presumption of correctness is not unreasonable. *See id.* at 198.

C. Granting An Evidentiary Hearing

A federal evidentiary hearing is intended to ensure that a petitioner has a full and fair opportunity to have the factual basis of his claim considered. *See Townsend v. Sain*, 372 U.S. 293, 312 (1963). The enactment of the AEDPA, however, served to limit the availability of evidentiary hearings on federal habeas review. *See generally Campbell v. Vaughn*, 209 F.3d 280, 286 (3d Cir. 2000). As amended, § 2254(e) provides:

> (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 fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e) (1994 & Supp. 2000).

The first recognizable limitation is that AEDPA no longer mandates an evidentiary hearing. *See Campbell*, 209 F.3d at 287 (citing *Cardwell v. Greene*, 152 F.3d 331, 338 (4th Cir.

1998) and noting that while § 2254(e)(2) does not bar an evidentiary hearing where the state is at fault for an incomplete state record, that does not prove petitioner's entitlement thereto); *Murphy v. Johnson*, 205 F.3d 809, 815 (5th Cir. 2000) (grant of evidentiary hearing when not barred by § 2254(e)(2) is in district court's discretion, subject to review for abuse). Instead, federal courts have discretion in deciding whether to grant a hearing. *See generally Campbell*, 209 F.3d at 286-87.

Under § 2254(e)(2), the federal habeas court must "ask first whether the factual basis was indeed developed in state court, a question susceptible, in the normal course, of a simple yes or no answer." *Michael Williams*, 529 U.S. at 431. If the factual basis was developed, the federal habeas court must apply the presumption of correctness codified in § 2254(e)(1) which petitioner can rebut only by a showing of clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *see also generally Michael Williams,* 529 U.S. at 434; *Duncan*, 2001 WL 732014, at *6.

If the factual basis was not developed in state court, the federal court must determine whether the petitioner failed to develop the factual basis of his claim. *See* 28 U.S.C. § 2254(e)(2). The Supreme Court has reasoned that "[i]n its customary and preferred sense, 'fail' connotes some omission, fault, or negligence on the part of the person who has failed to do something." *Williams*, 529 U.S. at 431. Therefore, "[u]nder the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Id.* at 432. To determine whether petitioner failed to develop the state court record, "the question is not whether the facts could have been discovered but instead whether the petitioner was diligent in his efforts." *Id.* at 435. "Diligence for purposes of the opening clause [of § 2254(e)(2)] depends

upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Id.* At a minimum, diligence will require that the petitioner "seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 437. Additionally, petitioner bears the burden of persuasion on the question of diligence. *See id.* at 440.

If the district court determines that petitioner failed to develop the record in state court, an evidentiary hearing is barred unless petitioner surmounts the considerable hurdles of § 2254(e)(2)(A) and (B). That is, petitioner must show either (1) that his claim relies on a new rule of constitutional law that was previously unavailable and made retroactive to cases on collateral review by the Supreme Court; or (2) an instance where the facts could not have been discovered through the exercise of diligence, *see* 28 U.S.C. § 2254(e)(2)(A)(i) & (ii), plus a "convincing claim of innocence." *Michael Williams*, 529 U.S. at 435 (citing 28 U.S.C. § 2254(e)(2)(B)).

If the federal habeas court determines that petitioner is not at fault for the incomplete state record, the AEDPA permits the court, in its discretion, to grant a federal evidentiary hearing. *See Michael Williams,* 529 U.S. at 437; *Campbell*, 209 F.3d at 286-87. The Supreme Court has observed that "comity is not served by saying a prisoner 'has failed to develop the factual basis of a claim' where he was unable to develop his claim in state court despite diligent effort. In that circumstance, an evidentiary hearing is not barred by § 2254(e)(2)." *Michael Williams*, 529 U.S. at 437.

The Third Circuit has made clear that "even if a new evidentiary hearing is permitted under AEDPA--when it is solely the state's fault that the habeas factual record is incomplete--AEDPA, unlike *Townsend* and *Keeney* [*v. Tamayo-Reyes*, 504 U.S. 1 (1992)], does not require

that such a hearing be held." *Id*. at 287. In exercising its discretion, a district court should "focus on whether a new evidentiary hearing would be meaningful, in that a new hearing would have the potential to advance the petitioner's claim." *Id*. at 287; *see also Murphy*, 205 F.3d at 815 (holding that a district court abuses its discretion only when "the state did not provide [petitioner] with a full and fair hearing and [the court of appeals] is convinced that if proven true, his allegations would entitle him to relief"); *Cardwell*, 152 F.3d at 338 ("An evidentiary hearing is permitted only when the petitioner 'alleges additional facts that, if true, would entitle him to relief.'" (quoting *Beaver v. Thompson*, 93 F.3d 1186, 1190 (4th Cir. 1996))), *overruled on other grounds by Bell v. Jarvis*, 236 F.3d 149 (4th Cir. 2000).

D. Discovery in Litigating a Writ of Habeas Corpus

In a habeas proceeding, "[a] party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." Rule 6(a) Foll. § 2254. That is, unlike other federal civil litigants, a habeas petitioner must show "good cause" in order to conduct discovery. A showing of good cause is made "[w]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)); *see also Payne v. Bell*, 89 F. Supp.2d 967, 970 (W.D. Tenn. 2000) ("Petitioner need not show that the additional discovery would definitely lead to relief. Rather, he need only show good cause that the evidence sought would lead to relevant evidence regarding his petition."). In the Third Circuit, good cause is established "[i]f a petitioner can point to specific evidence that might be discovered that would

support a constitutional claim." *Marshall v. Hendricks*, 103 F. Supp.2d 749, 760 (D.N.J. 2000) (citing *Deputy v. Taylor*, 19 F.3d 1485, 1493 (3d Cir. 1994)). Central to this standard is the requirement that the discovery sought relate to a constitutional claim raised in the petition for habeas relief. *See Bracy*, 520 U.S. at 904 (stating that court must identify the essential elements of the constitutional claim before determining wither petitioner is entitled to discovery); *Payne v. Bell*, 89 F. Supp.2d 967, 971 (W.D. Tenn 2000) (noting that each request for discovery must be related to a claim raised in the petition).

Nevertheless, the enactment of AEDPA served to limit the availability of discovery to a federal habeas petitioner in many respects. Important here is § 2254(e)(2) which precludes a district court from hearing and considering new factual evidence not developed in state court if petitioner was at fault for the incomplete factual basis of the claim in the state court record. As stated, petitioner may overcome this bar only if he surmounts the considerable hurdles of § 2254(e)(2)(A) and (B). That is, petitioner must show either (1) that his claim relies on a new rule of constitutional law that was previously unavailable and made retroactive to cases on collateral review by the Supreme Court; or (2) an instance where the facts could not have been discovered through the exercise of diligence, *see* 28 U.S.C. § 2254(e)(2)(A)(i) & (ii), plus a "convincing claim of innocence." *Michael Williams*, 529 U.S. at 435 (citing 28 U.S.C. § 2254(e)(2)(B)). It follows that if petitioner seeks discovery regarding new evidence to support the merits of a claim, under AEDPA standards, petitioner cannot establish good cause where he fails to demonstrate that he is entitled to a hearing at which the discovered evidence may be admitted. *See Cherrix v. Braxton*, 131 F. Supp.2d 756, 776 (E.D. Va. 2000); *Charles v. Baldwin*, No. CV-97-380-ST,

1999 WL 694716, at *1-2 (D. Or. Aug. 2, 1999).[11]

With this statutory standard of review in mind, I will turn to petitioner's claims.

III. DISCUSSION

Petitioner alleges that numerous aspects of his trial, penalty hearing and appeal violated the United States Constitution. In addition, petitioner asserts that many of the PCRA court's determinations were based upon factual findings that are unreasonable in light of the evidence presented. Finally, petitioner requests an evidentiary hearing and, at times, discovery pertaining to certain of his claims. I will consider each of petitioner's challenges seriatim.[12]

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[11] A habeas petitioner perhaps may seek discovery to locate evidence to establish that he can overcome a procedural bar. Such a request for discovery, however, would not implicate § 2254(e)(2) and good cause should then be established pursuant to Rule 6. *See Charles v. Baldwin*, 1999 WL 694716, at *2; *see also generally Payne v. Bell*, 89 F. Supp.2d at 970 (reasoning that the standard for granting an evidentiary hearing should not apply to requests for discovery where an evidentiary hearing is not the ultimate goal of the discovery motion).

[12] Petitioner did not file his petition for habeas relief and memorandum in support thereof together. In fact, petitioner also filed separate papers challenging the reasonableness of the state court's finding of facts and requesting an evidentiary hearing and/or discovery concerning certain claims. As a result, the whole of petitioner's claims were briefed in a less-than-organized fashion, leaving the court with massive amounts of paper setting forth numerous arguments among several filings. In order to simplify the court's memorandum, it will be organized as follows. Subsection A under each claim will summarize the factual assertions as set forth in the petition for relief and upon which petitioner relies for each claim. Subsection B will summarize the legal authority under which petitioner asserts each claim and the Commonwealth's response, as set forth in petitioner's memorandum of law in support of his habeas petition and the Commonwealth's response thereto. Subsections C and D will analyze each claim within the confines of AEDPA (although petitioner never analyzes a single claim under the framework established by AEDPA). Finally, subsections E and F will address, where applicable, petitioner's evidentiary hearing and discovery requests, respectively.

III.1 STATE INDUCED FALSE WITNESS TESTIMONY IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE 5TH, 8TH, AND 14TH AMENDMENTS.

A. Allegations in Support of Claim

Petitioner claims that Cynthia White received favors from the government in exchange for false testimony. Indeed, he asserts that two witnesses have stated that White was not even at the scene of the shooting. In further support of this claim, it is alleged that: (1) the police said there were no such favors; (2) the police precluded investigation of White by having plainclothes officers interfere with any efforts to do so; (3) the police directed any officer who subsequently arrested White to bring her to the homicide division; and (4) the trial judge barred witness testimony regarding White's bias. *See* P1 ¶¶ 60-77.

Petitioner also avers that Robert Chobert changed his testimony at trial to favor the prosecution. Petitioner asserts that in his first statements to police, Chobert described the shooter as being larger than petitioner, and stated that the shooter fled the scene. As part of this claim, it is further alleged that: (1) petitioner's trial counsel was barred from impeaching Chobert with evidence of prior bad acts and convictions; (2) the prosecution failed to advise petitioner's counsel that Chobert had been promised assistance and leniency concerning his driving a taxi with a suspended license; and (3) the prosecutor personally vouched for Chobert's credibility in summation. *See id.* ¶¶ 58-95.

B. Violation of Federal Constitution, Law or Treaty

Petitioner contends that his right to a fair and reliable determination of guilt was violated, for which he offers three principal arguments. First, he argues that respondents struck deals with White and Chobert in exchange for false testimony, and that the deals never were disclosed. *See*

P14 at 36-37 (citing *United States v. Giglio*, 405 U.S. 150, 154 (1972); *Smith v. Kemp*, 715 F.2d 1459, 1467 (11th Cir. 1983); *Ouimette v. Moran*, 942 F.2d 1, 11 (1st Cir. 1991); *Reutter v. Solem*, 888 F.2d 578 (8th Cir. 1989); *United States v. Williams*, 927 F.2d 95 (2d Cir. 1991); *United States v. Burnside*, 824 F. Supp. 1215 (N.D. Ill. 1993); *United States v. Moreno-Rodriguez*, 744 F. Supp. 1040 (D. Kan. 1990); *United States v. Abadie*, 879 F.2d 1260 (5th Cir. 1989); *United States v. O'Neill*, 767 F.2d 780 (11th Cir. 1985); *United States v. Andrews*, 824 F. Supp. 1273 (N.D. Ill. 1993); *United States v. Hill*, 799 F. Supp. 86 (D. Kan. 1992); *United States v. King*, 121 F.R.D. 277 (E.D.N.C. 1988)).[13]

Second, petitioner contends that at trial, he was denied meaningful cross-examination of Chobert concerning Chobert's probationary status and resultant possible bias. *See* P14 at 38 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986); *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974); *Olden v. Kentucky*, 488 U.S. 227, 230 (1988); *Crane v. Kentucky*, 476 U.S. 683, 690

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[13]Petitioner offers numerous citations in support of many of his claims, often times to decisions rendered by courts of appeals and district courts within other circuits. This example is typical. Petitioner, however, rarely applies the law of these cases to his claim. More important, petitioner never analyzes his claims within the context of AEDPA.

At any rate, a writ of habeas corpus will issue under AEDPA only where the state court decision is "contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). This does not mean, however, that "federal habeas courts are precluded from considering the decisions of the inferior federal courts when evaluating whether the state court's application of the law was reasonable." *Matteo*, 171 F.3d at 890 (citing *O'Brien v. Dubois*, 145 F.3d 16, 25 (1st Cir. 1998)). Indeed, the decisions of inferior federal courts may serve as "helpful amplifications of Supreme Court precedent." *Id*. Accordingly, under the doctrine of *stare decisis*, decisions from the Third Circuit continue to be binding upon this court. *See generally* Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual*, 51 Vand. L. Rev. 103, 131-36 (1998). Furthermore, decisions from courts of appeals and district courts in other circuits will be of limited value, especially where the Third Circuit has already elaborated on the relevant Supreme Court precedent. Therefore, the court will address primarily the Supreme Court and Third Circuit decisions raised by each party (Although respondents also include unnecessary citations, they do so less often than petitioner).

(1986)).

Third, petitioner maintains that the prosecutor "exploited the suppression of the *Brady* material" when he improperly vouched for Chobert in closing argument. *See* P14 at 38-9 (citing no Supreme Court or Third Circuit opinions).

Respondents have three answers. First, they state that there is no evidence of any agreement between either witness and the prosecution. As such, there was nothing for the Commonwealth to disclose. *See* Commw.'s Mem. (Doc. No. 23) [hereafter "R23"] at 48-49 (regarding Chobert); R23 at 50-53 (regarding White). Second, respondents argue that at any rate, any conversation between Chobert and the prosecutor about Chobert's driver's license does not rise to the level of material evidence as required under *Brady*. *See* R23 at 49 (citing *Wood v. Bartholomew*, 516 U.S. 1 (1995); *United States v. Agurs*, 427 U.S. 97, 112-114 (1976); *Giglio v. United States*, 405 U.S. 150 (1972)). Third, respondents suggest that the state court fact-findings, turning on a determination concerning the credibility of Veronica Jones, are presumed to be correct and have not been rebutted by clear and convincing evidence. *See* R23 at 52-53 (citing *Miller v. Fenton*, 474 U.S. 104, 114 (1985); *Marshall v. Lonberger*, 459 U.S. 422 (1983)).

C. "Contrary to" or an "Unreasonable Application of" Clearly Established Federal Law

As with each claim in the petition, petitioner does not specify the legal decision of the state court that was opposite to that reached by the United States Supreme Court on a question of law, or that was at odds with that of the Supreme Court in a case with materially indistinguishable facts. *See Terry Williams*, 529 U.S. 412-13. Nor does petitioner attempt to show that the state court's denial of this claim constituted an unreasonable application of clearly

established federal law. *See id.* at 413. In short, after setting forth the standard for review under AEDPA, petitioner neither revisits nor applies it to any individual claim. Indeed, on several occasions, petitioner fails even to cite appropriate Supreme Court or even Third Circuit precedent in support of his individual federal constitutional claims. Rather, petitioner often cites numerous decisions, standards and tests applicable in other federal circuits.[14] Nonetheless, the court will inquire into the legal theories presented under each of petitioner's claims.

1. Failure to Disclose Inducements Offered to Witnesses Cynthia White and Robert Chobert

Petitioner submits that the eyewitness testimony of White and Chobert was manipulated by law enforcement officials and that this fact never was disclosed to the defense. See P14 at 36. Regarding White, petitioner contends that her testimony, which allegedly conflicted with the physical evidence presented at trial, came about only after White was given favors from law enforcement, *i.e.*, she was permitted to prostitute herself without interference from police. *See id.* Furthermore, petitioner asserts that the testimony of Veronica Jones, which allegedly confirmed the extension of such favors to White, was unjustifiably stricken at trial.[15]

Regarding Chobert, petitioner argues that the prosecution failed to inform petitioner that Chobert had been offered "assurances that he would be allowed to continue to earn his livelihood as a cab driver" despite operating a cab while his license was suspended. *See* P14 at 36.

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[14] *See, e.g.,* P14 at 61-68 (in support of claim number fourteen, citing few Supreme Court cases, one Third Circuit opinion, and over ten opinions from other circuits); *see also supra* note 13 and accompanying text.

[15] As with many of petitioner's contentions, this allegation is also raised as a separate claim. *See infra* claim 10. As such, it will be addressed there.

Elsewhere, petitioner appears to object that the prosecution failed to disclose that Chobert requested assistance from the prosecutor regarding a suspended license. *See* P1 at 27.

The claim was fairly presented to the state courts, and thus the exhaustion requirement is satisfied. *See* Amend. St. PCRA Pet. ¶¶ 88, 91, 97, 104; St. PCRA Mem. at 51, 55-60, 64-66, 72-75; St. PCRA Appeal Mem. at 39-45. Moreover, it was adjudicated on the merits by the state courts. *See PCRA Op. F.F.* ¶¶ 272-78 & *C.L.* ¶¶ 9-11 & 20, 42; *PCRA Appeal Op.* at 94-100. Therefore, it is subject to the strictures of § 2254(d).[16]

In *Brady v. Maryland*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). "There are three components of a true *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). Furthermore, "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." *United States v. Giglio*, 405 U.S. 150, 154 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

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[16]Petitioner bears the burden of demonstrating that each claim has been exhausted and that no additional state remedies exist for those claims. *See Werts*, 228 F.3d at 192; *Lambert*, 134 F.3d at 513. Other than simply stating that his claims have been exhausted, petitioner does not demonstrate with a single citation to the state court record that he has met this burden. All references to the state court record regarding exhaustion are a result of the court's own review of the state court record.

The prejudice requirement–whether there exists a "reasonable probability that the suppressed evidence would have produced a different verdict," *Stricker*, 527 U.S. at 281–also is expressed in terms of the *Brady* materiality inquiry. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (evidence is material under *Brady* if "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."). "Although courts have used different terminologies to define 'materiality,' a majority of [the Supreme] Court has agreed, '[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985) and citing *id.* at 685 (White, J., concurring)). Moreover, "[a] 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682.[17] Thus, "[t]he question is not whether the defendant would more likely

[17]In 1976, the Supreme Court distinguished three situations where a *Brady* claim might arise: first, where undisclosed evidence reveals the use of perjured testimony, and the prosecutor either knew or should have known of the use of such testimony; second, where the government fails to comply with a pretrial request for specific exculpatory evidence; and third, where the government fails to volunteer exculpatory evidence that was requested only generally, or not at all. *See United States v. Agurs*, 427 U.S. 97, 103-07 (1976). The Court explained that the standard of materiality depended upon the "character of the evidence" suppressed, and the scope of an accused's pre-trial inquiry. *Agurs*, 427 U.S. at 110 & 103-13. Under *Agurs*, where the accused made no request for favorable evidence or made only a general request therefor, suppressed evidence was material if, "in the context of the entire record," "the omitted evidence creates a reasonable doubt [regarding guilt] that did not otherwise exist." *Agurs*, 427 U.S. at 112.

In 1985, the Supreme Court refined the *Agurs* standard when it held that one standard of materiality applied to all claims of suppressed favorable evidence. *See Bagley*, 473 U.S. at 682; *id.* at 685 (White, J., concurring) (agreeing that one materiality "standard is 'sufficiently flexible' to cover all instances of prosecutorial failure to disclose evidence favorable to the accused"). The Court then enunciated the proper standard: "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682; *see also id.* at 685 (White, J., concurring). Significantly, the Court concurred with the analysis in *Agurs* that *Brady*'s materiality requirement implied "a

than not have received a different verdict with the evidence, but whether in its absence he received a fair trial." *Id.* at 434.

The PCRA court properly identified *Brady* as controlling precedent. *See PCRA Op. C.L.* ¶ 9. In light of its factual determinations that no deal existed between the prosecution and Chobert, *see id. F.F.* ¶¶ 272-74, 276 & 278, and that no deal existed between the prosecution and White, *see id. F.F.* ¶ 14 n.4, the PCRA court concluded that the prosecution had not "withheld any materially favorable evidence or knowingly used false evidence." *See id. C.L.* ¶ 11. In its decision denying petitioner's PRCA appeal, the Supreme Court of Pennsylvania also looked to *Brady* as the controlling source of law. *See PCRA Appeal Op.* at 94. Thereafter, the court found that "no promise was offered by the Commonwealth to Mr. Chobert," and found also that there were no deals or favors offered to White in exchange for her testimony. *See id.* at 95-97.

I conclude that the decision of the state courts was neither contrary to nor an unreasonable application of *Brady* and its progeny. The state courts found as fact that no deals existed between the prosecution and White or Chobert. As discussed *infra*, I conclude that these findings are not unreasonable. Therefore, because it is axiomatic that a *Brady* claim cannot survive where a defendant fails to demonstrate that evidence allegedly withheld by the prosecution even existed in the first instance, petitioner's claim will be denied.

2. Denial of Right to Confront Witness Chobert with Evidence of Probationary Status

Petitioner's next sub-claim alleges that he was denied the opportunity to cross examine

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concern that the suppressed evidence might have affected the outcome of the trial." *Id.* at 678.

Chobert about his probationary status in an effort to reveal his possible bias. Specifically, petitioner notes that he offered a previous arson conviction as a means of impeaching Chobert, for which purpose it was excluded. *See* P1 ¶ 87; P18 at 58. Although petitioner characterizes the value of the evidence as being proof of probationary status and therefore bias, *see* P14 at 30 n.37; *id.* at 38, he admits that trial counsel "did not seek to introduce the fact that Chobert was on probation as evidence of possible bias or motive to lie." *See* P18 at 58. Petitioner also alleges that the trial court improperly excluded evidence that Chobert had two prior DWI convictions, which petitioner argues were relevant to the possibility that Chobert was drunk at the time of the shooting. *See* P1 at 89; P14 at 28 n.35. He does not identify the constitutional error.

Respondents argue that Chobert's arson conviction properly was excluded on the grounds offered (*crimen falsi*). Moreover, respondents assert that Chobert's conviction was not relevant under *Davis v. Alaska*, 415 U.S. 308 (1974) as proving a probationer's bias because Chobert was not implicated in the same crime as petitioner, nor could the prosecutor have revoked Chobert's probation based on his complicity in the crime. *See* R24 at 25. Respondents further argue that petitioner's failure to ask Chobert about his probation at the PCRA hearing indicates that petitioner has failed to prove bias. *See* R24 at 25.

This claim was fairly presented to the state courts. *See* Amend. St. PCRA Pet. ¶¶ 93, 97; St. PCRA Mem. at 67, 74-5; St. PCRA Appeal Mem. at 403. Therefore, the exhaustion requirement is satisfied. Further, both the PCRA court and the state supreme court rejected the claim on the merits. *See PCRA Op. F.F.* ¶ 277 & *C.L.* ¶¶ 43-48; *PCRA Appeal Op.* at 95 & n.20. Thus, consideration of the claim is subject to the strictures of § 2254(d).

In Jamal's state post-conviction proceedings, the Pennsylvania courts found that trial

counsel never sought to impeach Chobert as biased, due to favor or fear, in light of his probation. *See PCRA Op. C.L.* ¶¶ 43-45; PCRA App. Op. at 95 n.20. In reliance on that finding, the state courts concluded that petitioner was not deprived of any constitutional right. *See PCRA Op. C.L.* ¶¶ 43-48; PCRA App. Op. at 95 n.20.

Petitioner argues that "the trial court blocked defense counsel from exploring Chobert's bias by questioning him about his continued probationary status." *See* P14 at 38. The question here is whether the reason why Chobert was not so questioned was that the court precluded this line of questioning.[18] The state courts concluded, and the record supports the conclusion, that trial counsel did not seek to impeach Chobert on the ground of bias as a result of probation. *See PCRA Op. C.L.* ¶¶ 43-45; PCRA App. Op. at 95 n.20. Having not been presented with bias as a ground for admissibility, the state courts did not "block" that line of inquiry. Moreover, no constitutional error is suggested in the trial court's failure to raise, *sua sponte*, that basis for admission. As such, the cases on which petitioner relies are inapposite, for in each cross-examination was sought to demonstrate bias and the lower court had ruled that the cross-examination was impermissible. *See Olden*, 488 U.S. at 229-30 (explaining that the trial court denied cross-examination on cohabitation of victim and witness even though "[i]n order to demonstrate [the witness'] motive to lie, it was crucial, [defendant] contended"); *Van Arsdall*, 475 U.S. at 676 & 679 (finding that "the trial court prohibited all inquiry into the possibility that [the witness] would be biased as a result of the State's dismissal of his pending public drunkenness charge" which the witness "acknowledged . . . had been dropped in exchange for his

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[18] In Claim 6, petitioner presents the argument that trial counsel was constitutionally ineffective for failing to try to impeach Chobert on the ground of bias. *See* P14 at 44. That is a separate question, and is addressed under that claim.

promise to speak to the prosecutor" about Van Arsdall's case); *Crane*, 476 U.S. at 685-86 (explaining that the trial court blocked examination on circumstances of confession even though "[d]efense counsel responded that she . . . was seeking only to demonstrate the circumstances of the confession 'cas[t] doubt on its validity and its credibility'") (alteration in original); *Davis*, 415 U.S. at 311 (explaining that defense counsel "made it clear that he would . . . seek to show--or at least argue--that [the witness] acted out of fear or concern of possible jeopardy to his probation," which the state court prevented). Nor does any case stand for the proposition that the trial court must on its own suggest grounds of admission, let alone that it is constitutionally required to do so. The state courts in this case concluded that the trial court did not prevent petitioner from engaging in such a cross-examination. That decision is not contrary to, or an unreasonable application of, clearly established law.

Although not included in his legal support for Claim 1, petitioner suggests that the state court erred in denying cross-examination about "Chobert's two convictions for driving while intoxicated, despite his earning his livelihood driving a cab." *See* P1 ¶ 89; *see also* P14 at 28 n.35 (suggesting that convictions were relevant to the possibility that Chobert was drunk at the time of the shooting). This characterization of the record is materially inaccurate. At a trial sidebar, trial counsel explained that he wanted to see if Chobert "has some bias for the officers." *See* 6/19/82 Tr. at 224-25. When it was suggested that he was trying to expose Chobert's criminal record, trial counsel responded "Oh, no." *See id.* at 225. The trial court explained its concern that defense counsel was "going to get into the fact that they were the [officers] that arrested him for intoxicated driving." *See id.* Trial counsel assured the court that he was "not going to ask him that." *See id.* Trial counsel expressly disavowed his intent to question Chobert

about his convictions for driving while intoxicated. The state court found that the line of questioning never was suggested. *See PCRA Op. C.L.* ¶¶ 43 & 46. That decision is not contrary to or an unreasonable application of clearly established federal law.

3. Prosecutorial Vouching for Chobert at Closing Argument

Petitioner's third argument is that the prosecutor "exploited the suppression of *Brady* material regarding Chobert" by vouching for Chobert's credibility during his closing argument in the guilt-phase. *See* P14 at 38-39. This argument will be addressed under Claim 14, which presents the factual and legal challenges to that closing argument.

D. "Unreasonable Determination of Facts" Analysis

1. Determinations of Facts Regarding White

Petitioner argues that the PCRA court implicitly credited the testimony of Cynthia White. I understand petitioner specifically to be contending that the PCRA court credited the trial testimony of White that she had no deal with the prosecution whereby she would receive favors in exchange for favorable testimony. Of course, White's credibility was a question for the jury in 1982. At trial, White was impeached extensively by exhaustive questioning about prosecutorial inducements, circumstances permitting an inference of bias, her history of untruthfulness, her prior criminal convictions, and the consistency of her prior statements to police. *See, e.g.*, 6/21/82 Tr. at 4.81-4.84, 4.138-4.141, 4.169-4.171 (questioning existence of deal); 6/22/82 Tr. at 5.81, 5.88 (same); 6/21/82 Tr. at 4.171-4.175 (regarding contact with homicide); 6/22/82 Tr. at 5.25-5.81 (regarding bench warrants, prosecution, and favors to friend); 6/21/82 Tr. at 4.80-4.81 (regarding false information to police); 6/22/82 Tr. at 5.114-5.222 (impeaching based on prior

inconsistent statements as to shooter height, time, distance, visibility of gun).

Nonetheless, the jury returned a verdict of guilty on both counts, for which two reasonable explanations exist. First, the jury believed White's trial testimony, perhaps attributing inconsistencies to the fact that White was "not very bright." *Cf.* 6/21/82 Tr. at 4.185 (the trial court suggesting to counsel a simpler line of questioning because White "is not very bright"). Second, the jury agreed with the prosecutor that, in its essential elements, White's account never varied. *See* 6/22/82 Tr. at 5.170-5.178 (noting that White always asserted that she had seen petitioner run across the street, shoot Faulkner, Faulkner turn, petitioner shoot Faulkner again, and then collapse on the curb). Although each line of impeachment could permit an inference that White was being untruthful, I cannot say that either the jury or the judge at the PCRA hearing–each of whom was able to observe White's demeanor on the witness stand for over two days– was unreasonable in credited her trial testimony, including her statement that her testimony was not offered due to fear of, or favor from, the Philadelphia District Attorney.

Petitioner identifies five grounds in particular which demonstrate that the decision to credit White's testimony was unreasonable. First, he argues that her account of the shooting conflicted with the physical evidence because Faulkner could not have shot petitioner as Faulkner fell. *See* P18 at 7. Although Dr. Hayes testified at the PCRA hearing that the physical evidence would contradict a finding that Faulkner shot petitioner from below him, Dr. Hayes also could not conclude that a bent petitioner could not have been shot by a falling Faulkner. *See PCRA Op. F.F.* ¶¶ 188, 190-191; 8/4/95 Tr. at 77-80. Moreover, Dr. Hayes had not reviewed White's testimony and thus could not say that her characterization of events was inconsistent

with the medical evidence. *See PCRA Op. F.F.* ¶¶ 189-191; 8/4/95 Tr. at 75, 78-79, 114-15.[19] The state court therefore did not unreasonably determine as a fact that Faulkner could have shot petitioner as described by White.

Second, petitioner argues that the state court improperly discounted the testimony given by private investigator Robert Greer regarding the plainclothes police protection Greer assumed White was receiving. *See* P18 at 9. However, the record reveals that Greer gathered no information about the alleged undercover officers, had an ambiguous basis for identifying any undercover officer, encountered no police interference with other witnesses, and could say only that two individuals in a red car "appeared to be police officers" protecting White. *See, e.g.,* 8/1/95 Tr. at 202-05 (revealing lack of identification, lack of investigation, and concession that the car occupants "could have been anything else"); *id.* at 187 (saying never worked undercover); *id.* at 231-32 (explaining that he found other witnesses and no complaints regarding police treatment); *id.* at 188 (saying that he "assumed that they were police officers simply because they never left the scene"). Moreover, the record does not demonstrate that White was able to prostitute herself despite the presence of the car, or conversely that White conducted no business

[19] This court has reviewed the entire record and finds petitioner's contention disingenuous. In petitioner's brief to the state supreme court during PCRA proceedings, petitioner sought to support Singletary's testimony by saying that "Dr. Hayes testified that [it] . . . was possible [that Jamal could have been 'shot from the ground' by Faulkner] if Jamal was bending forward when he approached the fallen officer." *See* PCRA Appeal Br. at 53 n.70. Dr. Hayes testified to only two possibilities. First, "[petitioner] was slightly bent and the shooter fired horizontally." *See* 8/4/95 Tr. at 76. Second, a standing shooter firing downwards towards Mr. Jamal, who was in the lower position." *See id.* at 77. Dr. Hayes was not asked about Singletary's account, nor did he testify that he had reviewed it. It is unreasonable and frivolous for the same counsel in the same case representing the same petitioner and seeking the same relief to suggest first that Hayes' testimony permits a finding that the shooter shot up toward Jamal and then later to argue, without acknowledging the prior statement, a shot directed upwards is impossible.

because of the car. Thus, on review of the full record, I cannot conclude that the state court judge, able to observe the demeanor of the witness, was unreasonable in his factual determination that Greer's account of the "little red car" being occupied by two persons Greer assumed to be police officers was not credible and that there was no evidence of a police deal with White.

Third, petitioner argues that the state court improperly relied on the exclusion of Jones's trial testimony in concluding that there was no deal with White. *See* P18 at 9. The record rebuts petitioner's contention in two separate respects. Initially, the proffered testimony from Jones--that police offered her a deal for favorable testimony--was sought for the purpose of impeaching Jones herself on the ground of bias. *See* 6/29/82 Tr. at 142. It was not offered to impeach White. Consequently, there is no error in excluding it for the purpose for which it was offered. Moreover, after an extensive remand hearing, the state court did not find Jones's account of coerced testimony to be credible. *See PCRA Jones Op.* at 14. As explained later, that determination was supported by the record.

Fourth, petitioner argues that the PCRA court failed to recognized that White did not see the undisputed transfer of Arnold Howard's license application from the car to Faulkner. *See* P18 at 10. Of course, no evidence of the transfer exists, much less is such evidence undisputed. *See generally infra* III.2. Further, White never was asked about it, and the trial record does not suggest that it must have been known by any witness. Finally, even accepting as true petitioner's assertion, White's failure to see the transfer of the application would not render it unreasonable to conclude that there was no deal between White and the prosecution. For all of these reasons, the PCRA court's conclusion was not unreasonable.

Lastly, petitioner argues that it was unreasonable for the PCRA court to credit White's

account because she failed to see the undisputed attack on Cook. *See* P18 at 11. During trial, White was cross-examined as to whether she could account for Cook's injuries. *See* 6/22/82 Tr. at 5.114-5.121, 5.138-5.139. She explained that she stopped looking at Faulkner and Cook when she noticed petitioner running from across the street. *See id.* at 5.118, 5.138-5.139. Her explanation was not unreasonable, and I do not find that the PCRA court, which observed the demeanor of the witness, unreasonably believed her explanation.

Therefore, I conclude that petitioner has failed to demonstrate that the state court was unreasonable in determining that there was no inducement or coercion of White's testimony.

2. Determination of Facts Regarding Robert Chobert

Petitioner argues that the PCRA court wrongly found that Chobert had no agreement with the prosecution. I disagree. In general, I note that the record of testimony, both at trial and at the PCRA hearing, is sufficient to permit a reasonable factual determination that Chobert saw petitioner shoot Faulkner and did not receive improper inducements or promises from the prosecutor. Both the jury and the PCRA court were able to observe Chobert's demeanor, which is an integral part of determining credibility. Moreover, there is no evidence in the record that Chobert necessarily spoke to McGill about his license prior to his testimony, although there was a conversation sometime during the trial. There is evidence that Chobert never received any favor, in that he still did not have his license in 1995 and had been fined for not having it. There is also evidence that Chobert never expected a favor for testimony. Finally, it is clear that Chobert, as with all witnesses, offered testimony that was inconsistent in some way with that given by each other witness. In short, it was not unreasonable for the PCRA court to determine that Chobert made no deal with the prosecutor in exchange for favorable testimony. Petitioner

raises several specific bases for his motion, and I will address these in turn.

First, petitioner avers that the PCRA court improperly found no meaningful change in testimony between Chobert's crime-scene statements and his trial testimony. *See* P18 at 11-12. I note at the outset that Chobert was impeached at trial through the extensive use of his prior statements. *See* 6/19/82 Tr. at 233-261. Both the jury and the PCRA judge were in a position to evaluate not only the documentary evidence of Chobert's prior statements, but also to evaluate his demeanor. That Chobert was impeached does not necessitate a determination that the state court unreasonably credited his testimony. A review of the record also demonstrates that Chobert's statements consistently indicated that the shooter and another man moved from the shooting scene, that they were apprehended, that Chobert was positive about his identification of petitioner as the shooter, and about observations not helpful to the prosecution--namely, that he did not see a woman on the corner (White), that he did not see the gun, and that he placed events in a different location than some other witnesses. *See* 6/19/82 Tr. at 212-13, 234, 250-61, 267. These elements of Chobert's testimony strongly indicate that the PCRA court's finding that he had no cooperation agreement with the prosecution was not unreasonable.

Second, petitioner argues that the PCRA court improperly failed to account for Chobert's lack of fear in approaching Faulkner. *See* P18 at 12. First, Chobert was never questioned about his fear, and the record does not demonstrate that the state court made a determination either way with regard to fear. Further, other witnesses approached or remained at the scene of the shooting despite knowing what had transpired: Cynthia White, Veronica Jones, William Cook. Moreover, Chobert suggested that he went to see if Faulkner required assistance, a praiseworthy and not unnatural motivation. There is nothing unreasonable about the state court's factual

determination that Chobert exited his cab to see if the officer required assistance.

Third, petitioner argues that the trial court improperly barred examination regarding Chobert's probationary status. *See* P18 at 13. In fact, counsel argued that Chobert's prior conviction should be admissible as a *crimen falsi* conviction, relevant to character for truthfulness. *See* 6/19/82 Tr. at 216-223. The trial court excluded it for that purpose, which is not alleged as error. Impeachment by proof of bias due to probationary status was never raised as a ground for admission of the evidence. Moreover, the PCRA court concluded that Chobert was being truthful about the substance of his testimony. Consequently, the exclusion of testimony regarding Chobert's probationary status does not render the PCRA court's finding regarding the lack of a cooperation agreement between Chobert and the prosecution unreasonable. I note that petitioner also raises the issue of whether petitioner's trial counsel was constitutionally ineffective for failing to raise the bias argument. While this contention is fully addressed, *infra*, it presently merits three observations. One, it would not be unreasonable for counsel to refrain from such an inquiry if he feared that a jury would perceive it as a baseless attack on a witness. *Cf. Davis v. Alaska*, 415 U.S. 308, 318 (1974) (noting that where defense counsel was unable to make a record from which to argue bias, that the jury might perceive the limited cross-examination as a "baseless line of attack"). Two, petitioner does not allege that Chobert's operation of a vehicle without a license is a source of bias which should have been subject to question. Three, counsel may have feared that an impeachment inquiry would lead to the fact that Chobert was being kept in a hotel under police protection due to security concerns, which petitioner's counsel recognized as potentially prejudicial to petitioner. *See* 6/21/82 Tr. at 4.[86]

In petitioner's fourth objection to the state court's fact findings, he argues that the PCRA

court improperly blocked examination on the subject of Chobert's recantation. *See* P18 at 14. The record reflects that petitioner's direct examination of Chobert was designed to demonstrate that Chobert received a promise of assistance from the trial prosecutor. *See* 8/15/95 Tr. at 3-10. On cross-examination, respondents introduced Chobert's prior statements, to which petitioner's counsel objected as being beyond the scope of the proceedings. *See id.* at 12-13. The PCRA court sustained the objection and limited introduction of the statements to permit Chobert to identify that they were in fact his statements. *See id.* at 13-14. Petitioner later sought to impeach the accuracy of the statements. *See id.* at 25-27. The PCRA court sustained an objection to that inquiry, on the ground that they were admitted only as prior consistent statements relevant to whether a deal influenced his trial testimony. *See id.* at 27. This determination, which was not factual but rather was evidentiary, was not unreasonable.

Fifth, petitioner argues that the PCRA court unreasonably concluded that the parties spoke of the suspended license only after Chobert's trial testimony, despite Chobert's testimony that they never spoke afterward. *See* P18 at 14. Chobert testified that he did not speak to the prosecutor "after trial." *See* 8/15/95 Tr. at 20. Chobert further testified that he had only perfunctory contact with the prosecutor on the day he testified. *See id.* at 28. Finally, Chobert testified that he was not sure, but thought he spoke to the prosecutor "sometime during the trial." *See id.* at 4. Chobert testified on June 19, 1982, two days after the trial began and nearly two weeks before it ended. It does not appear that the PCRA court found as a fact that Chobert asked the prosecutor about his license after he testified, but rather that the evidence did not demonstrate that he had asked before he testified. In light of the finding that Chobert was credible and the record evidence that (1) Chobert did not expect a favor regarding his testimony; and (2) that

Chobert never did have the suspension of his license lifted and was, in fact, fined at least once for driving with a suspended license, I cannot say that the state court unreasonably found the absence of a deal, express or implied, between Chobert and McGill.

Finally, petitioner argues that the state courts unreasonably ignored the prosecutor's closing argument in reaching their conclusion as to the absence of a cooperation agreement. *See* P18 at 14. As explained later, the argument was not improper and permits no inference that Chobert and McGill reached a deal. In fact, an alternative inference would be just as reasonable: Chobert was credible and McGill knew of nothing to suggest otherwise.

3. Determination of Facts Regarding Impeachment of Chobert

Factual determinations relevant to this sub-claim pertain only to what trial counsel attempted and what the trial court permitted. The state court determined that it had not been presented with the suggestion that Jackson should be permitted to impeach Chobert as a probationer. *See PCRA Op. C.L.* ¶¶ 44-45; PCRA App. Op. at 95 n. 20. A review of the record supports that finding. *See* 6/19/82 Tr. at 216-23. No evidence in the record suggests that the question of impeachment by proof of bias due to probation was sought. Therefore, the state court determination is eminently reasonable. As explained in the foregoing section, it also is simply untrue that the state court blocked cross-examination of Chobert to prove drunkenness by prior conviction for driving while intoxicated. *See id.* at 224-25. Therefore, the court's determination that it had not been presented with the argument is not unreasonable. *See PCRA Op. C.L.* ¶¶ 43 & 46.

E. Evidentiary Hearing

Petitioner asserts that an evidentiary hearing is discretionary on this claim. *See* P27 at 1. In so doing, he implicitly concedes a developed factual basis in the state court. *See* P14 at 10-13 (explaining that an evidentiary hearing is mandatory where petitioner was deprived of "a full and fair opportunity to present the full panoply of evidence supporting" particular claims). His burden, then, is to provide clear and convincing evidence that the state court's factual determination is erroneous. He makes no attempt to so define the evidence he would muster. In fact, he disavows altogether application of § 2254(e)(1). *See* P14 at 8. Nor does he characterize his evidence as newly discovered clear and convincing proof of his innocence, as required under § 2254(e)(2). Because petitioner has failed to present any clear and convincing evidence that the state court incorrectly determined a factual issue on an incomplete record, an evidentiary hearing on this claim is not proper.

III.2 STATE SUPPRESSION OF EVIDENCE THAT THE TRUE SHOOTER FLED THE SCENE IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE 5TH, 8TH, AND 14TH AMENDMENTS.

A. Allegations in Support of Claim

Petitioner alleges that eyewitness reports of a black male fleeing the crime scene were suppressed by intimidation, threats, coaxing, and coercion. Petitioner says that testimony of the following witnesses was either coerced (and the coercion not disclosed) or that certain witnesses were suppressed. In support of these allegations, petitioner makes the following assertions:

1. Chobert renounced his initial report to the police at the scene of the shooting that he saw someone flee.

2. Veronica Jones testified at a PCRA hearing that she changed her testimony in exchange for prosecutorial leniency in an unrelated felony charge against her.

3. William Singletary originally signed a statement that the shooter was not petitioner and had fled the scene, and that Cynthia White was not present at the scene as she had testified. This statement was destroyed and, after coercion, Singletary signed a false statement, which was given to defense counsel. This false statement discouraged defense counsel from calling him as a witness.

4. Police recovered Arnold Howard's driver's license application from Faulkner's person, raising an inference that a third person was present at the scene. Howard was taken into custody and interviewed and his hands were tested for gunpowder. The presence of the document never was disclosed and a witness statement from Howard was misleading, incomplete, and forged. Howard later said that he gave his license application to Freeman, who was being held as a suspect at the same time that Howard was being interviewed.

5. Dessie Hightower, the only trial witness to have seen the fleeing man, was forced to submit to a polygraph during which he never was asked about the fleeing man. He was told that he passed, but the polygraph was suppressed.

6. Deborah Kordansky told police officers that she saw a man fleeing the shooting scene, but was deemed unavailable for trial despite defense counsel's express

desire to procure her as a witness and his notice to the court that he was unaware of how to secure her testimony. Petitioner further alleges that Kordansky's address was redacted from her statement to police, that Kordansky would not provide her address to the defense, and that petitioner was denied court assistance in securing Kordansky's presence at trial.

7. William Cook, petitioner's brother, did not testify out of fear of self-incrimination and retaliation. He offered to testify at PCRA hearings, but has fled because the court refused protection from arrest on outstanding warrants.

See P1 ¶¶ 96-160.

Finally, petitioner asserts that evidence demonstrating that officers pursued a theory of a fleeing shooter was suppressed.

B. Violation of Federal Constitution, Laws or Treaty

Petitioner argues that he was deprived of his right to a fair and reliable determination of guilt due to the coercion or suppression of seven witnesses. Petitioner characterizes this claim as a "classic instance of the State breaching its *Brady* obligations." P14 at 40. Respondents assert that the state courts properly rejected this claim on factual grounds. Respondents add that the testimony of Jones, Howard, Chobert and Kordansky was not material under *Brady*, *see* R23 at 54, 56-59, and they further contend that the testimony of Singletary, Howard, and Hightower was not credible. *See* R23 at 55-8. Finally, respondents contend that Cook could have offered testimony at the PCRA hearing, but chose not to do so. *See* R23 at 59-60.

C. "Contrary to" or "Unreasonable Application of" Clearly Established Federal Law

Petitioner identifies *Brady* as the controlling Supreme Court precedent. To reiterate,

"[t]here are three components of a true *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*, 527 U.S. at 281-82. In addition to *Brady*, petitioner identifies the following Supreme Court precedent as relevant authority.

First, petitioner alleges that coercion of witnesses violates due process. *See* P14 at 40 (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Mooney v. Holohan*, 294 U.S. 103 (1935)). However, in none of the cited cases is coercion of witness testimony discussed. Two of the cases cited stand for the proposition that knowing presentation of false testimony deprives a defendant of his due process rights. *See Alcorta*, 355 U.S. at 31 (dealing with prosecutorial elicitation of known false testimony); *Mooney*, 294 U.S. at 112 (dealing with presentation of testimony known to be perjured). The other deals with government responsibility for loss of evidence. *See Valenzuela-Bernal*, 458 U.S. at 861 & 868 (dealing with propriety of deporting potential witnesses). Therefore, I conclude that because petitioner has failed to provide any legal authority to support this due process point, analysis of this sub-claim will be restricted to *Brady* and its progeny.

Second, petitioner asserts that because the witness coercion here led to the loss of exculpatory evidence, the state engaged in the spoliation of evidence and violated petitioner's due process rights. *See* P14 at 40 (citing *Valenzuela-Bernal*, 458 U.S. 858; *Arizona v. Youngblood*, 488 U.S. 51 (1988); *California v. Trombetta*, 467 U.S. 479 (1984)). Petitioner is partially correct. Cases he cites, each a progeny of *Brady v. Maryland*, support the proposition that loss or destruction of evidence is a due process violation if the exculpatory value of the

evidence was apparent, or the destruction was in bad faith and the evidence was material. *See Valenzuela-Bernal*, 458 U.S. at 872-73 (holding that a violation of due process protections "requires some showing that the evidence lost would be both material and favorable to the defense"); *Youngblood*, 488 U.S. at 58 (holding that "unless 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"); *Trombetta*, 467 U.S. at 488-89 (explaining that the state's duty to preserve evidence is limited to evidence which "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means"). Thus, petitioner will make out a due process claim if he demonstrates that the state lost or destroyed "fleeing man" evidence and that the value of such evidence was apparent or lost or destroyed in bad faith.

Third, petitioner maintains that evidence of misconduct in the investigation should be considered by a jury to evaluate the integrity of the investigation, thereby rendering such evidence material under *Brady*. *See* P14 at 40 (citing *Kyles v. Whitley*, 514 U.S. 419, 445 (1995); *Wood v. Barholomew*, 516 U.S. 1 (1995)). The relevant holding in *Kyles* is that prior inconsistent statements of a witness are material, in part, because they would have permitted an attack on "the thoroughness and even the good faith of the [police] investigation" in that matter. *See Kyles*, 514 U.S. at 445. The relevant holding in *Wood* is that it is not constitutional error to fail to disclose results of polygraph examinations for two witnesses where those results were inadmissible as evidence and would not have affected the trial strategy of defense counsel. *See Wood*, 516 U.S. at 5-8. Neither holding supports petitioner's proposition. As such, review of petitioner's following assertions will be limited to whether the decision of the state courts was

contrary to or an unreasonable application of *Brady* and its progeny, *Valenzuela-Bernal*, *Youngblood* and *Trombetta.*

1. Recantation by Chobert

Petitioner argues that Chobert recanted his testimony and, although he does not say it, he implies that the recantation was a result of coercion. *See* P14 at 39-40. The claim was fairly presented in state court, and the state courts properly identified *Brady* as controlling precedent. *See* Amend. St. PCRA Pet. ¶¶ 87, 93; PCRA Appeal Br. at 39-43; *PCRA Appeal Op.* at 94. Moreover, the courts adjudicated the claim on the merits. *See PCRA Op. F.F.* ¶¶ 272-78 & *C.L.* ¶¶ 9-11; *PCRA Appeal Op.* at 94-95. Therefore, the claim is subject to the restrictions of § 2254(d).

The state courts determined that Chobert did not make any deal with the prosecution pursuant to which his testimony would be exchanged for a promise of favor from the state. *See PCRA Op. F.F.* ¶¶ 273-76. Further, the state court found that Chobert did not recant his testimony, but explained his earlier statement at trial. *See id. F.F.* ¶ 276 & *C.L.* ¶ 47. Finally, the state courts determined that Chobert testified credibly at trial and the PCRA hearing. *See id. F.F.* ¶ 278 & *C.L.* ¶ 48. Indeed, the Pennsylvania Supreme Court concluded that petitioner's claim, "that Chobert initially claimed the shooter 'ran away,' is a misrepresentation of the testimony." *PCRA Appeal Op.* at 95. As such, this sub-claim is easily disposed. In each of the cases cited by petitioner, the falsity, absence, or suppression of the specific evidence was not contested before the Supreme Court. Here, that is the essential dispute. The state courts have made specific factual determinations regarding this sub-claim. I have found that these determinations are not unreasonable. Furthermore, it is clear that there can be no *Brady* violation

because petitioner has failed to show that the alleged suppressed evidence even exists. Therefore, the decision of the state courts denying petitioner's *Brady* claim regarding Chobert's alleged recantation was not contrary to or an unreasonable application of clearly established federal law.

2. Suppression of Kordansky's Address

Petitioner argues that Kordansky "was never called due to defense counsel's dereliction and the prosecution's withholding of her address."[20] *See* P14 at 39. The state courts found that Kordansky was, in fact, contacted during the trial and was not unavailable as a witness. *See PCRA Op. F.F.* ¶¶ 176-77, 183, *C.L.* ¶¶ 101-03; *PCRA Appeal Op.* at 102-03. The state courts found also that Kordansky did not state that she saw someone running away from the scene of the shooting, as petitioner contends. Rather, the courts found that Kordansky stated: (1) that she saw someone running on Locust from 13th Street toward 12th Street in the direction of the shooting, (2) that she saw the individual running after the officers had arrived at the scene; (3) that she could not tell if the runner was male or female; and (4) that she could not tell if the runner was a police officer. *See PCRA Op. F.F.* ¶¶ 178-82; *PCRA Appeal Op.* at 102-03. In light of these findings of fact, the state courts concluded that Kordansky's testimony would not have been materially favorable to the defense. *See PCRA Op. C.L.* ¶¶ 101, 104; *PCRA Appeal Op.* at 103. The state courts also rejected this claim by noting that the trial court ordered that "any civilian witness would be made available to the defense upon request" and that petitioner's investigator found "every civilian witness defense counsel selected." *See PCRA Op. C.L.* ¶ 27.

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[20] Counsel's dereliction, of course, is irrelevant to a *Brady* violation and will be treated with the other claims of ineffective assistance of counsel.

Petitioner identifies his claim as one controlled by the *Brady* doctrine, and the state courts likewise identified *Brady* as controlling. *See PCRA Op. C.L.* ¶¶ 9-11, 20, 25, 104. Having found that Kordansky was not unavailable and that Kordansky would not have testified favorably to petitioner, the state courts denied relief on this sub-claim. Under *Brady*, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682 & 685 (White, J., concurring). The state court found as fact that Kordansky testified at the PCRA hearing that she saw someone run in the direction of the shooting after police had arrived on the scene, and that she could not identify even the sex of the person. The state court record supports these findings. Such testimony certainly does not create a reasonable probability that had it been disclosed to the defense, the result of petitioner's trial would have been different. Accordingly, I conclude that the state court's denial of petitioner's *Brady* claim insofar as it pertains to his allegations regarding Kordansky was not contrary to or an unreasonable application of clearly established federal law.

3. Coercion of Jones to Recant Her Initial Report of Flight

Petitioner contends that Jones recanted her report of two men fleeing the shooting scene only after being coerced by police officers. *See* P14 at 39. This claim was presented in the state collateral proceedings, and is thus exhausted. *See* Amend. St. PCRA Pet. ¶ 87; PCRA Appeal Br. at 44-5. Moreover, the matter was adjudicated on the merits by the state courts, and so is subject to the strictures of § 2254(d).

After the PCRA court denied the state petition for post-conviction relief, the state

supreme court remanded the matter for the limited purpose of conducting a hearing to take testimony from Jones. *See PCRA Jones Op.* at slip 2. The PCRA court, following that hearing, found that Jones's testimony was "incredible and worthy of little or no belief." *See id.* at slip 5; *see also id.* at slip 8 (finding testimony regarding perjury induced by coercion not to be credible). The court also concluded that even if believed, Jones's testimony was neither exculpatory nor material. *See id.* The state supreme court adopted these findings. *See PCRA Appeal Op.* at 97-100. The state courts thus concluded that Jones's trial testimony was not coerced. *See PCRA Op. C.L.* ¶ 42.

The state courts treated the question as one arising under *Brady*, presenting the question whether material favorable evidence was suppressed. *See PCRA Jones Op.* at slip. 13; *PCRA Appeal Op.* at 94, 100. Because *Brady* requires the disclosure of favorable, material evidence, and petitioner has not demonstrated the unreasonableness of the state courts' findings that Jones's testimony was neither material, favorable, nor coerced, the decision of the Pennsylvania courts to deny relief pursuant to this sub-claim was not contrary to or an unreasonable application of clearly established law.

4. Coercion of Singletary to Recant His Initial Report of Flight

Petitioner proffers that Singletary signed a false witness statement as a result of coercion during his interrogation by police. Moreover, he suggests that Singletary never came forward due to alleged attacks on his business. *See* P14 at 39. This claim was presented to the state courts in post-collateral proceedings, and therefore, is exhausted. *See* Amend. St. PCRA Pet. ¶ 83, 91; PCRA Appeal Br. at 49-53. Moreover, the state courts adjudicated the claim on the merits. As such, it is reviewed under the standards of § 2254(d).

Regarding this claim, the state court found that "[n]o statements by [Singletary] were destroyed." *See PCRA Op. C.L.* ¶ 14. Indeed, the court found that Singletary's account of events at the PCRA hearing was not credible. *See id. F.F.* ¶¶ 247-66. The court also found that Singletary's account of the shooting was medically impossible. *See id. F.F.* ¶ 267. Finally, the court found that Singletary's explanation for failing to come forward at the time of trial also was incredible. *See id. F.F.* ¶ 268.

The claim is presented as a *Brady* claim, *see* P14 at 39, and it was so reviewed by the state courts. *See PCRA Op. C.L.* ¶¶ 9-11, 14; *PCRA Appeal Op.* at 101-02. Because the Pennsylvania courts reasonably determined that no coercion had taken place and that no statements had been destroyed, the decision to deny the claim was not contrary to or an unreasonable application of clearly established federal law.

5. Hightower and a Polygraph Test

Petitioner argues that police officers "endeavored to manipulate witness Hightower through prolonged interrogation and coercive use of a polygraph." *See* P14 at 39. Petitioner alleges that the prosecution, in violation of *Brady*, failed to disclose both the fact of the examination and the exculpatory results of the evaluation. *See* P1 ¶¶ 116-22; P14 at 39-41. The claim was presented to the state courts and is thus exhausted. *See* Amend. St. PCRA Pet. ¶¶ 85, 91; PCRA Appeal Br. at 47-9, 56-8. Further, the state courts adjudicated the claim on the merits. *See PCRA Op. F.F.* ¶¶ 160-68, *C.L.* ¶¶ 17-18; *PCRA Appeal Op.* at 100-01. Therefore, the claim is subject to the strictures of § 2254(d).

The state court determined that Hightower's PCRA testimony that he saw a person

fleeing the shooting scene was not credible, in part because he previously had stated that police were on the scene before he saw the individual running. *See PCRA Op. F.F.* ¶¶ 162-167. The state court further found that Hightower had not been coerced into taking the polygraph test, but took the test voluntarily. *See id. C.L.* ¶ 112. The court also concluded that there was no evidence that a polygraph test was given only to Hightower. *See id. F.F.* ¶ 172 & *C.L.* ¶ 112. Furthermore, the state court determined that Hightower had been told that he was not being truthful when, during the polygraph test, he denied seeing petitioner with a gun in his hand. *See id. F.F.* ¶ 166 & *C.L.* ¶ 18. Lastly, the state court found that favorable polygraph results were not withheld from petitioner. *See id. F.F.* ¶ 168. In light thereof, the state court concluded that the prosecution had not suppressed any favorable, material evidence relative to either the use or results of the polygraph. *See id. C.L.* ¶¶ 9-11, 17-18, 112; *see also PCRA Appeal Op.* at 100-01. Because the state court reasonably found as fact that no evidence of coercion or of favorable polygraph results existed, I conclude that the state court's denial of petitioner's *Brady* claim as to the alleged manipulation of Hightower was not contrary to or an unreasonable application of *Brady* and its progeny.

6. Suppression of a Driver's License Application Found on Faulkner

Petitioner claims that the state suppressed evidence that Howard's driver's license application was found on Faulkner on the night of the shooting. *See* P14 at 40. It is not clear that this claim was exhausted in the state courts. Petitioner's PCRA Petition makes no mention of either Howard or his driver's license application. *See* PCRA Pet. at 49-66 (discussing *Brady* violations). After the PCRA petition was denied, petitioner appealed to the state supreme court. In his appeal brief, petitioner argued that the Commonwealth "provided a witness statement

which Howard says was not accurate." *See* PCRA Appeal Br. at 56. In so doing, petitioner also argued that the "Commonwealth withheld [the] facts" that Howard "was taken into custody shortly after the shooting on suspicion that he was involved in the shooting and had fled the scene" and that "two other black males . . . were in custody as suspects." *See id.* Additionally, the clear focus of Howard's testimony was related to whether his statement, provided to the defense, was accurate. *See, e.g.,* 8/9/95 Tr. at 4-109. Prior to this litigation, petitioner never suggested that suppression of the actual driver's license application itself, or the place in which it was discovered, was impermissible under the dictates of *Brady*. Thus, the state courts were not fairly presented with an opportunity to address that federal constitutional question and this sub-claim is unexhausted.

Moreover, because more than one year has expired after conclusion of direct review of petitioner's state court conviction, I also conclude that petitioner is barred from further state post conviction review. *See* 42 Pa. Cons. Stat. § 9545; *Commonwealth v. Banks*, 726 A.2d 374, 376 (Pa. 1999) (noting that the one year limitations period delineated in § 9545 is jurisdictional and can be overcome only if one of the three exceptions set forth in that section is found to apply to the facts at bar); *see also Szuchon v. Lehman*, 2001 WL 1472680, at *16 n.14 (3d Cir. Nov. 20, 2001).[21] As a result, I conclude that the claim is time barred in state court and accordingly, although exhaustion is excused as futile in this case, *see Szuchon*, 2001 WL 1472680, at *16

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[21]It does not appear that any of the exceptions to § 9545 apply to petitioner's claim. *See* 42 Pa. Con. Stat. § 9545 (1) (i), (ii), & (iii) (failure to raise claim is result of government interference, facts upon which claim is predicated previously unknown, and new constitutional right held to apply retroactively). Nor does petitioner assert that any of these exceptions pertain. In any event, § 9545 requires any petition invoking any of these exceptions to be filed within 60 days of the date the claim could have been presented. Clearly, this deadline has passed as well.

n.14, it petitioner has defaulted his federal claim pursuant to an independent and adequate state procedural rule.

A procedurally defaulted claim may only be reviewed by a federal habeas court if the petitioner shows cause for his noncompliance with the state procedural rule and actual prejudice from the alleged violation, or a fundamental miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722, 748-49 (1991), *Schlup v. Delo*, 513 U.S. 298, 314-15 (1995). Petitioner alleges neither. Therefore, petitioner has failed to overcome the procedural bar and his sub-claim that the Commonwealth's suppression of Howard's license or the place in which it was discovered violates the dictates of *Brady* consequently is non-justiciable.

Nevertheless, I also will deny the claim on the merits. The state courts found that Howard testified falsely at the PCRA hearing, and that his statement of December 9, 1981 was accurate. *See PCRA Op. F.F.* ¶ 217. That statement was adopted as fact. *See id.* Moreover, even if the license application gave rise to suspicion of Howard, the facts contained in Howard's police statement (which was provided to defense counsel) are neither favorable to petitioner nor material. Furthermore, had Howard testified at trial, he would have stated that he lost his license application in William Cook's Volkswagen and that Howard was elsewhere at the time of the incident. *See id. F.F.* ¶¶ 202, 216-17. This additional information, considered in light of all the evidence presented, would not have given rise to a reasonable probability of a different outcome. Therefore, no constitutional error is found in the Commonwealth's failure to turn over the actual duplicate license.

7. William Cook Did Not Testify at Trial or the PCRA Hearing out of Fear

Petitioner alleges that Cook did not testify at trial due to fear of retaliation and self-incrimination, and that he did not testify at the PCRA hearing due to the court's "refusal to provide Cook protection from arrest on outstanding bench warrants." *See* P1 ¶¶ 157-60. The claim was fairly presented to the state supreme court on PCRA appeal. *See* PCRA Appeal Br. at 60. Therefore, the exhaustion requirement is satisfied. Moreover, the state courts adjudicated the claim on the merits. *See PCRA Op. F.F.* ¶¶ 279-85, C.O.L ¶¶ 114-21; *PCRA Appeal Op.* at 106. Therefore, my review is limited by § 2254(d).

The state court determined that petitioner decided not to call Cook, his brother, at trial. *See PCRA Op. F.F.* ¶ 287. Furthermore, the state court found that petitioner failed to call Cook at the PCRA hearings, failed to secure an affidavit from Cook, and failed to obtain a subpoena for Cook's appearance. *See id. F.F.* ¶¶ 280, 288-89. Next, the state court determined that Cook's attorney at the time of the PCRA hearing, Daniel Alva, Esq., had reached agreement with the Commonwealth regarding Cook's bench warrant. *See id. F.F.* ¶ 282. Finally, the state court found that Cook did not return to speak to Mr. Alva on September 11, 1995, or September 12, 1995, as expected. *See id. F.F.* ¶ 283. Accordingly, the state court concluded that an adverse inference was permissible because the proffered favorable testimony was available and was not presented. *See id. C.L.* ¶ 115. The state court also concluded that Cook's testimony was neither unavailable nor material. *See id. C.L.* ¶ 116.

The claim is presented in the habeas petition as a violation of the *Brady* doctrine, and was evaluated by the state courts as such. *See, e.g.*, *PCRA Appeal Op.* at 106. The state court concluded that Cook was available and that petitioner declined to call him as a witness. *See id.*; *PCRA Op. C.L.* ¶ 116. Further, the PCRA court drew an adverse inference as to the testimony

Cook would offer, *see PCRA OP. C.L.* ¶ 115, and reasonably found that, in the absence of any affidavit or proffer, petitioner failed to prove that Cook's testimony would be either favorable or material. *See id.* at ¶¶ 115-16. I conclude that the decision of the state court was not contrary to or an unreasonable application of *Brady*, which requires only that material favorable evidence be disclosed.

D. Unreasonable Determination of Facts in Light of Evidence Presented

1. Coercion of Jones

Petitioner alleges that the PCRA court's finding that Jones' testimony at a 1996 PCRA hearing was not credible is unreasonable for the following reasons: (1) she admits recanting testimony, *see* P18 at 17 (citing 7/31/95 Tr. at 106; 10/1/96 Tr. at 20-21); (2) she says she lied at trial, *see* P18 at 18 (citing 10/1/96 Tr. at 20-21); (3) she told police two men jogged across Locust Street, *see* P18 at 18-19 (citing PCRA Ex. C-1 at 1-2; 10/1/96 Tr. at 21, 33, 72, 83-84, 94-95; 10/2/96 Tr. at 252, 257); (4) she testified that the men jogged away from and not toward the scene (and Detective Bennet confirmed that is what Jones meant to say), *see* P18 at 19 n.22 (citing 10/1/96 Tr. at 85; 10/2/96 Tr. at 252, 257); (5) she testified that she had been promised a deal and had been subjected to coercive threats, *see* P18 at 20-21 (citing 10/1/97 Tr. at 21-24, 46-47, 57); (6) she was taken by surprise at trial, *see* P18 at 20 (citing 10/1/96 Tr. at 21, 23); (7) the Commonwealth and the PCRA court harassed her at the PCRA proceeding, *see* P18 at 21-22 & n.24 (citing 10/1/96 Tr. at 96 & 83, 93, 108-09; 10/2/96 Tr. at 64-65); and (8) the Commonwealth's witness, Detective William Thomas, did not refute Jones' description of police intimidation, *see* P18 at 22-23 (citing 10/2/96 Tr. at 196-209, 223).

I conclude, however, that a review of the record supports the PCRA court's determination that Jones was not credible in recanting her trial testimony and in declaring that two men ran away from the scene, that her trial testimony was coerced, that she received a deal, or that she was taken by surprise at trial. *See, e.g.,* 10/2/96 Tr. at 76-77 (Jones explaining her inability to recall whether she reviewed her 12/15/82 statement and her inability to recall other false elements of testimony, concluding that "all I know is that I lied . . . I lied and it wasn't right" and explaining that she lied "evidently when I was at trial, I don't know"); *id.* at 76-77 (Jones explaining that she signed the 12/15/82 statement contrary to trial representations); *id.* at 94 (Jones explaining that she waited a few minutes before looking around the corner); *id.* at 98 (Jones denying that she spoke to anyone about her testimony when confronted with the trial record which demonstrated that she spoke to the public defender) & *id.* at 158-166 (David Rosen, Esq., testifying that the record reveals that he advised Jones at trial regarding Fifth Amendment implications arising from any difference between her proposed trial testimony and her pre-trial statement); *id.* at 110-12 (Jones stating both that she was unaware of PCRA proceedings and that she "heard something about it"); *id.* at 122-23 (Jones revealing that her PCRA legal counsel was introduced to her by petitioner's counsel and that she was not paying for the services--proving no impropriety but permitting an inference of bias); *id.* at 107-09 (Jones explaining that she never told anyone her trial testimony was false prior to contact by PCRA counsel); *id.* at 26 (Jones explaining that she came forth because she wanted to set an example for her grandchildren); *id.* at 108 (Jones being hostile in revealing her alcoholism); *id.* at 117-19 (Jones resenting inquiry into possible financial bias for PCRA testimony); *id.* at 136 (Jones denying bench warrant); *id.* at 141 (Jones resenting the feeling that she is on trial). Furthermore, the PCRA judge, who

presided over the trial and PCRA hearings, had the additional advantage of observing Jones both in 1982 and in 1996 and was able to assess her demeanor on the witness stand. Although I do not say that the cold paper record compels the conclusion that Jones was incredible in recanting her testimony, I conclude that the state courts did not unreasonably determine that Jones was not credible in 1996.

2. Coercive Use and Suppressed Results of Hightower's Polygraph Test

Petitioner alleges that the PCRA court's factual findings concerning Hightower's PCRA testimony are unreasonable because Hightower reported the same story of a fleeing person immediately after the shooting and again on December 13, 1981. *See* P18 at 23-24 (citing 8/3/95 Tr. at 18-24, 92, 100, 103). The factual question before the PCRA court was not whether Hightower's prior statements and his testimony at trial were true; rather, it was whether Hightower was telling the truth in 1995. There is sufficient evidence in the record to permit a finding that Hightower's 1995 account of events was inconsistent with material elements of the account he offered in 1982. *Compare* 8/3/95 Tr. at 96 (Hightower insisting he was never unsure that the fleeing figure was a black male) with 6/28/82 Tr. at 125-26 (Hightower describing the figure always as a "person" who could have been female) & *id.* at 148 (Hightower answering that the figure could have been female); *see also* 8/3/95 Tr. at 46, 80-81 (Hightower explaining that his statement of 5/3/82 to Greer, that the scene was "flooded with other police officers. [I] saw somebody running past the hotel," was not properly transcribed, although he signed it); *see also id.* at 73-77 (Hightower disavowing statement that he "could picture [Jamal] with a gun but didn't see him with one," included in a signed statement he gave on 12/15/81, on the ground that it was not consistent with his other testimony). Accordingly, I conclude that the state court's

factual findings regarding Hightower's PCRA testimony are not unreasonable.

Petitioner also contends that Hightower was the only witness subjected to a polygraph, which the Commonwealth could not explain. *See* P18 at 24 (citing 8/3/95 Tr. at 117, 169, 171). Respondents retort that petitioner failed to prove this allegation. *See* R24 at 39 n.23. The PCRA court so found. *See PCRA Op. C.L.* ¶ 112. I conclude, however, that respondents' factual insinuation is misleading and that the PCRA court's commensurate factual determination is unreasonable. Indeed, Attorney Grant, on behalf of the Commonwealth, admitted that no prosecution witnesses had been subjected to a polygraph test. *See* 8/3/95 Tr. at 171. Petitioner was entitled to rely on this representation. It is also clear, however, that the decision of the state court was not a result of this particular unreasonable factual determination. Accordingly, that this specific factual determination is unreasonable does not entitle petitioner to relief. *See* 28 U.S.C. § 2254(d)(2) (requiring a causal relationship between the adjudication of petitioner's claim and the unreasonable factual determination if habeas relief is to be warranted).

Furthermore, I conclude that the remaining state court factual determinations regarding Hightower are not unreasonable. First, the court's finding that petitioner had not demonstrated any bias in the usage of polygraphs is supported by the record. *See PCRA Op. F.F.* ¶ 172 (finding that Detective Thomas, called by petitioner regarding administration of polygraph tests, lacked both authority and knowledge regarding the administration of polygraph tests); 8/3/95 Tr. at 169-72 (Detective Thomas testifying that he suspected that the administration of polygraph tests was a "supervisory decision," but that the decision was not within the scope of his authority). Petitioner points to no other evidence in support of his allegations.

Second, the PCRA court's finding that Hightower took the polygraph test voluntarily and

without harassment or intimidation also is well-supported by the record. *See PCRA Op. C.L.* ¶ 112; 8/3/95 Tr. at 39 (Hightower explaining that, "for the most part," police were "professional and courteous" and "didn't try to change any of my statements"); *id.* at 56-57 (Hightower attesting that polygraph test was administered voluntarily); *id.* at 92 (Hightower explaining that despite "inconveniences," the police were "pretty fair with me").

Third, the state court's determination of the incredibility of Hightower's PCRA testimony was not unreasonable because that determination was based not on an assessment of the results of the polygraph test, but on "his demeanor, his fallacious testimony as to what he was told about the result of his polygraph test, and the fact that his recent account is inconsistent with the one he gave in 1982." *See PCRA Op. F.F.* ¶ 167. Moreover, I also reject petitioner's claim that the PCRA court's findings focus on the accuracy of the polygraph test and not on the fact of its administration. *See* P18 at 24. The record belies petitioner's contention. The PCRA court found as a fact that Hightower was told by the police that he failed the polygraph test. *See PCRA Op. F.F.* ¶ 169 & *C.L.* ¶ 18. This finding, however, does not focus on the test's accuracy, but on the fact that Hightower was *told* that he failed it. Moreover, the record demonstrates that the PCRA court even assumed that the officers erred in reading the test results when they told Hightower he was being deceptive. *See* 8/4/95 Tr. at 134, 136, 148 (assuming that Lieutenant Sterling incorrectly read the results of the polygraph). The PCRA court also noted that polygraph results are not admissible in Pennsylvania courts. *See PCRA Op. C.L.* ¶ 17. As such, contrary to petitioner's suggestion, the state court did not focus on the accuracy of the polygraph test, but rather focused on whether any results of that test were conveyed to Hightower.

Petitioner next argues that the PCRA court blocked expert testimony regarding the

polygraph results after soliciting it. *See* P18 at 25 n.27 (citing 8/7/95 Tr. at 66-70 and PCRA Ex. D-25). At the PCRA proceeding, the court precluded examination of Lieutenant Sterling regarding his qualifications, on the ground that whether he was qualified to administer the polygraph was not relevant to whether he told Hightower that Hightower was being deceptive. *See* 8/4/95 Tr. at 136. The PCRA court then inquired whether petitioner had an expert who could analyze the polygraph charts. *See id.* Thereafter, the court advised attorney Weinglass to "do whatever you want to do. If the law permits you to do it." *See id.* at 149. The PCRA court operated on the assumption that polygraph results are not admissible in Pennsylvania courts. *See id.* at 155. Mr. Weinglass offered the polygraph results for the limited purpose of impeaching credibility, suggesting that if Hightower had passed, such a fact favored a finding that he was told he passed. *See id.* at 135-36, 155-56 (indicating that Hightower's truthfulness does not necessarily follow from a determination that he passed the polygraph examination). The Commonwealth objected on the grounds that such an inquiry was beyond the scope of examination and sought inadmissible evidence. *See id.* at 133, 137-38, 154-55. Rather than specifically "solicit" an expert, the PCRA court merely advised petitioner's counsel that he could proceed as allowed by law, and the Commonwealth continued to object to the introduction of testimony on the accuracy of the test results. It was not unreasonable to exclude such testimony. Moreover, because the state court's decision regarding this matter was not based upon a determination of the test's accuracy, that decision also was not based on an unreasonable determination of facts.[22]

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[22]I also note that there is nothing unreasonable in the PCRA court's suggestion that test results showing truth would not support Hightower's statement that he was told he passed. That is, the essence of the claim was the selective and harassing use of polygraph tests to coerce

3. Suppression of Witness Kordansky

Petitioner alleges that the PCRA court's decision to credit Kordansky's initial statement to police–that she saw a person fleeing the scene after police arrived–is unreasonable because her subsequent, contrary account is corroborated by four other witnesses and because it would make no sense to report what happened after police arrived, especially where she admitted her motive was to aid the police. *See* P18 at 25-26 (citing 8/3/95 Tr. at 238, 247, 252-53, 255). Petitioner is incorrect. Kordansky was uncertain about much of her recollection at the PCRA hearing. She did testify, however, that her initial statement would be her most accurate account of events. *See* 8/3/95 Tr. at 212, 215 (Kordansky explaining that she always felt her first statement would be most accurate). That explanation is consistent with Kordanksy's statement to detectives in April 1982, which she could not recall. *See id.* at 223 (Kordansky explaining that her memory was colored by racial prejudice, news accounts, and her mental processes). That explanation also is consistent with Kordansky's account of what she told Jackson at trial regarding her ability to testify. *See id.* at 212-15 (same). Consequently, it was not unreasonable for the PCRA court to rely on Kordansky's first statement, in which she described a person running after police officers arrived. *See* 8/3/95 Tr. at 240-45 (Kordansky reasserting that her first statement was consistent with her way of thinking and conduct and therefore, would be her most accurate account of

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witness testimony. If the police were trying to coerce Hightower after he passed such an examination, then it would appear just as likely that they would tell him he failed the test even if he did not. Therefore, the opinion of an expert on whether Hightower passed or failed would not necessarily advance the inquiry concerning what Hightower was told. Most important, the PCRA court was able to witness the demeanor of both Hightower and Sterling and to assess their credibility based thereon. *See id.* at 148-49 (noting that his credibility determination would be based on observed demeanor). Such determinations are not to be set aside on federal habeas review if not an unreasonable determination of the facts.

events). Although Kordansky's first statement to police was challenged during the PCRA hearings, petitioner does not contest, in this litigation, that Kordansky gave the statement. *See, e.g.,* P18 at 26 n.28 (characterizing the statement as "the police report memorializing her statement to law enforcement"). Because the reliability of the police report was not undermined and Kordansky continued to attest to its accuracy in light of her recollection of events and of her knowledge of her character, it was not unreasonable for the PCRA court, observing the witness' demeanor, to determine that Kordansky's police statement meant what it said.

Petitioner next challenges the PCRA court's finding that Kordansky may have reported an individual running toward the scene as "absurd." *See* P18 at 26 n.28. In reality, this finding was not absurd, bur rather was reasonable. Kordansky's statement in the police report is inconclusive regarding the runner's direction of movement, point of origin, and destination. *See* 8/3/95 Tr. at 239-40. Moreover, although Kordansky testified at the PCRA hearing that she recalled the person running eastbound on Locust Street from 13th Street toward 12th Street, she could not say whether the person was running to or from the scene of the murder. *See id.* at 239-40, 247-55. There also is record evidence that Kordansky had a limited view of Locust Street and could not describe what the runner was wearing, or even if that person was a police officer. *See id.* at 230, 250-51. In light of the record, I conclude that the determination that the person Kordansky saw may have been running toward the scene was no less reasonable than would have been a determination that the person she saw must have been running away from the scene.

Next, petitioner submits that the PCRA court's finding that Kordansky was not called for strategic reasons is unreasonable because it is contrary to Jackson's PCRA testimony that he attempted at trial to procure Kordansky's testimony, was blocked in his effort, objected to this,

and then proceeded to present the defense. *See* P18 at 26-27 (citing 7/27/95 Tr. at 53-56; 7/31/95 Tr. at 107-08; 6/30/82 Tr. at 14). Petitioner is correct. The state record makes clear that Jackson sought Kordansky and was unable to compel her appearance in court. Indeed, a review of the trial record reveals that when Jackson sought to call Kordansky to testify, the Commonwealth gave him her address and phone number. He spoke with Kordansky by phone but she no longer lived at the address provided. *See* 6/30/82 Tr. at 3-14, 97-104. Jackson, however, felt that he could not effectuate a subpoena because he did not know where to serve her. *See id.* at 98. Although there is a suggestion in the record that both Jackson and McGill recognized that Kordansky was a potentially harmful witness to each, *see, e.g., id.* at 10-15 (counsel and the court discussing possibly prejudicial and inflammatory nature of Kordansky's testimony); 97-100 (Jackson recognizing that Kordansky's testimony might be consistent with her statement in the police report), Jackson continued to seek her out. *See id.* at 5-7 (explaining inability and need to speak to witness); 97-100 (same). It is clear that Jackson continued to pursue access to Kordansky, rather than deciding not to contact her, but was unable to locate her. Thus, it is unreasonable to conclude that Jackson made a tactical decision.

Yet this determination of unreasonableness is not dispositive of petitioner's *Brady* claim because the failure to bring Kordansky to court is not attributable to the court or to the prosecution. The prosecution made efforts to assist Jackson in locating Kordansky, and there is no credible evidence that at the time of trial, when Jackson presented his request, the Commonwealth knew where to locate Kordansky. It appears from the record that for security reasons, it was not unusual in homicide cases for witness addresses to be withheld from counsel and the public until counsel requested the address. *See* 6/30/82 Tr. at 9 (Jackson explaining that

"in homicide cases the addresses of the witnesses are not given to counsel" and the court responding "I know that"); *id.* at 100 (McGill explaining that the practice in "most homicide cases" to keep witness addresses secret); *see also PCRA Op. C.L.* ¶ 27. Accordingly, the PCRA court's conclusion that Jackson made a tactical decision is inapposite to the *Brady* issue.

4. Suppression of Witness Singletary

Petitioner suggests that in light of testimony that Singletary had no reason to lie, the PCRA court was unreasonable in finding incredible Singletary's 1995 exculpatory version of the events and his claim that his original statement was destroyed. *See* P18 at 28 (citing 8/14/95 Tr. at 28-29). The testimony cited, offered by Detective Jones, reveals only that Jones knew of nothing "unusual" about Singletary and knew Singletary to be someone who "like[d]" the police. *See* 8/14/95 Tr. at 28-29. Of course, the judge who presided over the PCRA hearings had the opportunity to observe the demeanor of all witnesses. Moreover, he also had the benefit of his observations at trial concerning witness demeanor and testimony. The PCRA court's credibility findings are presumed to be correct. Further, there is more than enough support in the record for his conclusion that Singletary's PCRA testimony was not credible. *See PCRA Op. F.F.* ¶¶ 247-71; 8/11/95 Tr. at 234-36 (Singletary explaining that statements that allegedly had been destroyed revealed that the driver of the Volkswagen, Cook, chased the actual shooter, although Cook was apprehended at the scene); *id.* at 236-37, 275-79 (Singletary explaining that Faulkner's gun "discharged" and later that Faulkner "grabbed his gun and fired"); *id.* at 269-73 (Singletary testifying that Faulkner spoke after being shot in the eye, which was instantaneously lethal); *id.* at 280-81 (Singletary testifying that Faulkner shot petitioner after being shot in the eye); *id.* at 239, 296 (Singletary reporting seeing a police helicopter over the scene); *cf. id.* at 212-24 (Singletary

explaining fear of actual harassment) with *id.* at 224 (Singletary explaining that he moved away as of August 1982) & *id.* at 214, 287-90 (Singletary explaining that he told Representative Deal and Dale Jones, a reporter, of his account) and *id.* at 284 (Singletary explaining that he waited for a subpoena) & *id.* at 223 (Singletary explaining that he went on vacation from June 26, 1982 to July 9, 1982--the latter part of the defense presentation at trial); *cf. id.* at 232, 242-44 (Singletary explaining that African American Detective Green typed his statement) with 8/14/95 Tr. at 50-52, 59 (Detective Quinn, a white police officer, testifying that he took Singletary's statement, as evidenced by the form). Accordingly, I conclude that the testimony of one witness that Singletary "didn't dislike police" and was not "unusual" does not in any way render the PCRA court's credibility finding unreasonable in light of Singletary's inconsistent testimony.

Petitioner further argues that the PCRA court's finding that Singletary's testimony was not credible is unreasonable because Singletary testified that he saw a passenger from the Volkswagen shoot Faulkner, that he spoke with Faulkner, and that he saw Faulkner shoot petitioner after Faulkner was shot. *See* P18 at 28 (citing 8/11/95 Tr. at 212, 232, 235-36, 242-43, 298-99). Singletary's account of the shooting, however, conflicted with medical evidence that Faulkner died instantly after being shot in the face, thus precluding his ability to speak thereafter or to fire a gun. *Cf.* 8/11/95 Tr. at 235, 267 (Singletary describing shot to Faulkner's face) with 8/4/95 Tr. at 60-61 (Dr. Hayes explaining that face wound was instantly lethal) & 8/9/95 Tr. at 185 (Dr. Hoyer explaining same). Moreover, Singletary also said that Faulkner accidentally shot petitioner, *see* 8/11/95 Tr. at 237 (Singletary explaining that the gun just discharged), and that Faulkner deliberately shot petitioner, *see id.* at 276-80 (Singletary explaining that he was correct in saying that Faulkner "grabbed his gun and fired"). Accordingly, the state court's factual

determination that Singletary's testimony was incredible is not unreasonable.

Finally, petitioner argues that the police report containing a statement by Officer Jones and upon which the PCRA court unreasonably relied to discredit Singletary's testimony lacked authenticity and indicia of reliability. *See* P18 at 29 (citing 8/14/95 Tr. at 22-23, 29, 42, 45). Petitioner, however, does not suggest that he raised any evidentiary objection to its admissibility, and therefore, the report is deemed to have been admitted. The question of its weight is one for the finder of fact. Although the police report lacks certain features which perhaps would be expected, the statement was adopted as true by Jones, who candidly admitted his inability to recall circumstances surrounding its recording. *See* 8/14/95 Tr. at 15-18, 23-27. The PCRA court had the benefit of observing Detective Jones' demeanor as a witness and therefore, could better assess his credibility with regard to the events surrounding the shooting and the formulation of the report. Moreover, petitioner neither called the transcribing officer, nor attempted to call him for the purpose of impeaching the document. Thus, I cannot say that it is unreasonable for the court to have relied on a document that was entered into evidence without objection.

I note that petitioner appears to suggest prosecutorial suppression of Singletary's identity, although he does not rest his claim on alleged evidence that Singletary was, in fact, White's companion at the scene and a co-witness. *Compare* P1 ¶ 121 n.6 (charging that "the prosecution and Detective William Thomas misled the jury") with 8/11/95 Tr. at 208 (petitioner's counsel agreeing that Singletary was only to testify as to whether his signed and typed statement was false and the court sustaining an objection to inquiry about Singletary's relationship with White). Allegations in footnotes, which are not the premise of any constitutional claim before the court

and which were not advanced as substantive arguments in the Pennsylvania courts, serve only to obfuscate the issues and delay the proceedings. Where accurate, they are unhelpful and unnecessary. Where inaccurate, they are improper.

5. Suppression of Howard's Driver's License (Application)[23]

Petitioner claims that the PCRA court's determination that Howard's driver's license application was of no import is unreasonable because it is undisputed that it was found on Faulkner at the scene. *See* P18 at 30 (citing 8/9/95 Tr. at 6; 8/11/95 Tr. at 167). Petitioner also argues that the PCRA court unreasonably failed to recognize that the license application would have impeached the prosecution's theory that only two persons were at the shooting. *See* P18 at 31 (citing 6/26/82 Tr. at 83). More specifically, petitioner argues that the PCRA court unreasonably discounted the import of the application because it would have impeached White's testimony. *See* P18 at 30. Finally, petitioner argues that the PCRA court unreasonably ignored the fact that the "prosecution indisputably suppressed this evidence." *See* P18 at 30-31.[24]

The state courts were not presented with any allegation that the license application, in

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[23]PCRA testimony reveals that there is a dispute as to whether the item found was a license, or an application for a duplicate license. *See* 8/11/95 Tr. at 139-44, 160-61 (inquiring whether Philadelphia Police Captain Edward D'Amato recalled a duplicate license or a duplicate license application). Moreover, petitioner's brief on appeal from denial of PCRA relief suggested, as a means of showing that Howard's signed statement was not accurate, that petitioner's actual license was found, not a duplicate application. *See* PCRA Appeal Br. at 57. Because the parties dispute what, if anything, was found, this court will use "driver's license" and "driver's license application" interchangeably.

[24]Respondents argue that the application does not prove the presence of a third party, and that petitioner failed to prove non-disclosure, as was his burden. *See* R24 at 45. Respondents are correct. Any inference as to a third-person was dispelled when Howard was interviewed and provided both a statement and evidence that he had lost the application in Cook's Volkswagen and was not present at the scene.

itself, was of constitutional import. Rather, petitioner argued that Howard's ordeal and true account of events were suppressed. *See* PCRA Appeal Br. at 56-58. Moreover, the PCRA court determined that Howard's PCRA testimony was not credible and that the testimony of D'Amato was credible. In finding Howard to be incredible, the PCRA court relied on its observations of Howard's demeanor, on Howard's convictions for crimes revealing a character for untruthfulness, and Howard's testimony itself. *See PCRA Op. F.F.* ¶ 217. The record reveals nothing unreasonable about the state court's factual determination that Howard was not credible. *Compare* 8/9/95 Tr. at 19 (Howard saying that an African American woman was behind the lineup glass) *with id.* at 76 (Howard saying that he could not see through the lineup glass); *compare id.* at 72 (Howard testifying that he read the first page of the statement before he signed it) *with id.* at 67 (Howard testifying that he threw the statement at detectives and did not read it); *compare id.* at 31-44 (Howard explaining that he was handcuffed and denied meals) *with id.* at 101 (Howard explaining that he never formally complained but told many people of his ordeal); *compare id.* at 84 (Howard denying that he was questioned regarding whether he was in Cook's Volkswagen) *with id.* at 85-86 (Howard explaining that he may have been asked about being in Cook's Volkswagen); *see also id.* at 27 (Howard admitting to prior convictions). Although Howard's testimony does not compel the conclusion that he was not truthful, a factual determination that he was in fact untruthful is not unreasonable in light of the evidence presented.[25] In short, the state court decision that no material favorable evidence was suppressed

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[25]I note that petitioner does not identify as unreasonable the factual determinations that D'Amato and Officer Jones testified truthfully and the court's decision to adopt as fact Howard's signed statement of December 9, 1981. In any event, the record is not without support for the factual determinations that D'Amato and Jones testified credibly, and that a statement taken from Howard was accurate when recorded.

is not based on an unreasonable determination of facts in light of the evidence presented. Rather, it is based on a reasonable determination that Howard did not testify credibly at the PCRA hearing.[26]

E. Evidentiary Hearing

Petitioner asserts that an evidentiary hearing is discretionary on this claim. *See* P27 at 1. In so doing, he implicitly concedes a developed factual basis in the state court. *See* 28 U.S.C. § 2254(e)(1). His burden, then, is to provide clear and convincing evidence that the state court's factual determinations are erroneous. He makes no attempt to so define the evidence he would muster. In fact, he disavows altogether application of § 2254(e)(1). *See* P14 at 8. Nor does he characterize his evidence as newly discovered clear and convincing proof of his innocence, as required under § 2254(e)(2). Therefore, an evidentiary hearing is not proper on any part petitioner's second claim.

Petitioner also seems to suggest that the factual record regarding the suppression of Howard's driver's license application was not fully developed in state court. Specifically, petitioner claims that it is undisputed that the driver's license was on Faulkner's person and that because its presence was not contested, he produced no evidence of its existence or suppression. *See* P27 at 18 n.3. If there is an evidentiary hearing, petitioner seeks permission to present evidence of its suppression. Respondents retort that it is petitioner's burden to prove presence, not respondents' burden to answer unsupported allegations. *See* R30 at 31.

Petitioner is wrong that the presence of the license was undisputed. First, suppression of

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[26]Petitioner does not identify with any specificity any unreasonable factual determinations regarding William Cook that, he asserts, would warrant relief under this claim.

the license itself never was suggested as the basis of a *Brady* claim in the state court. Second, PCRA testimony reveals that there is a dispute as to whether the item found was a license, or an application for a duplicate license. *See* 8/11/95 Tr. at 139-44, 160-61 (inquiring whether D'Amato recalled a duplicate license or a duplicate license application). Moreover, petitioner's PCRA appeal brief suggested, by way of showing that Howard's signed statement was not accurate, that petitioner's actual license was found, not a duplicate application. *See* PCRA Appeal Br. at 57. In any event, it is clear that if the state court record is indeed undeveloped, it was petitioner who failed to fully develop it. An evidentiary hearing will be barred under the provisions of § 2254(e)(2) where a petitioner has "failed to develop the factual basis of a claim in State court proceedings" unless the claim surmounts the considerable hurdles of § 2254(e)(2)(A)&(B) (new rule of constitutional law or facts that could not have been previously discovered in the exercise of diligence, and clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found petitioner guilty). Petitioner does not suggest that he can meet this standard. Therefore, no evidentiary hearing will be held on this claim.

F. Discovery of Police Files Related to Veronica Jones

Petitioner also seeks discovery of police files related to Jones. He alleges that he sought all police files relating to Jones in state court, but the PCRA court denied disclosure. *See* P27 at 16 (citing 10/1/96 Tr. at 3-8; 10/3/96 Tr. at 73). Respondents argue that petitioner never requested discovery of the file in state PCRA proceedings, and that in any event, the request would have exceeded the scope of the remand to hear evidence from Jones. *See* R30 at 29-30. Further, respondents claim that because the only basis for believing that a file exists is the

incredible testimony of Jones, no good cause is shown for discovery. *See* R30 at 30.

The record reveals that the discovery request on which petitioner relies was one for the District Attorneys' "entire file related to this case" in light of "substantial due process claims in this case on several different grounds and in several respects." *See* 10/1/96 Tr. at 3. The state court reviewed the subpoena and noted that it sought "all records, files, memoranda, reports, notes, rough notes, whether typed, handwritten or taped." *See* 10/3/96 Tr. at 73. In response to objections related to breadth and relevance to the supplemental hearing, petitioner's counsel then asked for "all the information that deals with Veronica Jones from the prosecution files." *See* 10/1/96 Tr. at 14. On appeal, petitioner objected to the denial of discovery. *See* PCRA Appeal Br. at 28-29. The state supreme court rejected petitioner's arguments as meritless, finding no error in the PCRA court's denial of such a broad and unsupported discovery request. *See PCRA Appeal Op.* at 90-91.

Petitioner again seeks "all files pertaining to Veronica Jones." *See* P27 at 17. Because the state court made a reasonable determination that Jones had not been subject to police coercion or pressure, and because that finding has not been shown to be incorrect by clear and convincing evidence (or even to be unreasonable), there is no record showing of "good cause" for such discovery as is required to warrant discovery pursuant to Habeas Corpus Rule 6(a). *Bracy*, 520 U.S. at 908-09. A fishing expedition is not permitted. Therefore, the motion for discovery of the files sought will be denied.

Petitioner also argues that he PCRA court denied discovery of files of Detective Herbert Gibbons, the detective responsible for Jones's case. *See* P27 at 17 (citing 10/1/96 Tr. at 7, 13). Respondents contend that Gibbons neither was sought in state court nor was his relevance ever

explained. *See* R30 at 30 & n.21. Petitioner, in support of his state court request for all of the District Attorneys' files, described an alleged conversation between Ms. Wolkenstein and Gibbons which Wolkenstein characterized as permitting an inference that Gibbons had drafted reports regarding Jones that petitioner never received. The court denied the motion on the ground that it requested overbroad discovery beyond the scope of the remand hearing. *See* 10/1/96 Tr. at 13. Petitioner now renews his request. *See* P27 at 17. Petitioner, however, fails to make specific allegations as to what facts would be fully developed from discovery of those files. Moreover, petitioner fails to offer any proof that Gibbons was involved at all in the investigation of Jones. Accordingly, petitioner has failed to demonstrate "good cause" for the requested discovery and that request will be denied.

III.3 USE OF A FABRICATED CONFESSION IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE 5TH, 8TH, AND 14TH AMENDMENTS.

A. Allegations in Support of Claim

Petitioner claims that evidence of his confession was fabricated. At trial, Durham and Bell testified that petitioner claimed to have shot Faulkner. Petitioner insists that he attempted to call Officer Wakshul, charged with overseeing petitioner in the hospital, who reported at the end of the relevant shift that petitioner had "made no comments." Petitioner asserts that Wakshul never testified at trial because the prosecutor misled the court to believe he was unavailable. Petitioner insists that Wakshul could have impeached the testimony of the witnesses to his confession. Further, petitioner alleges that at the PCRA hearing, a subpoena to call Wakshul's partner Trombetta, who failed to report hearing a confession, was quashed. *See* P1 ¶¶ 161-191.

B. Violation of Federal Constitution, Law or Treaty

Petitioner argues that he was deprived of his right to a fair and reliable determination of guilt for several reasons. First, petitioner suggests that the prosecutor's misrepresentation of Wakshul's availability was spoliation of *Brady* evidence. *See* P14 at 42 (citing *Valenzuela-Bernal*, 458 U.S. 858 (1982)). Second, petitioner maintains that his conviction was obtained by the prosecution's contrived pretenses, *i.e.*, that petitioner had confessed. *See id.* (citing *Alcorta v. Texas*, 355 U.S. 28 (1957); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)). Petitioner further claims that the prosecutor deliberately permitted trial witnesses to create the false impression that petitioner had confessed. *See id.* (citing *Miller v. Pate*, 386 U.S. 1, 7 (1967); *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). Third, petitioner asserts that the exclusion of Wakshul's testimony violated *Kyles v. Whitely* because it would have shown a biased investigation and prosecution.

See id. (citing *Kyles v. Whitely*, 115 S. Ct. 1555, 1573 (1995)). Respondents answer that because petitioner has failed to prove his "fabricated confession" theory, any claims premised upon that theory necessarily fail. *See* R23 at 60-62.

C. "Contrary to" or "Unreasonable Application of" Clearly Established Federal Law

The claim was fairly presented to the state courts, and thus the exhaustion requirement is satisfied. *See* Amend. St. PCRA Pet. ¶¶ 31-34, 78, 84, 93-95; St. PCRA Mem. at 61-66. Moreover, it was adjudicated on the merits by the state courts. *See PCRA Op. F.F.* ¶¶ 123-37 & *C.L.* ¶¶ 11, 15-16, 38-41; *PCRA Appeal Op.* at 92-94. Therefore, it is subject to the strictures of § 2254(d).

The state supreme court provided the following factual background for this claim:

> Officer Wakshul gave three statements regarding this matter. His first statement, taken at 5:50 a.m. on the morning of the shooting, contained the statement: 'He [Appellant] made no comments.' His second statement, given on December 16, made no mention of an admission on the part of Appellant, but . . ., the subject matter of that statement was narrowly tailored. In the third statement, taken during an Internal Affairs Bureau Investigation initiated by Appellant's complaints of mistreatment, Officer Wakshul reported having heard Appellant's admission that 'I shot him . . . I hope the m... f... dies.' On the last day of trial testimony, the defense attempted to call Officer Wakshul, but was informed that he had gone on vacation and hence was unavailable to testify. Following a sidebar discussion regarding this proposed witness, the court denied a defense request to delay the proceedings so they could search for Officer Wakshul. It is apparent from review of this sidebar discussion that the basis for the court's denial was the defense's belated request to have this officer testify. . . .
>
> At the PCRA hearing, Officer Wakshul testified that he did not stand guard over Appellant at all times; that there were several

> other officers also at the hospital, none of whom he could recall. Officer Wakshul explained the omission of the information regarding Appellant's confession in the first statement by saying that he was emotionally overwrought after hearing Appellant state that he had shot the officer and then seeing the body of Officer Faulkner on a gurney and that he remembers little of what transpired after he heard Appellant's exclamation. Specifically, Wakshul testified that when Appellant uttered this confession, Wakshul was so stunned that he stumbled into an alcove and began to cry. He then went outside in an effort to regain his composure. He testified that upon his eventual return, he remembers little else but having seen Officer Faulkner's feet on a gurney. Admitting that his recollection after leaving the hospital was somewhat weak, Wakshul testified that he remembered being in the Homicide Unit and, after leaving there, crashing his vehicle into a cement pole. He testified that he and Officer Faulkner were friends and that the fact that a police officer was killed was trying. He explains the second statement by saying that he was simply answering very specific questions relating to specific items and was not asked whether he heard the admission.

PCRA Appeal Op. at 92 (record citations omitted). Further, noting that petitioner offered no legal analysis in support of his claim, the court assumed that petitioner was bringing the claim pursuant to the *Brady* doctrine. *See id.* at 93. The court concluded, however, that *Brady* was not violated because each of Wakshul's statements was turned over to the defense and because the failure to call Wakshul was attributable to petitioner. *See id.* Finally, the court determined that petitioner's fabricated confession claim lacked merit because petitioner failed to prove that Wakshul was available to testify when called by the defense or that Wakshul's testimony would have revealed that the confession was fabricated. *See id.* at 94.

In support of this conclusion, the PCRA court found the following facts: (1) that it was petitioner's personal decision to call Wakshul at the last minute; (2) that Wakshul had been available during the early part of his vacation, which lasted in its entirety from June 25, 1982

through July 8, 1982, but that he was never notified that he would be called as a defense witness and accordingly left the city during the latter part of that vacation; (3) that petitioner presented no evidence that the prosecution or police told Wakshul to take a vacation and make himself unavailable; (4) that Wakshul's explanations for failing to mention the confession in his first two statements to the police were credible; and (5) that had Wakshul testified at trial, he would have presented testimony unfavorable to petitioner and cumulative to the testimony of Officer Gary Bell and Priscilla Durham that petitioner had confessed. *See PCRA Op. F.F.* ¶¶ 123-137.

Absent clear and convincing evidence of error, a federal habeas court must presume state court fact findings to be correct. Petitioner has failed to demonstrate such clear and convincing evidence. For example, there could be no violation of *Brady* where all of Wakshul's statements were turned over, where no other evidence that petitioner did not confess existed to be turned over, and where petitioner failed to prove that the prosecutor misrepresented Wakshul's unavailability at trial. Moreover, the prosecution could not have created or deliberately permitted witnesses to create a false impression that petitioner had confessed, given that two witnesses testified to the confession and petitioner has failed to prove that the unavailability of Wakshul was attributable to the prosecution or that his testimony would have established the lack of a confession rather than merely creating a credibility issue at best. Finally, even disregarding the fact that the PCRA court found that the absence of Wakshul's testimony at trial was attributable to petitioner, Wakshul's PCRA testimony failed to demonstrate a biased investigation and prosecution. Accordingly, I find that because petitioner has not substantiated his theory that his confession was fabricated, the state court's denial of his *Brady* claim based on that allegation could not have been contrary to Supreme Court precedent or an unreasonable application of it.

D. Unreasonable Determination of Facts in Light of Evidence Presented

In connection with his fabricated confession theory, petitioner challenges the following findings of fact: 124, 125, 137, 132, 133. I will consider the reasonableness of each in turn.

Finding of fact 124 concludes that the court denied the defense's last-minute request to call Officer Wakshul at trial because by the time defense counsel announced that he wanted to call Wakshul, the officer had gone on vacation and was unavailable. *See PCRA Op. F.F.* ¶ 124. Petitioner claims that this finding is unreasonable because Wakshul testified that he was home during trial and reachable by telephone. Petitioner, however, overlooks Wakshul's PCRA testimony that he was on vacation from June 25th through July 8th, that he did stay home during the early part of that vacation period, waiting to be called as a witness, that he was not called as a witness, and that he left the city for a few days at the end of that vacation period. *See* 8/1/95 Tr. at 94-102. On the whole, this testimony does not lead to the automatic conclusion that Wakshul was still home by the time defense counsel wished to call him to testify. Accordingly, I find that it is not an unreasonable determination of the facts for the state court to find that Wakshul had left the city at the time of the defense's last-minute request for him to testify.

Finding of fact 125 determines that attorney Jackson's PCRA testimony–that it was his fault that Wakshul was not called in a timely manner to testify–was incredible in light of Jackson's assertion at trial that it was petitioner's last-minute decision to call Wakshul. *See PCRA Op. F.F.* ¶ 125. Jackson remarked at trial that he had no advance knowledge that Wakshul would be needed, and petitioner concedes that this statement fosters the conclusion that Jackson may not have been responsible for the decision to call Wakshul at the last minute. However, petitioner nonetheless claims that finding 125 is unreasonable because Jackson also admitted

implicitly at trial that the untimely request was his fault. *See* R18 at 33 (citing 7/1/82 Tr. at 34: "I was forced to remember everything that everybody said and I couldn't do it.").

First, I find that it was reasonable for the court to assign more credibility to defense counsel's statement at trial, made as the Wakshul issue arose, than to Jackson's testimony at the PCRA hearing years later. The question, then, becomes whether the state court's finding that petitioner was at fault for calling Wakshul at the last minute is reasonable. As the state court noted and petitioner concedes, attorney Jackson admitted that he did not know that he would be calling Wakshul to testify. *See* 7/1/82 Tr. at 33-34. It is not absolutely clear, however, that Jackson's reason for his lack of knowledge was because petitioner decided to call Wakshul at the last minute or because of an oversight on the part of Jackson. *See id.* Nonetheless, I find that the state court's determination attributing the last-minute request to petitioner is not unreasonable in light of the evidence presented. For example, on at least two prior occasions, Jackson alluded to the fact that petitioner controlled the decision to call certain witnesses. *See, e.g.*, 6/24/82 Tr. at 2-6 (Jackson submitting that petitioner informed him that he intended to call character witnesses, but that petitioner had not yet advised him as to who these witnesses would be); 6/26/82 Tr. at 136-140 (Jackson advising the court that he was concerned about his impending opening remarks because petitioner still had not given him names of character witnesses; and Jackson advising the court that he no longer had copies of witness statements because petitioner had taken possession of them). Accordingly, I find that it was not unreasonable for the PCRA judge, who also presided at trial and was able to observe the interaction between defense counsel and petitioner, to find that it was petitioner's decision to call Wakshul at the last minute.

In finding of fact 137, the PCRA court found that had Wakshul testified at trial, he would

have presented testimony unfavorable to petitioner because it would have been cumulative to and corroborated by the testimony of two other witnesses who testified to having heard petitioner confess to the murder. *See PCRA Op. F.F.* ¶ 137. The court also pointed out that, like Officer Bell, Wakshul did not report hearing petitioner confess in his initial statement. *See id.* I find that the PCRA court's determination of facts is not unreasonable. Wakshul testified at the PCRA hearing that he heard petitioner confess, a fact that also was contained in Wakshul's third statement to police. *See* 8/1/95 Tr. at 25. Moreover, the PCRA judge, who was in the best position to observe the demeanor of this witness, determined that Wakshul's explanation for failing to mention the confession in prior statements was credible. *See PCRA Op. F.F.* ¶¶ 134-35. Such credibility determinations are not to be easily disturbed. Finally, as the PCRA court noted, the testimony of Durham, who reported the confession in writing the day after the murder, further corroborated Wakshul's account. Therefore, in light of all of the evidence presented, it is not unreasonable for the state court to have found that Wakshul's testimony at trial would have been harmful to petitioner.

Finding of fact 132 accepts Wakshul's testimony that he failed to report that he had heard the confession in his first police report because he was too distraught as a result of petitioner's exclamation. Petitioner argues that because Wakshul's excuse was both feeble and incredible, this finding is unreasonable. However, Wakshul at a later time did report hearing the confession, and his account was corroborated by Durham, an independent witness who reported hearing the same confession the day after the murder. Consequently, I find the PCRA court's acceptance of Wakshul's explanation to be reasonable, and to reiterate, the court is not in a position to second-guess such a reasonable credibility determination. *See* 28 U.S.C. § 2254(d)(2) (permitting habeas

relief pursuant to a state court's factual determination only where such is unreasonable).

Finally, finding of fact 133 concludes that Wakshul made two statements to the police, in the first of which he indicated that petitioner "made no comments," and in the second of which he reported hearing the admission. *See PCRA Op. F.F.* at 133. Additionally, because Wakshul's account of petitioner's confession was corroborated by two other trial witnesses, the court found that petitioner did make such an admission that, indeed, was heard by Officer Wakshul. *See id.* Petitioner challenges this finding because Wakshul actually made three statements to police and because petitioner claims that he did not confess to Officer Faulkner's murder. While it is true that Wakshul made three statements to police, I find that the PCRA court's finding that he made only two to be a mistake that neither affected the substance of finding 133, nor the decision of the PCRA court.[27] The central focus of this finding is that Wakshul's explanation regarding his failure to report having heard the confession in the first instance was credible and that in any event, his eventual report of the confession was corroborated by two other trial witnesses. Moreover, the state supreme court corrected this mistake in its recitation of the facts (quoted above) and nonetheless agreed with the PCRA court that Wakshul's testimony would have shown that petitioner indeed confessed. As such, while arguably an unreasonable factual determination, it is perfectly clear that the state courts did not base their decision as to this claim on this determination.

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[27]It is likely that the PCRA court found there to be only two statements from Wakshul because it excluded the December 16, 1981 statement as narrowly tailored. *See generally PCRA Appeal Op.* at 92 (characterizing Wakshul's second statement to police as "narrowly tailored"). In any event, as discussed, whether the PCRA court stated that there were two or three statements given by Wakshul, this determination did not affect the PCRA court's finding that Wakshul indeed had heard petitioner confess to the shooting.

E. Evidentiary Hearing

Petitioner contends that an evidentiary hearing is mandatory on this claim. *See* P27 at 1. This requirement no longer exists. However, construed favorably to the petitioner, the allegation may be that the state prevented petitioner from developing the factual basis of his claim. *See* 28 U.S.C. § 2254(e)(1). Even if true, the state court fact-findings are presumed to be correct unless petitioner presents clear and convincing evidence of error. *See id.* Petitioner makes no attempt to qualify his evidence as such, and accordingly the only possible basis for an evidentiary hearing on this claim is 28 U.S.C. § 2254(e)(2).

Petitioner claims that while his PCRA counsel explained to the court that they were unable to secure Trombetta's presence, the court quashed subpoenas for all law enforcement and municipal employees. *See* P27 at 14. Petitioner argues that he failed to develop this claim because he could not foresee that the PCRA court would deny it for lack of record support. *See* P27 at 14-15. Petitioner suggests that because that denial is unreasonable, he may now introduce new evidence. *See* P27 at 15.

Respondents answer that the failure to develop the record because of surprise at the court's findings not only demonstrates petitioner's failure under § 2254(e)(2), but is contradicted by petitioner's assertion that he expected the petition to be denied. *See* R30 at 29 & n.20. Additionally, respondents argue that the PCRA court instructed petitioner to call Trombetta, but that Trombetta never was sought by petitioner, *see* R30 at 24-25, and that such a subpoena never was quashed. *See* R30 at 25. Respondents submit that the court only ruled, in response to abuses by petitioner, that a subpoena would issue on request for leave and a proffer. *See* R30 at 26. However, petitioner never sought either for Trombetta. *See* R30 at 26. Finally, respondents add

that even if Trombetta heard nothing, it would not prove that other witnesses did not. *See* R30 at 28.

First, I find respondents' record citations to be persuasive. *See, e.g.*, 8/1/95 Tr. at 69-71; 162-65 7/31/95 Tr. at 301; 8/3/95 Tr. at 194-96; 8/7/95 Tr. at 57-59; *PCRA Op. F.F.* at 48. It is clear that petitioner's counsel failed to call Officer Trombetta in accordance with the procedure set forth by the PCRA court. Petitioner failed to exercise due diligence to develop the state court record and does not allege that he can meet the requirements of § 2254(e)(2)(A) and (B). Second, petitioner has not explained how one officer's testimony, presumably that he did not hear petitioner confess, would preponderate over that of three other witnesses, each of whom testified to having heard petitioner admit that he shot Officer Faulkner. As such, petitioner has not proffered clear and convincing evidence which, if believed, would entitle him to relief. Therefore, no evidentiary hearing will be held on this claim.

III.4 SUPPRESSION, MISREPRESENTATION, AND DESTRUCTION OF PHYSICAL EVIDENCE IN VIOLATION OF 5TH, 8TH AND 14TH AMENDMENTS.

A. Allegations in Support of Claim

Petitioner contends that it is standard police practice to test firearms and suspects at shooting scenes for evidence of recent firing, and that such tests must have been conducted in this matter and the results suppressed. Petitioner also alleges that the evidence of petitioner's nonuse of a firearm was suppressed, contrary to the prosecution's claim that the tests never were run. Further, petitioner claims that a prosecution expert admitted that there was no link between petitioner's gun and either the bullet retrieved from Officer Faulkner or the bullet recovered at the scene. Petitioner also suggests that there was a major contradiction in the ballistics report because it determined both that rifling characteristics were unreadable and also that the rifling characteristics showed a "right-hand twist." Finally, petitioner alleges that a bullet fragment from Faulkner's head wound was discarded before trial. *See* P1 ¶¶ 192-200.

B. Violation of Federal Law, Constitution, or Treaty

Petitioner claims that he was deprived of his right to a fair and reliable determination of guilt. In support of his claim, petitioner argues that the suppression or destruction of evidence violated his due process rights because it corrupted the trial process. *See* P14 at 43 (citing *Arizona v. Youngblood*, 488 U.S. 51 (1988)).

Respondents answer that the claim is procedurally defaulted because suppression was not alleged in petitioner's state court petition. *See* R23 at 63 (citing *Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Coleman v. Thompson*, 501 U.S. 722 (1991); *Wise v. Fulcomer*, 958 F.2d 30, 33 (3d Cir. 1992)). Respondents argue alternatively that the claim is frivolous because no evidence

of suppression or destruction was introduced. *See* R23 at 63. Respondents assert that petitioner is incorrect on the facts because his own ballistics expert conceded that the fatal bullet was the same caliber as petitioner's gun and refused to conduct further tests, because the medical examiner explained his findings about the gun, caliber and rifling, and because the tests that were performed were fully explained at trial. *See* R23 at 64-65.

C. "Contrary to" or "Unreasonable Application of" Clearly Established Federal Law

The claim was fairly presented to the state courts, and thus the exhaustion requirement is satisfied. *See* Amend. St. PCRA Pet. ¶¶ 78, 90, 99; St. PCRA Mem. at 76-79. Moreover, it was adjudicated on the merits by the state courts. *See Abu-Jamal*, 555 A.2d at 852; *PCRA Op. F.F.* ¶¶ 143-52 & *C.L.* ¶¶ 31, 34, 108; *PCRA Appeal Op.* at 107.[28] Therefore, it is subject to the strictures of § 2254(d).

The PCRA court made several findings of fact regarding this claim. *See generally PCRA Op. F.F.* ¶ 143-52. First, it determined that George Fassnacht, petitioner's ballistics expert, could not demonstrate that any of the ballistic evidence or testimony submitted at trial was false or incorrect. *See PCRA Op. F.F.* ¶ 145. Next, it found that although the heart of Fassnacht's testimony was that the Commonwealth's evidence was inadequate for failing to conduct certain

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[28]Respondents assert that this claim is defaulted because neither the claim nor its factual premise was fairly presented in state court. *See* R23 at 63. While it is true that petitioner's state court claim was alleged generally and did not argue clearly a *Brady* violation, a liberal reading of petitioner's amended PCRA petition suggests that he was asserting that the state violated *Brady* when it destroyed a bullet fragment. *See* Amend. St. PCRA Pet. at ¶¶ 78(8), 90-91. Additionally, the PCRA court ruled that petitioner failed to present evidence to support this allegation, *see PCRA Op. C.L.* at ¶ 31, and the Supreme Court of Pennsylvania affirmed the PCRA court's decision. *See PCRA Appeal Op.* at 121. Accordingly, I conclude that this claim is not procedurally defaulted.

scientific tests, Fassnacht was unable to opine how the results of these additional tests would have been helpful to petitioner. *See id.* ¶ 146. Based upon these facts, the court found that petitioner failed to produce evidence that the Commonwealth destroyed a bullet fragment, suppressed any ballistician's notes or that this supposed evidence could have aided petitioner's defense. *See id. C.L.* ¶¶ 31, 34, 108. Accordingly, the court concluded that this claim was without merit. The Supreme Court of Pennsylvania affirmed, citing this reasoning on direct appeal. *See PCRA Appeal Op.* at 107 (*citing Abu-Jamal*, 555 A.2d at 852).

Due process requires that "criminal defendants be afforded a meaningful opportunity to present a complete defense." *Trombetta*, 467 U.S. at 485. For example, whether a defendant requests it or not, the accused has a constitutional right to receive from the prosecution exculpatory evidence that would create a reasonable doubt as to the defendant's guilt. *See Agurs*, 427 U.S. at 112; *Brady*, 373 U.S. at 87. Moreover, in certain circumstances, due process may also impose on a state the duty to preserve evidence. This evidence, however, must be constitutionally material, *i.e.*, it "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Trombetta*, 467 U.S. at 489 (citing *Agurs*, 427 U.S. at 112). Further, due process is not violated unless the defendant can demonstrate bad faith on the part of law enforcement. *See Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

In the instant case, the state court found as a fact that petitioner's expert failed to prove that the Commonwealth's ballistics testing was inadequate or that any other tests would have proven helpful to petitioner's defense. Consequently, the court found that petitioner had failed to

substantiate his claim that the Commonwealth destroyed or withheld ballistics evidence. I note that in the absence of clear and convincing evidence to the contrary, state court fact findings are presumed correct. Because petitioner has failed to demonstrate that the evidence existed, that even if it did exist, the evidence was exculpatory, that he was unable to obtain comparable evidence by alternate means, or that the prosecution withheld or destroyed the supposed evidence in bad faith, I conclude that petitioner has failed to meet the *Agurs* constitutional materiality test as well as the *Youngblood* bad faith requirement. Petitioner merely has raised unsubstantiated allegations, which even if true, have not been shown to be helpful to his defense. In short, his allegations concerning this claim are pure speculation and lack any factual support. Accordingly, I cannot conclude that petitioner's due process rights were violated or that the state courts' denial of this claim was contrary to or an unreasonable application of federal law.

D. Unreasonable Determination of Facts in Light of Evidence Presented

Petitioner makes no allegations as to the factual basis of his claim, *e.g.*, that tests were conducted but suppressed. *See* P18 at 69-75 (discussing Fassnacht testimony in context of claims concerning ineffective assistance of counsel during guilt phase). Thus, although it is argued that a ballistician would have been helpful, petitioner raises no argument that, in light of the evidence presented, the state court unreasonably determined that tests were not performed.

E. Evidentiary Hearing

Petitioner maintains that an evidentiary hearing is mandatory on this claim. *See* P27 at 1. claim. He argues that forensic tests performed on him, on Faulkner, and on the wall behind them at the shooting scene were suppressed. *See* P27 at 2. He seeks discovery of all documents

related to lead or gunshot residue. *See* P27 at 2. Additionally, petitioner seeks to test his handgun for resiliency. *See* P27 at 3. Finally, petitioner seeks photos of sidewalks and will call an expert to testify that bullets fired would have caused damage to the sidewalk. *See* P27 at 4.

Respondents answer that the claim is defaulted because there is no evidence to support it and because the claim was not presented to the Supreme Court of Pennsylvania on PCRA review. *See* R30 at 6. Respondents alternatively note that tests were presented at trial, that petitioner failed to demonstrate that he is not responsible for the failure to develop the factual allegations in support of his claim, and that petitioner's ballistician refused to examine physical evidence at the PCRA hearing. *See* R30 at 6-7. Finally, respondents argue that petitioner's photo claim is defaulted because it never was raised and because petitioner was not prevented from developing the basis of this claim. In any event, respondents continue, the photo claim is unnecessary because thirty-three photosgraphs are part of the state court record and petitioner had hired his own photographer to take any additional photographs he thought necessary. *See* R30 at 8-9.

It is evident that petitioner's request for a hearing regarding this claim is a mere fishing expedition. *See Deputy v. Taylor*, 19 F.3d 1485, 1493 (3d Cir. 1994) (stating that habeas petitioners "are not entitled to go on a fishing expedition through the government's files in hopes of finding some damaging evidence"). Regarding the ballistics tests, petitioner had the opportunity at the PCRA hearing to demonstrate that such tests had been conducted. The court determined that petitioner failed to meet this initial burden. Moreover, petitioner has not shown that the state prevented him from developing the factual basis of this claim or that the state court's factual findings were erroneous. Regarding petitioner's request to test his handgun and to receive photos of the Locust Street sidewalk, petitioner has failed develop the factual allegations

supporting this request in state court. Indeed, the state court found that petitioner's own ballistician refused to examine any of the physical evidence at the PCRA hearing. *See PCRA Op. F.F.* ¶ 145. Petitioner failed to develop in state court the factual basis for any claim asserted in this section, and does not allege that he meets the requirements of § 2254(e)(2)(A) and (B). Moreover, he has failed to show the existence of clear and convincing evidence which, if believed, would entitle him to relief. Therefore, no evidentiary hearing will be held on this claim.

III.5 FAILURE TO DISCLOSE SURVEILLANCE FILES DEMONSTRATING BIAS AGAINST PETITIONER IN VIOLATION OF PETITIONER'S RIGHTS UNDER 5TH, 8TH, AND 14TH AMENDMENTS.

A. Allegations in Support of Claim

Petitioner contends that, because of his controversial political activities, he had been the object of Philadelphia police department monitoring and surveillance for years prior to Faulkner's murder. Petitioner further asserts that evidence of such was contained both in files maintained by the Philadelphia police department and in files kept by the FBI. Had these files been turned over, he alleges, such evidence would have revealed bias on the part of the Philadelphia police in the investigation of Faulkner's murder. Petitioner claims, however, that these files were not disclosed to him prior to trial. *See* P1 ¶¶ 201-12.[29]

B. Violation of Federal Constitution, Law or Treaty

Petitioner claims that he was deprived of his rights to a fair and reliable determination of guilt. Specifically, he argues that the failure to disclose these Philadelphia police and FBI files is relevant to bias in the investigation, and that their disclosure would have "bolstered the defense theory that law enforcement hastily concluded that Jamal was guilty." P14 at 43 (citing *Kyles v. Whitley*, 514 U.S. at 448-49). Petitioner adds that the files would have provided additional support for his theory that "law enforcement's overzealousness prompted the fabrication and manipulation of evidence." *Id.*

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[29]The court is conscious of the fact that claim 5 is substantively related to claim 24, in which petitioner asserts that these files would have demonstrated his lack of criminal history, which would have constituted relevant mitigating evidence at the penalty phase of his trial. Given the disposition of claim 25, also concerning the penalty phase, however, there is no need for the court to address claim 24.

Respondents answer petitioner's claim by asserting that the PCRA court properly excluded any files that petitioner allegedly obtained from the FBI as hearsay and as unauthenticated. *See* R23 at 66 & n.25. Respondents further note that, due to the lack of a proffer, the PCRA court properly quashed petitioner's subpoena for Alphonse Giordano, a police inspector who allegedly would have testified "that he knew [petitioner] through police surveillance." *PCRA Appeal Op.* at 108; *see also* R23 at 66. Finally, respondents assert that evidence of surveillance is not material under *Brady*, on which *Kyles* is based. *See* R23 at 67 n.26.

C. "Contrary to" or "Unreasonable Application of" Clearly Established Federal Law

This claim was fairly presented to the state courts, and thus the exhaustion requirement is satisfied. *See* Amend. St. PCRA Pet. ¶¶ 86, 91-92; St. PCRA Mem. at 54-55. Moreover, it was adjudicated on the merits by the state courts. *See PCRA Op. C.L.* ¶¶ 11, 19; *PCRA Appeal Op.* at 108. Therefore, it is subject to the strictures of § 2254(d).

In order to establish a *Brady* violation, petitioner must show that the Commonwealth withheld "favorable evidence [that] could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. The PCRA court properly identified *Brady* as controlling precedent. *See PCRA Op. C.L.* ¶ 9. Additionally, the PCRA court found as facts there was no evidence that (1) a police conspired to frame petitioner because of his political beliefs; (2) officers conducting interviews after the murder knew anything about petitioner apart from his connection with the murder; and (3) police ignored evidence of the "real" killer in order to implicate petitioner. *See id. F.F.* ¶ 269. Because

petitioner proved neither that any Philadelphia police department or FBI files existed nor that they were exculpatory, the PCRA court concluded that petitioner had failed to demonstrate that the Commonwealth improperly withheld any police files concerning petitioner's political activities. *See id.* ¶ 19.

I already have found that the state courts' interpretation of *Brady* and its progeny was not contrary to clearly established federal law. *See supra*, III.1.C.1. Additionally, in this instance, in light of the fact that petitioner failed to produce any evidence of police bias or the existence of surveillance files, the PCRA court's conclusion that the Commonwealth did not withhold any files regarding that bias does not constitute an unreasonable application of the *Brady* doctrine. Therefore, I conclude that the PCRA court's decision was not contrary to or an unreasonable application of federal law.

D. Unreasonable Determination of Facts in Light of Evidence Presented

Petitioner claims that the PCRA court's findings unreasonably fail to mention the FBI files, which the court unreasonably refused to admit at the hearing. *See* P18 at 32. Additionally, petitioner claims that the PCRA court unreasonably quashed his subpoenas for Churchill and Giordano, who would have testified as to such surveillance. *See* P18 at 32 n.31.

Respondents answer that the documents were not properly offered into evidence. *See* R24 at 46. Respondents add that witness Churchill was barred because there was no foundation for his expert opinion on surveillance, *see* R24 at 46 n.28, and that Giordano was barred because petitioner failed to provide either a proffer or an affidavit as required by the PCRA court. *See* R24 at 46 n.28.

The PCRA court excluded the FBI files because "even aside from questions of relevance and materiality, hearsay documents cannot simply be moved into evidence." *PCRA Op. C.L.* ¶ 19 n.30. Noting that the admission of evidence is a matter vested in the discretion of the trial court, the Pennsylvania Supreme Court ruled that the trial court's evidentiary ruling was not an abuse of discretion because "[a]bsent any authentication that these files were, indeed, FBI files, there is simply no basis for their admission." *PCRA Appeal Op.* at 108. It certainly was not unreasonable for the state court to require petitioner to lay a proper foundation before moving documents into evidence at the PCRA hearing. Moreover, petitioner never attempted later in the PCRA hearing to provide an authenticating document or witness.

Furthermore, petitioner never offered any factual basis for his assertion that the FBI files were relevant. Indeed, it was not unreasonable for the state court to conclude that police surveillance in general did not relate to specific police bias against petitioner in the investigation of the murder of Officer Faulkner, especially where the court had found that petitioner failed to produce any particularized evidence to substantiate his claim of police bias. *See* 8/7/95 Tr. at 25-26. Accordingly, I find that in light of the evidence presented, the state court's unwillingness to mention these files in its factual determinations was not unreasonable.[30]

Petitioner's assertion that Giordano improperly was barred from testifying also is without merit. Because of subpoena abuse by petitioner's counsel, the PCRA court established a procedure that required counsel "to first give [the PCRA court] a list of everybody they wish to

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[30]Petitioner also claims that the state courts findings unreasonably failed to mention these FBI files. The court cannot conceive of any instance where a court must make findings regarding evidence which was properly excluded.

call, and an affidavit from that person as to what he would say. Or why it's material in these proceedings." 8/7/95 Tr. at 60. This procedure, however, was not followed to secure Giordano as a witness. Instead, at 10:55 a.m. on August 7, 1995, petitioner's counsel served Giordano with a subpoena and advised Giordano to appear in court to testify as a defense witness at 2:00 p.m. that same date. *See id.* at 58. Accordingly, the PCRA court quashed the subpoena issued for Giordano. *See id.* at 60. Thereafter, petitioner made no attempt to follow the requisite procedure and re-subpoena Giordano. Moreover, the PCRA court's decision to quash the subpoena for Churchill was not unreasonable, as without the files in evidence there was no basis for the presentation of expert testimony on police surveillance. Therefore, I find that in light of the evidence presented, the state court's rulings quashing petitioner's subpoenas for Giordano and Churchill were not unreasonable.

E. Evidentiary Hearing

Petitioner maintains that an evidentiary hearing is mandatory on this claim. *See* P27 at 1. Petitioner seeks leave to introduce the FBI files and testimony as to their significance because he was denied the opportunity to develop the basis of this claim in PCRA proceedings. *See id.* at 6. Respondents allege that the files and witnesses properly were excluded for failure to authenticate the documents and because expert testimony was unwarranted in the absence of the documents. *See* R30 at 9. Respondents additionally point out that petitioner did not challenge the Pennsylvania Supreme Court's affirmance of the PCRA court on evidentiary grounds, has not met his burden of establishing the existence of the additional files sought, and does not allege that the surveillance involved this case. *See id.* at 9-10 & n.8.

Because I have concluded that the state court appropriately excluded petitioner's

proffered evidence, an evidentiary hearing on these claims will be denied. Moreover, petitioner failed to develop the record in state court and has not even suggested that he meets the requirements imposed by § 2254(e)(2)(A) and (B).

III.6 CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE 5TH, 6TH, 8TH AND 14TH AMENDMENTS.

A. Allegations in Support of Claim

Petitioner alleges that he received ineffective assistance of counsel and submits specifically that the following constitute deficiencies in the representation with which he was provided:[31]

(1) Counsel failed to serve as a zealous and minimally prepared advocate;[32]

(2) Counsel had little criminal or trial litigation experience, no capital litigation experience, was undercapitalized, and lacked adequate support staff;

(3) Counsel failed to devote sufficient time to the case during the pretrial phase;

(4) Counsel failed to obtain a ballistics expert, a pathologist, and an investigator. Additionally, counsel failed to follow-up on the court's invitation to file a memorandum of law supporting the need for and submitting itemized bills in support of interim payments to experts;

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[31]While petitioner sets forth numerous allegations of counsel's errors, petitioner fails to organize effectively those allegations. Moreover, while respondents have attempted to arrange and to address petitioner's various assertions, I find that respondents have overlooked a number of petitioner's allegations. As such, I have reviewed the petition and memorandum in support thereof and have categorized petitioner's assertions accordingly.

[32]As additional proof that Jackson's performance was ineffective, petitioner now asserts that he decided to proceed *pro se* because of Jackson's lack of preparation for trial. This assertion, however, is contradicted by the record. *See, e.g.*, 5/13/82 Tr. at 54 (petitioner stating that representing himself was consistent with religious beliefs); *id.* at 61-62 (petitioner stating that it had been his intention for several months to request to proceed *pro se*); *id.* at 64 (petitioner stating that he had "worked very closely with Mr. Jackson," but felt that it was now time to represent himself). Accordingly, I reject petitioner's contention because it is not supported in the record.

(5) Counsel failed to prepare voir dire topics;

(6) Counsel failed in his role as back-up counsel because he was unwilling to serve in this role and did nothing to discharge his duties in this capacity;

(7) After petitioner's *pro se* status was rescinded and Jackson was ordered to assume the role of petitioner's counsel, counsel did nothing to prepare for trial, was entirely unprepared to call witnesses, prepared no witnesses, declared that he saw no defense to the case, and failed to read and sometimes lost evidence;

(8) Counsel failed to research evidentiary issues;

(9) Counsel failed to consult with his client;

(10) Counsel failed to investigate, prepare and present an affirmative defense of actual innocence;

(11) Counsel failed to expose flaws and vulnerabilities in the prosecution's case;

(12) Counsel was responsible for the last-minute decisions to call witnesses Wakshul and Kordansky;

(13) Counsel permitted an unconstitutional and prejudicial summation by the prosecutor;

(14) Counsel failed to object to prosecutorial challenges to African American jurors and failed to challenge an empaneled alternate juror who was married to a police officer and an empaneled juror who was friends with a police officer shot in the line of duty; and

(15) Counsel allowed juror Dawley to be dismissed by the court and replaced with juror Courchain.

See P1 ¶¶ 213-294.

B. Violation of Federal Constitution, Law or Treaty

Petitioner claims that he was deprived of his rights to a fair and reliable determination of guilt and to effective assistance of counsel. Petitioner asserts that his counsel's failure to advocate a defense theory, to attack the physical evidence, and to attack the confession denied petitioner a meaningful adversarial testing of the prosecution's case. *See* P14 at 44 (citing *United States v. Cronic*, 466 U.S. 648 (1984)). He also alleges that counsel's actions were objectively unreasonable and prejudicial, and warrant relief pursuant to *Strickland v. Washington*, 466 U.S. 668, 696 (1984). Petitioner further alleges that such inadequacies are not excused for lack of sufficient funds. *See id.* at 45 (citing *Bloom v. Calderon*, 132 F.3d 1267 (9th Cir. 1998); *Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997); *Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987); *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980)). Further, petitioner contends that counsel's failure to prevent "prosecutorial overreaching" likewise constituted ineffectiveness and "deepened the damage done to Jamal's interests." *Id.* (citing *Kimmelman v. Morrison*, 477 U.S. 365 (1986); *Sullivan v. Louisiana*, 508 U.S. 275 (1993); *Mason v. Scully*, 16 F.3d 38 (2d Cir. 1994); *Virgin Islands*, 865 F.2d 59 (3d Cir. 1989)). Finally, petitioner argues that defense counsel's admission of defeat further proves that Jackson was constitutionally ineffective. *See id.* at 46 (citing *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997)).

Respondents engage petitioner essentially on the facts.

C. "Contrary to" or "Unreasonable Application of" Clearly Established Federal Law

The claim as a whole was fairly presented to the state courts, and thus the exhaustion requirement is satisfied. *See* Amend. St. PCRA Pet. ¶¶ 110-19; St. PCRA Mem. at 97-108. Moreover, it was adjudicated on the merits by the state courts. *See PCRA Op. F.F.* ¶¶ 52-55, 61-

77 & *C.L.* ¶¶ 57-85.; *PCRA Appeal Op.* at 88-108. Therefore, it is subject to the strictures of § 2254(d).[33]

The cause of action for ineffective assistance of counsel flows from the Sixth Amendment right to counsel, which exists "in order to protect the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684 (1984). Given the facts of this case, to succeed with a claim for ineffective assistance of counsel, petitioner must show (1) that his attorney's performance was objectively deficient and (2) resultant prejudice to his defense.[34] *See Strickland*, 466 U.S. at 687-90; *Deputy v. Taylor*, 19 F.3d 1485, 1493 (3d Cir. 1994). In considering whether counsel's performance was objectively deficient, the court must defer to his tactical decisions and must afford counsel's actions the benefit of a strong presumption of reasonableness. *See Deputy*, 19 F.3d at 1493. Translated into practical terms, this presumption

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[33] Although an ineffective assistance of counsel claim was raised and considered at the state level, respondents argue that petitioner here submits several allegations of attorney error which were neither fairly presented nor adjudicated on the merits in state court. They are: (1) that trial counsel failed to prepare character witnesses; (2) that trial counsel failed to prepare witness Dr. Coletta; (3) that trial counsel failed to object to the prosecution's use of racially motivated peremptories; and (4) that trial counsel failed to object to the seating of two jurors, one who was friendly with a police officer shot in the line of duty and the other who was married to a police officer. After reviewing the relevant record, I find that petitioner failed to present the first two referenced allegations of error to the state courts. *See generally* Amend. St. PCRA Pet. ¶¶ 110-119; St. PCRA Mem. at 100-104. Accordingly, the arguments that counsel was ineffective for failing to prepare both character witnesses and defense witness Coletta are procedurally defaulted. Moreover, because petitioner fails to establish any ground to allow this court to consider these procedurally defaulted arguments, the court may not review them on the merits.

[34] I reject the proposition advanced by petitioner that the representation provided by trial counsel was so egregiously deficient so as not to have subjected the prosecution's case to meaningful adversarial testing. Indeed, none of the arguments advanced by petitioner as to Jackson's ineffectiveness even approach the gravity required to state a claim under *United States v. Cronic*, 466 U.S. 648 (1984). Accordingly, the ineffectiveness standard that I will apply is that set forth in *Strickland*.

that counsel's actions were reasonable generates inquiries into whether the actions in question could be considered "'sound trial strategy.'" *Strickland*, 466 U.S. at 690 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). If so, then the first component of the *Strickland* test is unsatisfied, and the claim of ineffective assistance must fail. *See, e.g.*, *Werts v. Vaughn*, 228 F.2d 178, 204 (3d Cir. 2000); *Buehl v. Vaughn*, 166 F.3d 163, 176 (3d Cir. 1999).

In considering whether prejudice resulted from an objectively deficient performance, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *see also Kimmelman v. Morrison*, 477 U.S. 365, 375 91986) (reiterating this standard). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

The PCRA court heard this claim and the various assertions made in support thereof, but rejected it because "[p]etitioner fail[ed] to meet any of the minimal standards required to establish a claim of ineffective assistance of counsel." *PCRA Op. C.L.* ¶ 63. The court's conclusion was influenced heavily by its factual findings that petitioner controlled his own trial strategy and that he would not cooperate with his or any attorney. *See e.g., id.* ¶ 65-68. The Supreme Court of Pennsylvania affirmed the PCRA court's denial of petitioner's ineffective assistance claim for essentially two reasons: first, because petitioner failed to show that the underlying claims were of arguable merit; and second, having determined that the PCRA court's finding that petitioner controlled trial strategy was supported in the record, because counsel could not be deemed ineffective where petitioner pursued his own strategy. *See PCRA Appeal Op.* at 88-108. While the state courts did not identify specifically *Strickland*, the Pennsylvania case law they did reference articulates a nearly identical standard: whether the underlying claim is of

arguable merit, whether counsel's conduct was reasonable, and whether any unreasonable conduct prejudiced the defense. *See PCRA Op. C.L.* ¶ 58 (citing *Commonwealth v. Douglas*, 645 A.2d 226, 230 (Pa. 1994); *Commonwealth v. Pierce*, 527 A.2d 973 (Pa. 1987)); *PCRA Appeal Op.* at 88. Against this background I will consider each of petitioner's fifteen allegations of ineffectiveness.

1. Allegations Four, Twelve, Thirteen, Fourteen, and Fifteen

At the outset, the following allegations of error easily can be disposed: four, regarding the retention of experts; twelve, regarding witnesses Wakshul and Kordansky; thirteen, regarding the prosecutor's summation; fourteen, regarding prosecutorial challenges to African American jurors;[35] and fifteen, regarding the dismissal of juror Dawley. I specifically have found each of petitioner's substantive claims regarding these issues to be without merit. *See supra,* III.2 (Kordansky); III.3 (Wakshul); *infra* III.8 (experts); III.9 (Wakshul); III.14 (prosecutor's trial summation); III.16 (peremptory challenges); III.17 (juror Dawley); III.18 (juror Courchain). It follows that counsel cannot be deemed ineffective for having taken the actions on which these claims are based. *See generally Hartley v. Vaughn*, 186 F.3d 367, 372 (3d Cir. 1999) (finding no unreasonable attorney performance where the underlying claims regarding the failure to challenge statements made by the prosecutor and certain witnesses' testimony already had been

[35]Regarding petitioner's subclaim that Jackson was ineffective for failing to challenge two empaneled jurors, petitioner fails to surmount his *Strickland* burden of proof. Without deciding whether Jackson's conduct was reasonable, I find that petitioner has not demonstrated sufficient prejudice resulting from Jackson's decision not to challenge these two jurors. *See generally Strickland*, 466 U.S. at 697 (instructing that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed"). Accordingly, relief pursuant to this challenge will be denied.

found to be without merit); *Parrish v. Fulcomer*, 150 F.3d 326, 328 (3d Cir. 1998) (holding that there is no ineffective assistance where the claim not pursued by counsel is without merit).

2. Allegations One, Three, Five, and Seven

The central focus of allegations one, three, five, and seven is that Jackson was not prepared for trial.[36] However, the PCRA court reasonably found that Jackson did prepare for trial. *See PCRA Op. F.F.* ¶ 61; *infra*, at III.6.D (discussing factual finding 61 and determining it to be reasonable); *see also, e.g.,* N.T. 3/18/82 at 12-19 (Jackson moving for a jury survey to be conducted in advance of voir dire and articulating proposed questions); N.T. 6/19/82 at 7-8 (after the state supreme court did not permit Jackson to withdraw as counsel, Jackson assuring the trial court, "I am at this very moment prepared to defend Mr. Jamal to the best of my ability"); N.T. 6/26/82 at 139-40 (Jackson indicating that there may some additional witnesses called at trial, and that he would know for certain upon "reflect[ing] and think[ing] and search[ing] [his] notes as to the statements of witnesses"); N.T. 7/28/95 at 57 (Jackson admitting that prior to trial he read the statements of record in the case "at least" ten times each). As indicated above, the

[36]Allegation seven also suggests that Jackson was ineffective because he declared that he saw no defense to the case. While Jackson did articulate this fear at a June 18, 1982 *in camera* hearing, petitioner fails to articulate the specific prejudice resulting therefrom. In any event, this comment, without context, does not support a finding that counsel's performance was constitutionally deficient. Accordingly, petitioner fails to substantiate his *Strickland* claim. Allegation seven further suggests that Jackson was ineffective because he failed to read and sometimes lost evidence. Jackson testified that he read each statement at least ten times. *See* 7/28/95 Tr. at 55-58; *cf. id.* at 57 (Jackson stating that he did not read every statement in the case prior to trial). Moreover, the record indicates not that Jackson lost evidence, but rather that he turned such evidence over to petitioner who refused to return it. *See PCRA Op. F.F.* ¶ 70; *infra* at III.6.D (determining that fact finding 70 is reasonable). Furthermore, petitioner also has failed to articulate the requisite prejudice. Accordingly, allegation seven does not substantiate petitioner's ineffective assistance claim.

Pennsylvania Supreme Court concurred in this assessment, and further rejected petitioner's contention that Jackson "failed to adequately prepare his defense" on the ground that any shortcomings in the presentation of the defense's case were attributable to petitioner's refusal to cooperate with Jackson and "his decision to pursue his own trial strategy." *PCRA Appeal Op.* at 84. Absent clear and convincing evidence to the contrary, this finding is presumed to be correct. Petitioner has not proffered any such evidence. Accordingly, petitioner's ineffectiveness claim is unpersuasive insofar as it sounds in Jackson being unprepared for trial, and the state courts' denial of relief pursuant to this claim consequently is not contrary to or an unreasonable application of federal law.

3. Allegation Two: Counsel's Experience

Petitioner alleges that Jackson was ineffective because he was inexperienced, undercapitalized and lacked adequate support staff. I find that this claim lacks merit. First, the record does not support petitioner's assertion. *See PCRA Op. F.F.* ¶¶ 52-54, 56-59. As indicated by the PCRA court, "[p]rior to representing defendant, Mr. Jackson had tried approximately twenty cases in which his clients were charged with murder in the first degree, resulting in six convictions and no death sentences." *Id.* ¶ 52 (citing N.T. 7/27/95 at 92-93). Before he became an attorney, Jackson worked as an evidence technician for the Philadelphia Police Department, as an investigator for the Defender Association of Philadelphia, and as an investigator for Marilyn Gelb, Esq. *See id.* ¶ 53 (citing N.T. 7/27/95 at 95-101). As the PCRA further found, the record indicates that (1) Jackson was allotted funds to here experts and an investigator, and was to be provided with additional funds when he submitted itemized bills to justify each charge, *see id.* ¶ 56 (citing N.T. 3/18/82 at 7-8); (2) petitioner "was receiving an undisclosed amount of money

from various sources prior to and during trial, including an 'independent defense fund'; the Mumia Abu-Jamal Defense Committee, a fund-raising entity; the Association of Black Journalists; and other organizations and individuals" *id.* ¶ 57 (citing N.T. 4/1/82 at 11, N.T. 7/26/95 at 65, N.T. 7/27/95 at 175-77, 240-43); and (3) "the court provided over $1,300 for investigation and expert assistance." *Id.* ¶ 58. Moreover, even were I to assume that Jackson was inexperienced, undercapitalized and lacked adequate support, petitioner does not demonstrate "that there is a reasonable probability that but for these [conditions], the result of the proceeding would have been different." *Strickland*, 466 U.S. at 695. To the extent that petitioner has attempted to make this showing through the numerous other issues raised under the rubric of this claim, I have dealt with each one individually. Accordingly, this allegation does not support petitioner's claim of ineffective assistance, and the denial of this claim by the Pennsylvania courts was not contrary to or an unreasonable application of federal law.

4. Allegation Six: Jackson as Back-Up Counsel

Petitioner claims that Jackson was ineffective because he failed in his role as back-up counsel. The function of back-up or stand-by counsel is "to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975). Back-up counsel may also help to "lessen the 'unorthodoxy, confusion and delay [that] is likely, perhaps inevitable, in pro se cases.'" *In re City of Philadelphia Litig.*, 1987 WL 5281, at *2 (E.D. Pa. Jan. 9, 1987) (quoting *United States v. Dougherty*, 473 F.2d 1113, 1124 (D.C. Cir. 1972)). As indicated by the Supreme Court's use of the alternate moniker "stand-by counsel," however, the role of back-up counsel does not involve active investigation or

preparation for trial, nor does it entail the responsibility of conducting trial. Back-up counsel is intended to be a member of the bar who is merely familiar with the nature and course of the proceedings in the event that he should be needed to assume the role of counsel, at which time his responsibilities would cease to be passive. Against this background I evaluate petitioner's claim that Jackson was ineffective as back-up counsel.

Petitioner asserted in his PCRA petition that Jackson was "mystified" by the role of back-up counsel, i.e. that he could not fathom what such an endeavor might possibly entail. The PCRA court rejected this contention as a matter of fact, *see PCRA Op. F.F.* ¶ 81, and I note that the record supports this finding, as the trial court had explained to Jackson the contours of the role at the time at which he assumed it. *See* N.T. 5/13/82 at 54-70. Accordingly, I find, *infra*, that the state court's factual findings regarding defense counsel's "mystification" by, and performance in, the role of back-up counsel are not unreasonable. *See infra* at 126-27. Petitioner thus fails to substantiate his ineffectiveness claim–insofar as it is based on Jackson's shortcomings as back-up counsel–in any meaningful way, and a bare allegation, without more, will not support a *Strickland* claim. Accordingly, I find this allegation to be without merit, and the state courts' denial of such not to have been contrary to or an unreasonable application of federal law.

5. Allegations Eight, Nine, Ten, and Eleven

Because petitioner fails to substantiate the facts supporting each of these allegations, they must be rejected.

First, as to counsel's purported failure to research evidentiary issues, Jackson sought to

impeach Chobert's testimony using a prior arson-for-hire conviction on the basis that it was *crimen falsi.* Petitioner now suggests that Jackson should have attempted to admit Chobert's prior conviction and probationary status because they would have demonstrated bias. From this argument concerning an evidentiary point during the trial, petitioner apparently infers that Jackson failed to research evidentiary issues. This inference, however, is neither logically persuasive nor is it supported in the record. *See, e.g.*, *PCRA Op. C.L.* ¶¶ 78-80 (noting that, as indicated by the negative reception of the evidence presented by petitioner at the PCRA hearing, Jackson–to the extent that he exercised control over evidentiary decisions made at trial–had a "reasonable basis" for acting as he did). Consequently, I find petitioner's allegation to be meritless and that the state courts' rejection of it was not contrary to or an unreasonable application of federal law.

Second, petitioner makes the bare assertion that Jackson failed to consult with him. The record indicates numerous occasions on which counsel consulted with his client. *See, e.g.*, N.T. 5/13/82 at 62 (petitioner stating that "I worked very closely with Mr. Jackson but I feel it is now time for me to defend myself"); N.T. 6/24/82 at 7 (Jackson stating that petitioner had informed Jackson of his intention "to be silent in the courtroom and not to be disruptive . . ."); N.T. 6/28/82 at 28.45 (petitioner stating that Jackson "is *again* disobeying my orders . . . [h]e is working for me, not for the Court") (emphasis added); N.T. 7/1/82 at 44 (Jackson stating that "I have been ordered to make a motion. . . . My client wants to put on the record that he is making a motion for the definition of murder while the trial is still in progress . . . . He asked me to read that specifically in open court."); *id.* at 55 (Jackson reiterating that he was making this definitional motion at his client's direction).

The record also denotes several other instances in which Jackson attempted to consult with petitioner and petitioner refused. *See, e.g.*, N.T. 6/24/82 at 2 (Jackson indicating that he had tried to confer before the day's proceedings with petitioner and Janet Africa, but that he had been informed that his presence was unwelcome); *id.* at 5-6 (Jackson stating that petitioner refused to provide him with the names of character witnesses, and the court stating that "I can't force [petitioner] to give [the names] to Mr. Jackson"); N.T. 6/26/82 at 138 (Jackson indicating that he still had not been provided with the names of character witnesses); *id.* at 139-40 (Jackson stating that he no longer possessed copies of the statements of key witnesses because they were in petitioner's custody, and describing the difficulties caused by petitioner's actions); N.T. 7/28/95 at 167-72 (Jackson corroborating that petitioner engaged in a pattern of publicly abusive behavior toward him during the trial). Accordingly, Jackson's conduct was not objectively unreasonable.

Moreover, in light of the fact that the PCRA court found that petitioner controlled trial strategy (a fact that I have found not to be unreasonable), petitioner likewise fails to demonstrate that his counsel's alleged conduct resulted in any prejudice. For this reason as well his allegation of ineffectiveness is without merit, and its rejection by the Pennsylvania courts was not contrary to or an unreasonable application of federal law.

Third, petitioner asserts that counsel failed to investigate, prepare and present an affirmative defense of innocence. As indicated *supra*, however, petitioner fails to demonstrate as a threshold matter that the PCRA court was incorrect when it determined that "[b]ecause petitioner . . . retained personal control of trial strategy, any supposed 'ineffectiveness' . . . at trial was petitioner's own responsibility." *PCRA Op. C.L.* ¶ 68 (citing *Commonwealth v. Heidnik*, 587 A.2d 687 (1991)). *Cf. infra* (finding that the PCRA court was not unreasonable in finding as

a matter of fact that petitioner retained control of his defense). Therefore I conclude that any failure by Jackson to investigate such a defense does not warrant habeas relief pursuant to *Strickland*. *See generally Strickland*, 466 U.S. at 691 (explaining that "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions," and noting that a finding of ineffectiveness may be precluded where the defendant himself dictated a course of action that would have constituted ineffectiveness had it been the product of counsel's discretion). Furthermore, petitioner fails to overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689 (citation omitted). For this reason also I must reject petitioner's allegation and conclude that the state courts' denial of his ineffectiveness claim, insofar as it is based on this assertion, was not contrary to or an unreasonable application of federal law.

Petitioner additionally claims that Jackson failed to expose flaws and vulnerabilities in the prosecution's case. However, such a general assertion, without more, cannot support a claim for ineffective assistance under *Strickland*, as it is unclear which decisions are being alleged to have been objectively unreasonable. To the extent that this general assertion actually refers to the specific behaviors already addressed, e.g. failing to object to the prosecution's summations or inadequate cross-examination of witnesses Chobert and Jones, I have already found the underlying claims to be without merit. Accordingly, petitioner has not met his burden of proof under *Strickland*, and the Pennsylvania courts' rejection of this claim was not contrary to or an unreasonable application of federal law.

Lastly, just as I have found each of petitioner's individual allegations of ineffective

assistance of counsel to be without merit, the totality of these alleged deficiencies does not constitute ineffectiveness.[37] For the foregoing reasons, I conclude that the state courts' decision denying petitioner's ineffective assistance claim was not contrary to or an unreasonable application of Supreme Court precedent.

D. Unreasonable Determination of Facts in Light of Evidence Presented

Petitioner challenges the following findings of fact as unreasonable: 56, 57, 61, 64-82. I will consider each in turn.[38]

Finding of fact 56 states that "Judge Ribner ruled that additional funds [for experts] would be provided when Mr. Jackson submitted itemized bills to justify each charge." *See PCRA Op. F.F.* ¶ 56. Petitioner claims that this finding is unreasonable because, while literally true, the PCRA court used it to reject Jackson's PCRA testimony that he was ineffective for failing to follow this procedure. Petitioner's challenge for unreasonableness, however, is misplaced. As petitioner concedes, this finding is accurate and supported in the record. Petitioner fails to demonstrate how this correct finding becomes unreasonable simply because petitioner's counsel testified that he failed to follow this procedure. As such, finding 56 is not

[37]This is not to say that individual inadequacies in the representation provided to a criminal defendant that are not of constitutional dimension could never assume such proportions when amalgamated. *See, e.g.*, *Dobbs v. Zant*, 506 U.S. 357, 359 n.* (1993) (citations omitted). It is simply that in this case petitioner's specific allegations of ineffective assistance of counsel are uniformly devoid of merit, and thus, when combined, reveal no inadequacy in the representation provided by Jackson at all, much less one of constitutional import.

[38]In response to petitioner's claim of unreasonableness, respondents offer three general arguments: the state court judge was entitled to determine witness credibility, that those determinations are binding, and that because ineffective assistance is an objective claim, Jackson's subjective opinions about his conduct are not dispositive. *See* R24 at 53.

unreasonable in light of the evidence presented.

In finding 57, the PCRA court determined that the defense was receiving undisclosed monetary support from outside sources. *See PCRA Op. F.F.* ¶ 57. This finding is not unreasonable, as explained *infra*, at III.8.D.

Finding of fact 61 states that "Mr. Jackson conducted thorough and intensive pre-trial preparation for a period of five months." *PCRA Op. F.F.* ¶ 61. Petitioner argues that this finding is unreasonable in light of Jackson's PCRA testimony that when he first undertook the representation of petitioner, he was in the process of opening his own law practice and had been absent from the practice of criminal law for about four years. *See* P18 at 50-51. Petitioner additionally asserts that the record contradicts the court's finding because, *inter alia*, Jackson was unfamiliar with the case facts, including the fact that petitioner's brother was a co-defendant, and because Judge Ribner at one point suggested that Jackson pay more attention to the case. *See id.* (citing 1/5/82 Tr. at 66).

Petitioner is correct that the record reflects that Jackson did not have a complete grasp of the case facts as of a pre-trial hearing on January 5, 1982, one month after petitioner's arrest. *See* 1/5/82 Tr. at 66-67. That date, of course, marked the earliest stages of petitioner's case. In fact, the transcript of that day's proceedings is the second included in the state court record. Without more, it does not follow that because Jackson did not know every material fact in January of 1982, he did not thereafter prepare for petitioner's June, 1982 trial. In any event, the record also contains many examples of Jackson's pre-trial preparedness. *See, e.g.*, 3/18/82 Tr. at 9-10 (Jackson informing Judge Ribner that "I have spent a great deal of time in this matter thus far"); 7/28/95 Tr. at 55-58 (Jackson acknowledging that he was appointed to represent petitioner that

he poured over statements for a period of five months and read each statement at least ten times); *id*. at 67-68 (Jackson acknowledging that he "prepared the case with the intention of being Mr. Jamal's lawyer"); *cf.* 4/29/82 Tr. at 6-10 (Jackson requesting the appointment of additional counsel and assuring the court that he planned to be thoroughly prepared). Accordingly, I find that the state court's factual determination was not unreasonable in light of the evidence presented.

Next, because petitioner denies that he exercised plenary control over his defense, he argues that it is unreasonable for the PCRA court to assign to him any blame for his counsel's ineffectiveness. Accordingly, petitioner challenges findings 64-77. Finding 64 states that as early as the June 1, 1982 motion to suppress, petitioner demonstrated that he was not cooperating with Jackson because petitioner demanded to be represented by John Africa, a non-lawyer. *See PCRA Op. F.F.* ¶ 64 (citing 6/1/82 Tr. at 18, 31; 6/2/82 Tr. at 2.79-2.90). The record referenced by the PCRA court indicates that during the hearing on petitioner's suppression motion, petitioner asked the court at least twice to be represented by John Africa, that petitioner perceived a problem with his appointed counsel functioning in the role of back-up counsel, and that before this date, petitioner had not discussed with counsel the charges against him and possible penalties. Thus, the portion of the PCRA court's finding that concludes that petitioner demanded to be represented by John Africa is factually correct and not unreasonable. However, I find that the PCRA court reached too far when it inferred from this fact that petitioner was not cooperating with counsel at that time. Nonetheless, because there are many other instances in the record that support the finding that petitioner did not cooperate with his court-appointed counsel, *see, e.g., PCRA Op. F.F.* ¶¶ 64, 68 (trial record citations omitted); 6/29/82 Tr. at 5-6 (Jackson stating that

petitioner had not been cooperating with him); *see also supra* at 114, I conclude that the state court's finding was not unreasonable. Accordingly, petitioner is not entitled to relief pursuant to this factual challenge.

Finding 65 concludes that "[d]uring voir dire, several prospective jurors were frightened by petitioner, who was also belligerent and torpid in questioning the members of the venire panel." *PCRA Op. F.F.* ¶ 65. While the record reflects that at least one and perhaps more of the prospective jurors were frightened by petitioner, *see* 6/8/82 Tr. at 2.138 (prospective juror stating that questioning by petitioner "scares me to death" and McGill suggesting that other jurors displayed fear as well); 6/9/82 Tr. at 3.17 (court observing that venirepersons had been unnerved or upset when questioned by petitioner), and that the pace of voir dire was proceeding slowly, *see, e.g.*, 6/8/82 Tr. at 2.145 (only selected one juror in two days), it does not support the court's determination that petitioner was belligerent. In fact, the record reflects the opposite. *See, e.g.*, 6/8/82 Tr. at 2.143 (McGill stating that he was not moving the court to resume voir dire because petitioner was being disruptive); 6/9/82 Tr. at 3.2-3.4 (McGill indicating only two reasons for his motion for court to resume voir dire: fear of venire panel and pace of voir dire). Therefore, I find that the portion of finding 65 concluding that petitioner had been "belligerent" is unreasonable. However, because I also find that the state court's decision was not based solely on this determination, petitioner is not entitled to relief pursuant to this particular claim.

In the first part of finding 66, the court recounts what the record clearly reflects, that the trial court "ordered Mr. Jackson to see the court at sidebar to discuss [potential voir dire] questions that Mr. McGill wanted to ask but [Jackson] refused, stating that he had to honor his client's order not to participate in this proceeding." *PCRA Op. F.F.* at 66 (citing 6/9/82 Tr. at

3.17-3.40, 3.45; 6/15/82 Tr. at 247). Because this portion of the finding is an accurate account of the trial record, it is not unreasonable. In the latter part of this finding, the court stated that it was at this point that it took over the questioning of prospective jurors. *See id.* It is unclear, however, whether the state court found that Jackson's refusal to participate at petitioner's insistence prompted it to take over the voir dire, or that the court merely resumed the questioning after that incident. *See id.* ("We held in abeyance a criminal contempt charge of Mr. Jackson for failure to discuss with this court the aforesaid proposed questions by the Commonwealth. . . . At that point, this court took over questioning of prospective jurors."). If the state court concluded that this contempt incident prompted it to resume voir dire, petitioner correctly notes that this is an inaccurate summary of the record. *See* 6/9/82 Tr. at 3.2, 3.18, 3.20-3.22 (prosecutor McGill moving to resume voir dire because some prospective jurors were fearful of petitioner questioning them and because voir dire was proceeding rather slowly; trial court offering petitioner a choice: allow back-up counsel to resume questioning or court would take over voir dire; petitioner ordering Jackson not to participate). In any event, of this portion of finding 66 does not affect the accuracy of the court's core conclusion: that petitioner controlled trial strategy, as evidenced, *inter alia*, by his order to counsel not to participate in discussing the Commonwealth's proposed voir dire questions. Therefore, in light of the evidence presented, I conclude this finding is not unreasonable.

Finding 67 states that petitioner directed personally the use of peremptory challenges. *See PCRA Op. F.F.* ¶ 67. It is true that the court took over the questioning of prospective jurors due because petitioner was frightening members of the venire and because voir dire was proceeding too slowly, *see* 6/9/82 Tr. at 3.2-3.19, but petitioner continued to represent himself

during this portion of the proceedings. *See, e.g.*, 6/9/82 Tr. at 3.18 (court asking whether it would be acceptable to the defense for Jackson to take over voir dire, and Jackson replying "that would be Mr. Jamal's decision"); *id.* at 3.57 (defendant personally exercising a peremptory challenge); *id.* at 3.74 (same); *id.* at 3.85 (same); *id.* at 3.92 (same). Indeed, petitioner was not officially removed from pro se status until June 17, 1982, the first day of trial. *See* 6/17/82 Tr. at 1.123. Accordingly, it is not unreasonable for the state court to have found that petitioner took the lead concerning the use of challenges at voir dire.

Petitioner next challenges factual finding 68. Because finding 68 is an accurate reflection of the trial record, I find that it is not unreasonable. *See PCRA Op. F.F.* ¶ 68 (recounting petitioner's disruptions on the first day of trial which prompted his removal from *pro se* status, the state supreme court's order that Jackson continue as petitioner's court-appointed attorney, petitioner's repeated request for the assistance of John Africa, and petitioner's statement that he would not accept the assistance of a "legal trained lawyer"). Moreover, I reject petitioner's assertion that these cited incidents are somehow trivial.

In finding 69, the PCRA court concluded that petitioner "personally decided what character and exculpatory witnesses would be called on his behalf, refusing to even tell his trial attorney who these persons were." *PCRA Op. F.F.* ¶ 69. Petitioner claims that there is no support in the record for this proposition. Petitioner is incorrect. For example, on at least three occasions during trial, attorney Jackson alluded to the fact that petitioner controlled the decision to call certain witnesses. *See, e.g.*, 6/24/82 Tr. at 2-6 (Jackson submitting that petitioner informed him that he intended to call character witnesses, but that petitioner had not yet advised him as to who these witnesses would be); 6/26/82 Tr. at 136-140 (Jackson advising the court that

he was concerned about his impending opening remarks because petitioner still had not given him names of character witnesses; and Jackson advising the court that he no longer had copies of witness statements because petitioner had taken possession of them); 6/30/82 Tr. at 15 (Jackson informing the court that he would start that day with two or three character witnesses and that he was not sure if Councilman Street's aide would be testifying). Accordingly, in light of the evidence presented, it is not unreasonable for the PCRA court to have concluded that petitioner not only controlled the decision regarding whether certain witnesses would be called, but that he at times did not inform his counsel as to who these witnesses would be.

Regarding finding 70, the portion which simply recites the state record is necessarily not unreasonable. *See PCRA Op. F.F.* ¶ 70 (finding that Jackson turned over copies of witness statements to petitioner requiring Jackson to ask the prosecutor for additional copies) (citing 6/26/82 Tr. at 139-40; 6/29/82 Tr. at 5-7). Yet the question remains whether the court's finding that Jackson needed to request additional copies of witness statements because petitioner refused to return them is likewise not unreasonable. In light of all of the evidence presented, I find that it was not unreasonable. There are many instances in the record where petitioner refused to cooperate with his counsel, and it was not unreasonable for the state court to conclude that this was another of those instances.

Next, because findings 71, 72, 73, and 74 are accurate reports of incidents that occurred at trial, I find that they were not unreasonable. *See PCRA Op. F.F.* ¶ 71 (finding that petitioner ordered his counsel away while he conferred with John Africa) (citing 6/24/82 Tr. at 2); *id.* ¶ 72 (finding that petitioner was abusive toward Jackson on several occasions during the course of his representation) (citing 7/28/95 Tr. at 167-72); *id.* ¶ 73 (finding that "[o]n June 26, 1982, when

Mr. Jackson went to sidebar, defendant complained that Jackson was 'disobeying my orders'") (citing 6/28/82 Tr. at 28.45); *id.* ¶ 74 (stating that on the last day of trial, petitioner ordered Jackson to move to dismiss the charges on the ground that murder had not been defined to petitioner's satisfaction, and that Jackson complied). Moreover, I reject petitioner's assertion that these findings were trivial. It is clear that these are additional examples establishing petitioner's pattern of behavior.[39]

In finding of fact 75, the court determined "that it was petitioner's decision not to call his brother, William Cook, as a witness at trial." *PCRA Op. F.F.* ¶ 75. Petitioner claims that this finding is unreasonable because the record establishes that petitioner had nothing to do with this decision. *See* P18 at 49 n.49 (citing 7/27/95 Tr. at 192; 7/28/95 Tr. at 104). Although Jackson did testify at the PCRA hearing that petitioner was not responsible for the decision whether to call William Cook to testify, the PCRA court found Jackson's testimony incredible. I have found that credibility determination not to be unreasonable. *See infra.* Moreover, I also have found that the court's finding that petitioner controlled the decision regarding whether to call certain witnesses is not unreasonable. *See supra.* Once a fact is established, its validity is thereafter presumed until it is conclusively disproved. *See Falconi v. FDIC*, 257 F.2d 287, 291 (3d Cir. 1958) ("[I]t is settled that a course of conduct once established is presumed to continue until the contrary is established. . . ."); *Hertz v. Record Publishing Co. of Erie*, 219 F.2d 397, 399 (3d Cir.

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[39]Petitioner also argues that finding 74 is significant because this was the only time that Jackson stated a position prefaced by the fact that he was ordered to do so by petitioner. Petitioner suggests that from this, the court may infer that Jackson was actually in control of defense strategy. While such an inference may be reasonable, it is at least equally reasonable for the state court to have concluded that based upon the several cited instances regarding petitioner's conduct at trial, petitioner controlled his defense.

1955) (same); *Dinger v. Friedman*, 123 A. 641, 644 (Pa. 1924). Because petitioner has failed to present clear and convincing evidence that he did not control the decision whether to call William Cook to testify, I conclude that it was not unreasonable for the state court to have so found.[40]

In finding 77, the state court rejected Jackson's PCRA testimony–in which he denied that petitioner exercised a significant degree of control over trial strategy–as incredible because Jackson failed to explain numerous instances demonstrating that petitioner controlled this strategy. *See PCRA Op. F.F.* ¶ 77 (citing 7/27/95 at 106-109, 140-44; 7/28/95 Tr. at 116-17). Again, determinations of credibility are best left to the fact finder who was in the position to hear and to observe the witness from the stand. Moreover, the record does reflect that Jackson was unable to explain how certain instances at trial could not have reflected petitioner's control over defense strategy. Accordingly, it is not unreasonable for the state court to have determined that Jackson's testimony regarding this issue was incredible.

Finally, petitioner asserts that Jackson's PCRA testimony was believable and accordingly challenges findings 78-82 concerning Jackson's credibility as a PCRA defense witness. Specifically, petitioner argues that finding 78–that Jackson came forward to testify at the PCRA hearing in order to negate the blow to his ego suffered when he lost petitioner's trial–is absurd. *See* P18 at 53 n.56 (citing *PCRA Op. F.F.* ¶ 78). While Jackson did concede during his PCRA testimony that as a lawyer he had a certain degree of ego which allowed him to believe that he

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[40]The relevance of petitioner's challenge of finding 76, positing that during the penalty phase, petitioner decided to read a written statement to the jury without consulting counsel, is mooted by the disposition of claim 25, also pertaining to the sentencing phase of petitioner's trial. Accordingly, I will not discuss it here.

could win any case he tried, it does not follow that his ego also prompted him to testify, although it may have been a relevant factor. The PCRA court's contrary finding consequently was unreasonable. However, the PCRA court cited several reasons for its determination that Jackson's testimony was incredible–finding 78 merely was one of many findings upon which the court relied. Because I have evaluated the additional factual findings that the court employed as support for its conclusion as to Jackson's incredibility, and found them not to be unreasonable, *see infra*, petitioner is not entitled to relief based upon my determination that finding 78 is unreasonable.

In finding 79, the PCRA court found Jackson to be incredible because he made frequent assertions in his PCRA testimony that were contradicted by the trial record. *See PCRA Op. F.F.* ¶ 79 (citing 7/28/95 Tr. at 32, 45, 48, 53-54; 7/31/95 Tr. at 153-155, 158, 160-61; 8/1/95 Tr. at 214) . As an example, the court cited Jackson's testimony that there were no funds for experts and that he did not even know how to obtain such funds, testimony that Jackson later retracted as "just a slip" when confronted with the trial record. *See id.* Petitioner asserts that the court improperly seized upon this "just a slip" remark because it resulted from the prosecutor's manipulative cross-examination techniques. I find petitioner's argument to be without merit. The record makes clear that on direct examination Jackson attempted to paint a picture concerning his representation of petitioner that was not entirely accurate. It was only reasonable for the prosecutor to attempt to discredit Jackson's statements on cross-examination. Jackson, a member of the bar, should have been more careful in presenting his testimony on direct examination and in any event, would likely not have been "manipulated" on cross-examination as petitioner claims. Therefore, I find that it was not unreasonable for the PCRA court to have

discredited Jackson's testimony due to his many assertions that were inconsistent with the record at trial.

In finding 80, the PCRA court stated:

> Mr. Jackson claimed that the trial prosecutor had in some way kept witness Deborah Kordansky from being interviewed by the defense. The trial record, however, demonstrated that Mr. Jackson in fact contacted Ms. Kordansky, using information provided by the prosecutor. Mr. Jackson insisted that it was the trial record, not he that was incorrect, and appeared to break down emotionally.

PCRA Op. F.F. ¶ 80 (citing 7/27/95 Tr. at 216-221). This finding is an accurate recitation of the PCRA record. Petitioner argues that this finding is merely a half-truth, seized upon by the PCRA court in order to support further its faulty determination that Jackson was not credible. Petitioner's argument is unpersuasive. The trial record indicates that on June 29, 1982, Jackson contacted Kordansky by phone using a telephone number provided to him that same day by the prosecution. *See* 7/27/95 Tr. at 216-221. It was during this telephone conversation that Kordansky informed Jackson that she had been in a bicycle accident and considered it extremely inconvenient, if not impossible, for her to testify. *See id.* Additionally, Kordansky refused to give Jackson her new address. *See id.* As such, the next morning, Jackson asked the court's help in securing this witness. *See id.* Jackson's affidavit, filed in support of the PCRA petition, presented a different story. *See id.* at 220. Because Jackson's PCRA testimony starkly conflicts with the unambiguous trial record, I conclude that finding 80 was not unreasonable. Therefore, petitioner is not entitled to relief pursuant to this factual challenge.

Finding 81 concludes that "[i]t is not credible that Jackson was mystified by the concept of back-up counsel for defendant, or that his temporary standing as backup counsel–a condition

imposed by defendant–impaired his representation." *PCRA Op. F.F* ¶ 81. This finding is not unreasonable both as a matter of common sense and, more importantly, because it is supported in the record. *See e.g.*, 5/13/82 at 54-70 (court rejecting as absurd Jackson's argument that he did not know how to function as back-up counsel and explaining to Jackson that even in a back-up role, he was nonetheless an attorney and expected to perform as one). Accordingly, even if Jackson initially was "mystified" by the concept of back-up counsel, the state court made clear what conduct this role required. Moreover, the record reflects that Jackson provided back-up services according to the court's instructions. Therefore, in light of the evidence presented, finding 81 is not unreasonable.

Finally, in finding of fact 82, the court rejected Jackson's PCRA testimony as incredible because Jackson's testimony was "motivated by a desire to portray his actions at trial as constitutionally ineffective." *PCRA Op. F.F.* ¶ 82. Petitioner claims that this finding is unreasonable because Jackson's motive to testify is not contained in the record. While the state court record contains no direct references to Jackson's motive to testify, I nonetheless find that it is not unreasonable for the PCRA court to have so concluded. As already discussed, the record evidences several instances where Jackson's PCRA testimony was inconsistent with the trial record. Considering the fact that Jackson was present at trial and in any event, could have reviewed the trial transcripts before testifying, it is not unreasonable to infer that Jackson's inconsistent testimony was not the result of a faulty memory, but rather could be attributed to a less admirable motive. Therefore, petitioner is not entitled to relief pursuant to this factual challenge.

E. Evidentiary Hearing

Petitioner maintains that an evidentiary hearing is discretionary on this claim. *See* P27 at 1. In so doing, he implicitly concedes a developed factual basis in the state court. *See* P14 at 10-13. His burden, then, is to rebut the presumption of correctness by providing clear and convincing evidence that the state court's factual determinations are erroneous. He makes no attempt to do so. Accordingly, petitioner is not now entitled to a hearing concerning this claim.

III.7 THE COURT CREATED A CONFLICT OF INTEREST BETWEEN TRIAL COUNSEL AND PETITIONER IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE 5TH, 6TH, 8TH AND 14TH AMENDMENTS.

A. Allegations in Support of Claim

Petitioner complains that the court ignored Jackson's statements that he was unwilling and unable to function as petitioner's counsel, thereby causing the conflict that existed between him and his counsel. *See* P1 ¶¶ 295-310.

B. Violation of Federal Constitution, Law or Treaty

Petitioner claims that he was deprived of his rights to present a meaningful defense, to counsel free of a conflict of interest, to effective assistance of counsel, and to a fair and reliable determination of guilt. Specifically, petitioner asserts that his right to counsel was compromised because he and counsel had an unbridgeable rift between them. *See* P14 at 46-47 (citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Wood v. Georgia*, 450 U.S. 261, 172 (1981); *VonMoltke v. Gillies*, 332 U.S. 708, 725 (1948)). Petitioner further argues that he was deprived of an adversarial testing of the prosecution's case because there was no communication between client and counsel. *See id.* (citing *Anders v. California*, 386 U.S. 738, 743 (1967); *Jones v. Barnes*, 463 U.S. 745, 759 (1983)). Moreover, petitioner suggests that if a client will not or cannot communicate with his attorney, then there can be no effective assistance of counsel. *See id.* Finally, petitioner insists that the court had a duty to inquire into the factual basis of the disagreement. *See id.* at 48.

Respondents answer that petitioner's claim fails on the facts because petitioner is to blame for the trial disruption and alleged rift with his attorney. *See* R23 at 75-78.

C. "Contrary to" or "Unreasonable Application of" Clearly Established Federal Law

The claim was fairly presented to the state courts, and thus the exhaustion requirement is satisfied. *See* Amend. St. PCRA Pet. ¶¶ 110, 117-18; St. PCRA Mem. at 99, 105-08. Moreover, it was adjudicated on the merits by the state courts. *See PCRA Op. F.F.* ¶¶ 64-77 & *C.L.* ¶¶ 64-69; *PCRA Appeal Op.* at 108. Therefore, it is subject to the strictures of § 2254(d).

The PCRA court considered this claim and found the following facts: (1) that petitioner was not cooperating with his attorney; (2) that petitioner demanded to be represented by John Africa, a non-lawyer; (3) that petitioner "announced he would pursue 'the strategy of John Africa,' [(4)] that he would not accept the assistance of a 'legal trained lawyer,' and [(5)] that petitioner would not cooperate with Mr. Jackson." *See PCRA Op. F.F.* ¶¶ 64, 68 (trial record citations omitted). Moreover, the PCRA court also found that "[p]etitioner chose to exercise personal control of his trial strategy." *See id.* ¶ 69. Based upon these findings of fact, the court concluded that petitioner failed to prove that his counsel was at fault for any difficulties that may have existed between them. *See PCRA Op. C.L.* ¶ 64. The court also found that

> [p]etitioner's references in the instant claim to the supposed "deficient" performance of his attorney as a result of his "conflict" with petitioner are irrelevant, as any supposed conflict was caused by petitioner. His absolute refusal to cooperate with any attorney was a problem of his own creation, that he alone could solve. If petitioner has now decided in hindsight that his decision to take personal control of his trial strategy led to an inadequate defense, that in no way entitles him to relief.

Id. ¶ 69. The Supreme Court of Pennsylvania reviewed this claim and determined that because the PCRA court's findings were supported in the record, petitioner's ineffective assistance claim

was without merit. *See PCRA Appeal Op.*, at 108.

Although inartfully presented, as I understand this claim, petitioner is arguing that his alleged conflict with trial counsel violated the Sixth Amendment because it rendered counsel ineffective and violated the Fifth and Fourteenth Amendments because the alleged conflict and the trial court's handling thereof also rendered his trial fundamentally unfair.[41]

The Sixth Amendment affords a criminal defendant the right to the assistance of counsel. Where this constitutional right to counsel exists, the Supreme Court has instructed that "there is a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981) (citations omitted). Because "'"[c]onflict of interests" is a term that is often used and seldom defined,'" a conflict of interest may take many forms, and whether such a conflict exists must be evaluated on the facts of each case. *Virgin Islands v. Zepp*, 748 F.2d 125, 135 (3d Cir. 1984) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 356 n.3 (1980) (Marshall, J., dissenting)). In general, a conflict exists where counsel's undivided loyalty to his client is affected. *See generally Wood*, 450 U.S. at 271. Moreover, in order to prevail on this Sixth

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[41]Petitioner also avers that he "decided reluctantly to proceed *pro se* after it became apparent that his court-appointed counsel was floundering." P1 ¶ 297. This assertion, however, has no support in the record; rather, the record indicates that Jackson's performance had nothing to do with petitioner's decision to represent himself. *See* 5/13/82 Tr. at 54-70. Petitioner first moved the court to proceed *pro se* on May 13, 1982 during a pre-trial motion hearing before Judge Ribner. *See id.* at 54. Petitioner stated: "At this time I wish to petition the court with notice of intent to represent myself. I believe that such an action is consistent with my religious beliefs, which are deemed held –." *Id.* At this point, the court interrupted petitioner and acknowledged that petitioner had the right to so proceed. *Id.* Petitioner further stated that his motion to represent himself was not intended to delay trial and that "[w]e have been working on this for several months now, as you well know. This has been a position that I have held for several months now. It has been my intention to defend myself." *Id.* at 61-62. Petitioner never stated that he decided to proceed *pro se* because he was dissatisfied with Jackson's performance.

Amendment claim, "the defendant must 'show some actual conflict of interest that adversely affected counsel's performance.'" *United States v. Kole*, 164 F.3d 164, 175 (3d Cir. 1998) (citations omitted). Thus, the "defendant 'must identify something that counsel chose to do or not to do, as to which he had conflicting duties, and must show that the course taken was influenced by that conflict.'" *Id.* (quoting *Vance v. Lehman*, 64 F.3d 119, 124 (3d Cir. 1995)).

This standard also incorporates due process principles. The Supreme Court has explained the intricate relationship between the Sixth Amendment right to counsel and the due process guarantee to a fair trial:

> [T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial . . . through the several provisions of the Sixth Amendment, including the Counsel Clause . . . .

Strickland v. Washington, 466 U.S. 668, 684-85 (1984). Accordingly, the fundamental question is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. It is within this framework that I will consider petitioner's claim.

I find that petitioner has failed to make the requisite showing. First, petitioner has not demonstrated with any specificity that his alleged rift with counsel created a conflict of interest such that counsel's representation was influenced thereby.[42] Petitioner alleges that "Jackson's

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[42]Petitioner suggests that trial counsel conceded that a conflict of interest existed between counsel and client when he filed with the Supreme Court of Pennsylvania a post-trial petition requesting permission to withdraw as counsel. *See* P1 ¶ 301. Petitioner's argument, however, misconstrues the context of counsel's request. Counsel's stated reason for withdrawal did not

desperate plea to withdraw from the case, and his vocal objection to assuming the role of back-up counsel, had a devastating effect on the relationship between him and Jamal." P1 ¶ 297. Nowhere in his petition or accompanying memorandum of law, however, does petitioner "identify something that counsel chose to do or not to do, as to which he had conflicting duties, and . . . that the course taken was influenced by that conflict." *Kole*, 164 F.3d at 175 (internal quotations omitted). Petitioner's bare allegations do not support a conflict of interest claim. Rather, petitioner's allegations demonstrate that for whatever reason (and the state courts found that any animosity was the result of petitioner's actions), he did not have a meaningful relationship with his attorney. The Supreme Court, however, has held that while the Sixth Amendment right to counsel guarantees a defendant representation free from a conflict of interest, it does not guarantee the right to "a 'meaningful relationship' between an accused and his counsel." *Morris v. Slappy*, 461 U.S. 1, 14 (1983).

Second, petitioner has failed to show that counsel's conduct undermined the adversarial character of his trial.[43] The state court found as a fact that it was petitioner who undermined the relationship with his counsel. The court also found that petitioner would not have accepted the

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concern a conflict of interest that existed during trial. Rather, counsel requested to withdraw post-trial because petitioner was then advancing an ineffective assistance of counsel claim. It is axiomatic that counsel cannot advance an ineffective assistance claim regarding his own performance. Accordingly, the state supreme court permitted counsel's post-trial withdrawal.

[43]It appears that petitioner also claims that the trial court created his conflict with counsel because it improperly removed petitioner from *pro se* status. Because I have found that petitioner was not improperly removed from *pro se* status, it follows that the trial court was not responsible for any alleged conflict. *See infra*, III.11, III.12, III.13. I also note that the state court found as a fact that it was petitioner who was to blame for any conflicts with his counsel and that finding is not unreasonable. Moreover, because petitioner has not presented clear and convincing evidence disputing the correctness of this finding, I will presume it correct. Accordingly, this subclaim fails.

assistance of any "legal trained lawyer." *See PCRA Op. F.F.* ¶ 68 & *C.L.* ¶ 65; *see also* 6/17/82 Tr. at 1.76 (petitioner stating "[t]hen I don't want any lawyer in the whole world"). Because petitioner has not presented clear and convincing evidence that these findings are incorrect, I must afford them a presumption of correctness. In addition, they are not unreasonable. Consequently, I find that the alleged "unbridgeable rift" was a result of the voluntary conduct of petitioner and not any conflict of interest on the part of counsel. *See, e.g., Hudson v. Rushen*, 686 F.2d 826, 831 (8th Cir. 1982) (finding no Sixth Amendment violation where the communication breakdown between counsel and defendant was caused by defendant's obstreperous behavior). Therefore, because petitioner's constitutional claims fail, the state court's decision regarding the same was neither contrary to nor an unreasonable application of Supreme Court precedent.

D. Unreasonable Determination of Facts in Light of Evidence Presented

In section III.6.D, *supra*, the court evaluated petitioner's challenges to factual findings affecting his sixth through eighth claims, and I incorporate that discussion by reference here. With respect to this claim, however, petitioner challenges specifically finding of fact 11 wherein the court concluded that "[d]uring the times petitioner was removed from the courtroom, his counsel, Mr. Jackson, kept petitioner fully informed of the proceedings." *See* P18 at 65 (referencing *PCRA Op. F.F.* ¶ 11). Petitioner claims that this finding is "pure fiction." I conclude, however, that petitioner is incorrect. The trial record clearly reflects that Jackson kept petitioner informed during petitioner's courtroom absences:

> MR. JACKSON: I would like to say for the record, Your Honor, that most of the communication has been one way in that aside from Mr. Jamal not wanting to cooperate with me I nevertheless at each instance that he has been brought into the courtroom I have tried to tell him what I intended to do, or when he is not in the

> courtroom either to tell him what has happened or what I intend to do.

6/29/82 Tr. At 5-6. Accordingly, the state court's finding was not unreasonable.

E. Evidentiary Hearing

Petitioner maintains that an evidentiary hearing is discretionary on this claim. *See* P27 at 1. In so doing, he implicitly concedes a developed factual basis in the state court. *See* P14 at 10-13. His burden, then, is to provide clear and convincing evidence to rebut the presumption that the state court's factual determination is correct. He makes no attempt to so define the evidence he would muster. Nor does he characterize his evidence as newly discovered clear and convincing proof of his innocence, as required under § 2254(e)(2). Of course, his arguments as to unreasonableness could be construed to show clear and convincing evidence which, if proved, would demonstrate that a state court determination of a factual issue is incorrect. However, because I have found the relevant findings of fact not to be unreasonable, I likewise find that petitioner has failed to provide clear and convincing evidence that the trial court's factual determination was erroneous. Accordingly, petitioner's request for a hearing regarding this claim will be denied.

III.8 COURT DENIED PETITIONER MEANINGFUL ACCESS TO SERVICES OF EXPERTS AND INVESTIGATOR IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS.

A. Allegations in Support of Claim

Petitioner alleges that the trial court denied funds necessary to pay for expert services because the court told Jackson that it would not pay experts in advance, even when the experts refused to work without advance payment due to consistent problems with payment by the Philadelphia courts. Further, petitioner argues that suspicious inconsistencies in the ballistics and autopsy reports would have been exposed with the assistance of experts. *See* P1 ¶¶ 311-350.

B. Violation of Federal Constitution, Law or Treaty

Petitioner contends that he was deprived of his rights to confrontation of witnesses against him and to a fair and reliable determination of guilt. Petitioner asserts that the funding practices of the court denied him the ability to develop expert testimony necessary to impeach physical evidence and witness testimony, in violation of his right to assistance of experts reasonably necessary. *See* P14 at 49 (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)).

Respondents retort that petitioner received standard fees plus money from outside interest organizations. *See* R23 at 78-79. Second, respondents claim that petitioner must prove more than a "mere possibility" that tests would have been helpful. *See* R23 at 79 (citing *Caldwell v. Mississippi*, 472 U.S. 320, 324 n.1 (1985)). Finally, respondents submit that petitioner's investigator performed a sufficient investigation and that petitioner's ballistics expert failed to examine the bullet fragment at the PCRA hearing. *See* R23 at 81.

C. "Contrary to" or "Unreasonable Application of" Clearly Established Federal Law

The claim was fairly presented to the state courts, and thus the exhaustion requirement is satisfied. *See* Amend. St. PCRA Pet. ¶¶ 93, 98-102; St. PCRA Mem. at 75-82. Moreover, it was adjudicated on the merits by the state courts. *See Abu-Jamal*, 555 A.2d at 852; *PCRA Op. F.F.* ¶¶ 56-60, 138-51, 184-201 *& C.L.* ¶¶ 35-37, 49-53, 98-100, 111; *PCRA Appeal Op.* at 107. Therefore, it is subject to the strictures of § 2254(d).

The state supreme court found this claim to be without merit because:

> [O]ur review of the record confirms the Commonwealth's assertions that the allowance for investigative resources was more than what is represented in the appellant's brief; that there is no indication that other requests were made, or would have been denied had they been made; that the witnesses alluded to were not unavailable to the appellant for lack of funds but merely because the appellant chose not to pursue their testimony until it was too late; and that there is no indication that these witnesses would have offered testimony helpful to the appellant.

Abu-Jamal, 555 A.2d at 852.

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Supreme Court held that due process requires that a state provide an indigent defendant access to the assistance of a psychiatrist when the defendant has made a preliminary showing that his sanity at the time of the offense is seriously at issue. 470 U.S. at 80. The Court based this conclusion on the long recognized principle that "when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." *Id.* at 76. The Court instructed, however, that this principle does not require the State to fund for the indigent the same defense that a wealthier defendant might buy, but rather entitles indigent defendants to "basic tools" necessary to ensure "an adequate

opportunity to present their claims fairly within the adversary system." *See id.* at 77 (citing *Ross v. Moffit*, 417 U.S. 600 (1974); *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)). Finally, the Court reasoned that because the defendant's interest in the accuracy of a determination of guilt outweighed the state's obvious economic interest where the assistance of the psychiatrist reduces the risk of an erroneous result, due process required the state to fund the expert. *See id.* at 77-82.

In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), however, the Supreme Court declined to extend its holding in *Ake* to the appointment of a criminal investigator, a fingerprint expert, and a ballistics expert and did not reach the question "what if any showing would have entitled a defendant to assistance of the type here sought." 472 U.S. at 323 n.1; *see also Weeks v. Angelone*, 176 F.3d 249, 264-65 (4th Cir. 1999) (construing *Caldwell* as declining to extend the *Ake* holding). As such, there is no Supreme Court precedent either requiring or explaining the showing necessary to compel a State to appoint non-psychiatric expert services at trial. The *Ake* Court, however, implemented the following due process analysis:

> Three factors are relevant to this determination. The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.

Ake, 470 U.S. at 77 (citations omitted).

Applying this standard to petitioner's case, I find that the manner in which the state court handled petitioner's request for appointed experts was not contrary to or an unreasonable application of Supreme Court precedent. First, I recognize that the interest of petitioner in the

accuracy of a proceeding that places at risk both his life and liberty is immense. Second, as the Supreme Court noted in *Ake*, I agree that the state's interest in curtailing the financial burden imposed by requiring appointed expert assistance does not outweigh recognition of such a due process right. Thus, I must examine the probable value of the assistance sought and the risk of error in the proceeding if such assistance is refused. In short, I must determine if petitioner suffered prejudice resulting from a lack of expert assistance.

I first note that expert assistance in petitioner's case was not flatly denied. In fact, as was standard practice in Philadelphia, petitioner was allotted an initial amount of $150 each for a ballistician, an investigator, a photographer, and a forensic pathologist. *See* 1/20/82 Tr. at 36-37, 40; *see also PCRA Op. F.F.* ¶ 56. Moreover, the pre-trial judge expressly assured the defense that any additional reasonable expert fees would be reimbursed either at the close of the case when counsel submitted his pay petition or in the interim, as needed, based upon the submission of itemized bills. *See* 3/18/82 Tr. at 8-10 (stating that counsel may submit itemized expert bills from time to time); *id.* at 77 (court requesting itemized bills in response to defense counsel request for an increase in monies for expert fees); 4/1/82 Tr. at 9-11 (court stating that it will consider defense counsel's request for an increase in expert funds when counsel submits itemized bills and that counsel may submit these bills before trial); 4/29/82 Tr. at 11, 21-25 (counsel submitting an itemized bill for a ballistician in the amount of $350, a bill for an investigator in the amount of $562, and two bills for a photographer in the amounts of $150 and $250); *id.* at 27 (court stating that defense counsel may submit an estimated pathologist bill with a petition for consideration and counsel stating that he would submit that petition by Monday, at the latest); 5/13/82 at 16-17 (court stating that interim payments for experts is an option); *see also PCRA*

Op. F.F. ¶ 56.

Thus, in order for petitioner to have received expert funds before the close of trial, counsel needed to submit itemized bills for such services along with his request. Aside from a $350 bill for a ballistician, a $562 bill for an investigator and $150 and $250 bills for a photographer, however, counsel failed to submit any other written petitions supported by itemized bills (or an estimated pathologist bill as was permitted by the court) before or during trial. Therefore, there is no factual basis for petitioner's claim that he was denied meaningful access to experts. It is clear that the court was willing to entertain any reasonable and substantiated request, but that defense counsel never made that request.[44] Additionally, the procedure established by the court for requests of additional funds before trial is not contrary to or an unreasonable application of the Supreme Court's decisions in *Ake* or *Caldwell*. *Ake* holds that under the proper circumstances, the state should make these funds available. The case does not hold that experts, if warranted at all, should be prepaid for their services.

Furthermore, petitioner has failed to demonstrate that he received an unfair trial as result of the alleged lack of expert services. *See Riley v. Taylor*, 237 F.3d 300, 328 (3rd Cir. 2001) ("the Supreme Court made it clear that there is no constitutional right to the appointment of an investigator where the defendant offers 'little more than undeveloped assertions that the requested assistance would be beneficial'") (citation omitted), *vacated on other grounds pending rehearing en banc* 237 F.3d 348 (3d Cir. 2001). Indeed, the PCRA court found and the record supports the fact that petitioner received from the state over $1,300 for investigation and expert

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[44]The issue of whether defense counsel was constitutionally ineffective for failing to submit these interim requests for payment was addressed *supra* at III.6.

assistance. *See PCRA Op. F.F.* ¶ 58. Moreover, while petitioner claims that the assistance of a pathologist was necessary to show that the account of the prosecution's key witness was impossible, the PCRA court found the testimony of petitioner's pathology expert, Dr. Hayes, to be of little value "to the extent that [it was] founded on what the defense attorneys told him rather than on the facts of the case." *PCRA Op. F.F.* ¶ 191.[45] The PCRA court further found that Dr. Hayes offered no opinion that was inconsistent with the trial evidence. *See id.* For reasons stated in the next section, I find that the PCRA court's findings of fact concerning Dr. Hayes' testimony were not unreasonable. Thus, I also find that petitioner suffered no prejudice resulting from his inability to present a pathologist at trial. As such, the Pennsylvania courts' conclusion regarding the constitutionality of the procedure followed by the pre-trial and trial courts for allotting money for expert assistance to petitioner was not contrary to or an unreasonable application of federal law.

Next, petitioner claims that a ballistician would have shown that he and his gun could not have been connected to the shooting. I find petitioner's argument to be both speculative and unpersuasive. As already discussed in the context of claim four, petitioner's allegations that the prosecution "lost" or "destroyed" ballistics evidence is unfounded. As such, no expert could have proven what did not exist. I further note that petitioner did have at least some assistance from a ballistics expert at and before trial. *See* 4/29/82 Tr. at 21-25 (the court accepting an itemized bill for ballistic expert services in the amount of $350); *PCRA Op. F.F.* ¶ 149 (finding that defense counsel's fee petition demonstrated that he consulted with Fassnacht from March 30,

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[45]Dr. Hayes admitted at the PCRA hearing that his testimony was based of facts supplied by defense counsel, rather than upon a review of the eyewitness testimony in the case. *See* 8/4/95 Tr. at 100-104; *see also PCRA Op. F.F.* ¶ 189.

1982 through June 30, 1982). Moreover, when this same ballistician testified at the PCRA hearing, the court found "he would not have been able to opine that petitioner did not shoot Officer Faulkner," that he "could not demonstrate that any of the ballistic evidence or testimony submitted at trial was false or incorrect," and that at the PCRA hearing, he declined to "examine any of the physical evidence in the case, perform any experiments, look at photographs, or read the trial transcript." *See PCRA Op. F.F.* ¶¶ 144-145. For reasons stated in the following section, I also find the PCRA court's findings of fact not to be unreasonable with respect to the testimony of Fassnacht. Accordingly, because the testimony of the expert added nothing to petitioner's case, he did not suffer any prejudice resulting from any alleged lack of ballistics assistance at trial, and the determination of the state courts to this effect was not contrary to or an unreasonable application of federal law.

Finally, petitioner argues that an investigator was necessary to locate favorable witnesses and to expose the prosecution's "manipulation" of witnesses. First, I have already concluded that the state court's finding that the prosecution did not "manipulate" any witnesses is not unreasonable. Second, petitioner has failed to demonstrate that the investigative services provided to him were inadequate, or that if they were, such inadequacy was attributable to the procedure for payment of experts implemented by the state court. For example, petitioner's investigator, Robert Greer, testified at the PCRA hearing that he worked approximately four hours for every one hour billed to the state such that the value of his services received by Jamal was about four times the $562 billed to the court. *See* 9/1/95 Tr. at 193, 197-198, 212, 242; *see also PCRA Op. F.F.* ¶ 140 (finding same). Moreover, Greer also testified that he had no difficulty locating the witnesses defense counsel asked him to find. *See* 8/1/95 Tr. at 219-21,

228-29, 240-41; *see also PCRA Op. F.F.* ¶ 39 (finding same). Lastly, petitioner fails to demonstrate how any additional investigative hours would have been helpful. For this reason as well, I conclude that the state courts' determination that petitioner was not denied due process by the procedure employed to pay his experts was not contrary to or an unreasonable application of federal law.

D. Unreasonable Determination of Facts in Light of Evidence Presented

See also supra, III.6.D (discussing the reasonableness of many facts also related to this claim).

1. Investigator[46]

In general terms, petitioner complains that because funds were not authorized in a timely fashion, because names and numbers were redacted, because the prosecutor refused to provide information, and because funds were insufficient, he was not able to conduct an adequate investigation. Specifically, petitioner claims that factual finding 141, that Greer "had no difficulty in locating the witnesses Mr. Jackson asked him to find," is contradicted by testimony that Greer only found two witnesses. *See* P18 at 66-67. Respondents argue that record facts demonstrate that Greer investigated more than the hours for which he billed, that the Commonwealth agreed to make available redacted names, that the record reveals no attempt by the prosecutor to interfere with petitioner's ability to procure this information, and that an investigator was sought not because the police redacted names and numbers, but rather because

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[46]Respondents offer two general arguments to petitioner's allegations that he was prejudicially denied the services of experts: he in fact had experts and there was no prejudice because nothing exculpatory was revealed. *See* R24 at 67.

Jackson was receiving a number of tips, which required sorting by an investigator. *See* R24 at 68-69.

Both the PCRA court's and respondents' record citations are persuasive and I conclude that factual finding 141 is not unreasonable in light of the evidence presented. *See, e.g.*, 8/1/95 Tr. at 219-220 (Greer testifying that he had no difficult finding witnesses Hightower, Pigford, or White); *id.* at 221-222 (Greer testifying that the prosecution did not interfere with his ability to find Hightower, Pigford, or White); *id.* at 228 (Greer testifying that he was never asked to find Jones, or any police officer witnesses); *id.* at 229 (Greer first testifying that he was paid to look for everyone who gave statements to the police and then clarifying that testimony, stating that he was looking primarily for the witnesses already discussed); *id.* at 240-41 (Greer testifying that Jackson wanted him to look for the most important witnesses before pursuing others and that having located those people, he was getting ready to look for others); *id.* at 242 (Greer stating that he "found the ones he was looking for"). *See also, e.g.*, 8/1/95 Tr. at 193, 242 (Greer testifying that he billed for 22 ½ hours, but probably worked about three times that much). Additionally, I note that the record reflects that the state court even offered to make available to defendant's counsel and investigator any witness whose address had been redacted due to the state's concern about addresses of witnesses in homicide cases becoming public knowledge. *See* 3/18/82 Tr. at 68-72.

2. Expert Ballistician

Under this subsection, petitioner challenges as unreasonable the following findings of fact: 57, 25, 147, 145, 146. I will consider the reasonableness of each finding in turn. Finding of Fact 57 concludes that "the defense was receiving an undisclosed amount of money from

various sources prior to and during trial." *PCRA Op. F.F.* ¶ 57. Petitioner argues that this finding has no basis in the record. I find his assertion to be incorrect. First, at the PCRA hearing, State Representative David Richardson testified that he believed that there were a number of committees created to support petitioner, including a fund-raising committee. *See* 7/26/95 Tr. at 65-66. Second, the record demonstrates that investigator Greer had been retained by the Mumia Abu-Jamal Defense Committee to investigate the murder and petitioner's arrest. *See, e.g.*, 8/1/95 Tr. at 197-98 (Greer acknowledging that he signed a letter that stated "I have been retained by the Mumia Abu-Jamal Defense Committee to investigate the incident of his arrest."). Moreover, although both Greer and petitioner's trial counsel denied actual knowledge that the defense committee actually paid Greer, both conceded that the use of the word "retained" in a letter signed by Greer necessarily meant that the committee had paid Greer. *See e.g.*, 8/1/95 Tr. at 197-98 (Greer conceding that retained means that "I have been paid by"); 7/27/95 Tr. at 175-180 (Jackson testifying that he did not know that Greer was being paid by the defense committee, but agreeing that retained generally means that money has been paid for services). Third, Joseph Davidson, a journalist, testified that the Philadelphia Association of Black Journalists, in addition to other organizations and individuals, contributed to a defense fund created for petitioner and that at least some of that money went to pay for petitioner's photographer. *See* 7/27/95 Tr. at 240-43. Accordingly, it was not unreasonable for the state court to find that petitioner's defense had received monetary support from outside sources.

Factual finding 25 is not relevant to this claim. I assume that petitioner is referring to finding 60 which actually speaks to this subject. Citing observations made by the Supreme Court of Pennsylvania, finding 60 states that trial counsel's claim regarding insufficient funds was an

attempt to create an appellate issue. *See PCRA Op. F.F.* ¶ 60. As discussed above, the record reflects that petitioner initially was allotted funds to retain the services of a ballistician, an investigator, a photographer, and a forensic pathologist. The record also reflects that any additional funds could be requested in one of two ways: either at the close of the case when counsel submitted his fee petition, or in the interim, based upon the submission of itemized bills. On one occasion, trial counsel did submit an interim request, supported by itemized bills and the court ordered that those amounts be paid. However, there is no indication in the record that counsel ever submitted any other itemized requests or that those requests would have been denied. As such, trial counsel's argument that the court denied adequate investigative resources is baseless. Moreover, one reason to present such a baseless argument can be to create an appellate issue. Accordingly, I find the state court's finding not to be unreasonable in light of the evidence presented.

In finding of fact 147, the state court "completely reject[s] as absurd" Fassnacht's testimony "that he was unavailable as an expert witness during petitioner's trial due to lack of funds." *PCRA Op. F.F.* ¶ 147. As petitioner points out, Fassnacht did testify that his involvement in petitioner's case ended when he was "informed that no further funds would be available." 8/2/95 Tr. at 50. Fassnacht also stated that he eventually stopped taking court-appointment cases in Philadelphia "because Philadelphia either wouldn't pay sufficiently, would arbitrarily slash the bill in half, or make you wait one, two years for payment." *Id.* at 51. However, Fassnacht also testified that he may have consulted with and advised defense counsel during trial, even though he was not being paid. *See id.* at 100-101. That being said, because I already have determined that there is no proof in the record that there was such a lack of funds, I

also find that the state court's rejection of Fassnacht's contention regarding the availability of funds for petitioner's defense was not unreasonable.

Petitioner next argues that while Fassnacht testified to an absence of tests performed on petitioner's gun and hands and on a missing bullet fragment, and to contradictions in the ballistics report, the PCRA court never addressed this testimony. Instead, petitioner continues, the state court issued fact findings 145 and 146, both of which are unreasonable. Finding of fact 145 reads:

> [t]he witness could not demonstrate that any of the ballistic evidence or testimony submitted at trial was false or incorrect. This is not surprising, as Mr. Fassnacht did not examine any of the physical evidence in the case, perform any experiments, look at photographs, or read the trial transcript. In fact, he refused to look at the physical evidence when the prosecutor invited him to do so, claiming that to do so would somehow be 'unethical.' Given this testimony, Mr. Fassnacht's opinions are given only limited weight.

PCRA Op. F.F. ¶ 145 (record citations omitted). Finding of fact 146 concludes:

> [t]he heart of Mr. Fassnacht's direct and redirect testimony was that, based solely on his reading of the ballistics report, certain scientific tests were not done, and that the Commonwealth's ballistic evidence was therefore somehow inadequate. He was unable to opine, however, as to what the results of these additional tests would or should have been if they had been done, what would or should have been proven or disproved thereby.

PCRA Op. F.F. ¶ 146 (record citations omitted).

I first note that contrary to petitioner's assertion, the state court did address Fassnacht's testimony regarding the absence of certain scientific tests. In fact, the court referenced this testimony in the very finding that petitioner now challenges. *See PCRA Op. F.F.* ¶146. In

essence, the court afforded the testimony very little weight because Fassnacht only could testify that he should have been able to conduct these tests; Fassnacht was unable to offer an expert opinion as to what these tests would have shown or whether they would have proven helpful to petitioner. *See* 8/2/95 Tr. at 170-71. This finding accurately summarizes Fassnacht's testimony. As such, I find it not to be unreasonable. Moreover, it was also not unreasonable for the court to find such testimony unhelpful to petitioner. Just because one proclaims that certain tests should have been done, does not mean that those tests would have proven exculpatory. Therefore, that opinion does nothing to refute the evidence that was presented at trial.

Furthermore, regarding the evidence presented at trial, the state court found that Fassnacht never examined the evidence presented, could not demonstrate that any of that evidence was false or incorrect, and that Fassnacht declined to examine the evidence at the PCRA hearing stating that it was "unethical." *See PCRA Op. F.F.* ¶ 145. These findings accurately summarized the record. *See* 8/2/95 Tr. at 102-154. Additionally, based upon these findings, it was not unreasonable for the court to afford Fassnacht's opinions limited weight. After all, regardless of the reasons, Fassnacht had not and would not examine the evidence. As such, it is not unreasonable for the court to regard his testimony as a generalized opinion that only peripherally touched upon the extensive evidence presented at trial.

3. Expert Pathologist

Petitioner challenges factual findings 190 and 191. Finding 190 concludes that "Dr. Hayes had been misinformed by defense counsel; none of the eyewitnesses to the murder were able to testify to the victim's precise posture at the instant he returned petitioner's fire." *PCRA Op. F.F.* ¶ 190 (footnote omitted). In finding 191, the court stated that "Dr. Hayes' opinions are

of limited value as to the extent they are founded on what the defense attorneys told him rather than on the facts of the case. This caveat notwithstanding, Dr. Hayes offered no opinion that would be inconsistent with the trial evidence. . . ." *Id.* ¶ 191.

I first note that petitioner mischaracterized the PCRA court's findings. Citing finding 191, petitioner asserts that the court concluded that a pathologist would have been useless at trial. *See* P18 at 73. This interpretation reads too much into this finding. The state court explicitly found that Hayes's testimony was of limited value because his opinion was not inconsistent with the evidence presented at trial. The court, however, made no mention of any other pathologist and offered no opinion regarding the utility of any other pathologist's testimony at trial. Moreover, regarding what the court did find, the record supports the fact that Hayes reviewed only a limited amount of the record in the case, and based his opinion on the summary of the shooting provided by defense attorneys. *See* 8/4/95 Tr. at 78, 100-104. Accordingly, I conclude that finding 191 is not unreasonable in light of the evidence presented.

Regarding finding 190, respondents point out that no witness ever described the angle of the shot except Singletary, whose testimony was medically impossible, that Hayes had been misinformed by petitioner's counsel regarding the facts, and that the wound was not inconsistent with the description of events in that if petitioner had been leaning forward while shot or the officer had the gun pointing down slightly, then the wound would be consistent with those scenarios. *See* R24 at 73-74. I have reviewed the applicable record and am persuaded that respondents' assertions are supported adequately in the state court record. *See, e.g.*, 6/19/82 Tr. at 269 (no prosecution witness testified exactly as to when, how, or at what angle the officer shot petitioner); 6/25/82 Tr. at 8.64 (same); 6/21/82 Tr. at 4.104-105 (White did not testify as to the

bullet's trajectory); 8/4/95 Tr. at 78, 100-104 (Hayes' testimony was based upon the defense's summary of the events rather than upon a complete reading of the record); 8/4/95 Tr. at 77-79, 100-104, 114-115 (also regarding Hayes' testimony). As such, I conclude that finding 190 also is not unreasonable.

E. Evidentiary Hearing

Petitioner maintains that an evidentiary hearing is discretionary on this claim. *See* P27 at 1. In so doing, he implicitly concedes a developed factual basis in the state court. *See* P14 at 10-13. His burden, then, is to rebut the presumption that the state court's factual determination is correct. He has not done so. Moreover, because I have already determined that the state court's findings of fact were not unreasonable, petitioner's request for an evidentiary hearing necessarily will be denied. *See* 28 U.S.C. § 2254(e)(1).

III.9 DENIAL OF A CONTINUANCE IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE 5TH, 8TH AND 14TH AMENDMENTS.

A. Allegations in Support of Claim

Petitioner submits that although defense counsel needed to examine Wakshul in order to discredit prosecutorial evidence of petitioner's confession, the trial court accepted the prosecutor's misrepresentations and refused "to hold up this trial" despite the fact that the proceedings already had been suspended for a juror to take a professional exam. Petitioner contends that the court neither inquired into the witness's availability nor granted the requested continuance. *See* P1 ¶¶ 351-361.

B. Violation of Federal Constitution, Law or Treaty

Petitioner claims that he was deprived of his right to a fair and reliable determination of guilt. Specifically, petitioner contends that Wakshul was a critical witness, that there was no proof that Wakshul was on vacation, and that the trial court's denial of a continuance was in bad faith. He alleges a violation of his right to due process. *See* P14 at 49-50 (citing *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Virgin Islands v. Mills*, 956 F.2d 443, 445 (3d Cir. 1992)). Further, petitioner asserts that the court should have granted a continuance to ameliorate counsel's error in failing to procure Wakshul's testimony earlier. *See* P14 at 51.

Respondents argue that Wakshul never was told he would be a witness, that he was in fact unavailable when called by petitioner, that petitioner never proved that he was available, and that the continuance properly was denied because the failure to call Wakshul was attributable to petitioner. *See* R23 at 82-83 (citing *Virgin Islands v. Mills*, 956 F.2d 443, 446 (3d Cir. 1992)).

C. "Contrary to" or "Unreasonable Application of" Clearly Established Federal

Law

The claim was fairly presented to the state courts, and thus the exhaustion requirement is satisfied. *See* Amend. St. PCRA Pet. ¶¶ 94-95; St. PCRA Mem. at 66-72. Moreover, it was adjudicated on the merits by the state courts. *See PCRA Op. F.F.* ¶ 174 & *C.L.* ¶¶ 38-41, 106-07 ; *PCRA Appeal Op.* at 92, 94. Therefore, it is subject to the strictures of § 2254(d).

Although petitioner cites both *Chambers* and *Mills* in support of this claim, the applicable Supreme Court precedent is identified in *Mills*. *See Mills*, 956 F.2d at 446 (citing several cases). In *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982), the Court found that the Sixth Amendment required petitioner to show not only that he was deprived of relevant testimony, but also that the testimony would have been both material and favorable to his defense.[47] The *Valenzuela-Bernal* Court also determined that evidence was material "only if there is a reasonable likelihood that the testimony could have affected the judgement of the trier of fact." *See id.* at 874; *Mills*, 956 F.2d at 446. In *Rock v. Arkansas*, 483 U.S. 44, 56 (1987), the Court added that a Sixth Amendment deprivation of compulsory process must be arbitrary or disproportionate to any legitimate evidentiary or procedural purpose. 483 U.S. at 56; *see also Mills*, 956 F.2d at 446. Thus, in order for petitioner to prove that his due process or compulsory process right was violated, he must satisfy three criteria: First, that he was deprived of the opportunity to present evidence in his defense; second, that the evidence would have been

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[47]The *Mills* Court noted that courts have analyzed similar facts under both the due process and compulsory process clauses with little, if any, difference in the analysis. *See Mills*, 956 F.2d at 445 n.4. Accordingly, even though petitioner has brought this claim under the due process clause, the compulsory process clause and the *Valenzuela-Bernal* precedent are equally applicable.

material and favorable to that defense; and third, that the deprivation was arbitrary or disproportionate to any procedural purpose. *See id.*

In support of its denial of a continuance, the PCRA court cited *Commonwealth v. Birdsong*, 650 A.2d 26, 34 (Pa. 1994), which held that a court's denial of a continuance must be reviewed for abuse of discretion. Additionally, the *Birdsong* court cited five established criteria for determining whether the trial court's exercise of discretion was proper: "(1) the necessity of the witness to strengthen the defendant's case; (2) the essentiality of the witness to defendant's case; (3) the diligence exercised to procure his presence at trial; (4) the facts to which he could testify; and (5) the likelihood that he could be produced at the next term of court." *Birdsong*, 650 A.2d at 34. Arguably, the Pennsylvania state test encompasses the same principals as those required under the *Velenzuela-Bernal* and *Rock* precedents. Pennsylvania's "necessity" and "essentiality" prongs are synonymous with the federal "material" and "favorable" requirements. Moreover, the remaining three prongs of the Pennsylvania test, taken as a whole, are analogous to the federal arbitrary or disproportionate requirement. Thus, if the PCRA court's denial of a continuance was proper under *Birdsong*, it follows that it also was not contrary to or an unreasonable application of federal law.[48]

The PCRA court found as a fact that by the time the defense made its last-minute request to call Wakshul on the last day of the guilt phase of trial, he had gone on vacation and was

[48]While the *Birdsong* standard omits (at least in explicit terms) the first component of the federal standard–namely that petitioner was deprived of the opportunity to present evidence in his defense–it seems clear that a Pennsylvania court would have no occasion to apply the five factors that *Birdsong* does announce if petitioner had not been deprived of this opportunity. Accordingly, I conclude that such is an implicit component of the *Birdsong* standard.

unavailable to testify (although Wakshul earlier had remained in Philadelphia in view of the possibility that he might be called as a witness), that it was petitioner's decision to call Wakshul at the last minute and without any prior notice over his attorney's better judgement, that neither the police nor the prosecution was responsible for Wakshul's unavailability, and that had Wakshul testified at trial, his testimony would have been unfavorable to petitioner because Wakshul would have corroborated the testimony of two other witnesses to petitioner's confession. *See PCRA Op. F.F.* ¶¶ 124-27, 131, 137. Based upon these findings, the PCRA court determined that the denial of a continuance was proper. *See id. C.L.* ¶ 38-41. Because the PCRA court's findings demonstrate that petitioner was not "deprived" of the opportunity to present his defense, that Wakshul's testimony was neither "material" nor "favorable" to petitioner's defense, and that the denial of the continuance was not arbitrary, the state court's decision was not contrary to or an unreasonable application of federal law. Accordingly, petitioner is not entitled to habeas relief pursuant to this claim.

D. Unreasonable Determination of Facts in Light of Evidence Presented

Petitioner does not challenge directly any particular fact-findings related to the denial of the continuance. In any event, the court has reviewed all factual findings related to Wakshul and petitioner's control over trial strategy and has determined that they are not unreasonable. *See also supra*, III.3.D (discussing factual findings regarding petitioner's fabricated confession theory); III.6.D (discussing factual findings regarding attorney control over trial strategy).

E. Evidentiary Hearing

Petitioner concedes that this claim does not require an evidentiary hearing because the

evidentiary record is complete and because the PCRA court's credibility determinations are not at issue. *See* P14 at 9.

III.10 THE COURT IMPERMISSIBLY RESTRICTED DEFENSE ELICITATION OF MATERIAL, FAVORABLE EVIDENCE IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE 5TH, 8TH AND 14TH AMENDMENTS.

A. Allegations in Support of Claim

Petitioner claims that the court struck certain testimony of Veronica Jones, which was offered to impeach testimony of Cynthia White, as irrelevant without further explanation. Petitioner also complains that the restriction of impeachment of Chobert was without justification. *See* P1 ¶¶ 362-373.

B. Violation of Federal Constitution, Law or Treaty

Petitioner contends that he was deprived of his rights to confront witnesses against him and to a fair and reliable determination of guilt and penalty. Specifically, petitioner argues that barring Jones's testimony prevented him from proving White's agreement with the prosecution. *See* P14 at 51-52 (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)). He further alleges that the trial court impermissibly denied him the opportunity to introduce evidence of Chobert's probationary status and DWI convictions. *See id.* at 52. Finally, petitioner asserts that the restrictions placed on his examination of these two witnesses rendered his trial fundamentally unfair. *See id.* (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986); *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974); *Olden v. Kentucky*, 488 U.S. 227, 230 (1988); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Chambers v. Mississippi*, 410 U.S. 284 (1973)).

Respondents answer first that petitioner never advanced a confrontation claim in state court as to Cynthia White. *See* R23 at 84. Second, respondents assert that petitioner's claim fails on the facts because he knew before trial about Jones's existence but failed to investigate the

value of her testimony, because he failed to re-question White regarding any deal after the trial court restricted Jones's testimony, and because the PCRA court found Jones's testimony incredible. *See* R23 at 84-85. Additionally, respondents note that petitioner did not seek to impeach Chobert by advancing his probationary status as evidence of bias, but rather sought to impeach Chobert with *crimen falsi*. *See* R23 at 88 (citing *Davis v. Alaska*, 415 U.S. 308 (1974)). Finally, respondents argue that petitioner failed to prove fundamental unfairness because he did not demonstrate actual prejudice. *See* R23 at 89 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

C. "Contrary to" or "Unreasonable Application of" Clearly Established Federal Law

The claim was fairly presented to the state courts, and thus the exhaustion requirement is satisfied. *See* Amend. St. PCRA Pet. ¶¶ 93, 96-97, 102-03; St. PCRA Mem. at 72-75, 79-80. Moreover, it was adjudicated on the merits by the state courts. *See PCRA Op. C.L.* ¶¶ 42-48 ; *PCRA Appeal Op.* at 95-100 & nn. 20, 21. Therefore, it is subject to the strictures of § 2254(d).

First, petitioner's claim that counsel was restricted from impeaching Chobert already has been addressed. *See supra* at III.1. Again, I find that the state court did not improperly deny cross-examination of Chobert.

I next turn to petitioner's confrontation claim regarding Jones. Respondents characterize this claim as a confrontation claim regarding White. As I understand petitioner's claim, he is challenging the trial court's ruling denying his request to examine Veronica Jones regarding her alleged conversation with unnamed police detectives wherein she was told that if she implicated petitioner in the murder of Officer Faulkner, as Cynthia White had already done, that she too

would be permitted to "work the streets" without police interference. Petitioner apparently claims that this information could have been used to impeach White's testimony. Respondents assert that this claim is procedurally defaulted because it was not raised in state court. I disagree. In his amended PCRA petition, petitioner presented this claim in virtually identical language: "the court deprived Mr. Jamal of his right to present a defense" because "Mr. Jamal was barred from examining Veronica Jones and showing that prosecution witness Cynthia White . . . was coaxed and coerced to testify." Amend. St. PCRA Pet. ¶ 93. Moreover, petitioner cited much of the same legal authority to this court as he did to the PCRA court. *See* Amend. St. PCRA Pet. ¶ 103 (citing *Chambers v. Mississippi*, *Washington v. Texas*, *Giglio v. United States*). Finally, although the state supreme court decided this issue primarily under the *Brady* doctrine, it did note that petitioner presented the claim, offered no argument in support thereof, and in any event, failed to establish the requisite prejudice. *See PCRA Appeal Op.* at 97 & n.21. Accordingly, this claim is properly before this court.

The state court record provides the following background. Cynthia White testified for the Commonwealth as an eye witness to the murder. She was impeached extensively by questioning about her long history of arrests, about prosecutorial inducements, and about the consistency of her prior statement to police. *See, e.g.*, 6/21/82 Tr. at 4.81-4.84, 4.138-4.141, 4.169-4.171 (questioning existence of deal); 6/22/82 Tr. at 5.81, 5.88 (same); 6/21/82 Tr. at 4.171-4.175 (regarding contact with homicide department); 6/22/82 Tr. at 5.25-5.81 (regarding bench warrants, prosecution, and favors to friend); 6/21/82 Tr. at 4.80-4.81 (regarding false information to police); 6/22/82 Tr. at 5.114-5.222 (regarding prior inconsistent statements as to shooter height, time, distance, visibility of gun).

The defense called Veronica Jones to testify as to what she saw on the night of the murder, without first having spoken to the witness. She was not called as a witness to impeach the testimony of White. While on the stand, Jones revealed that she was taken to the police station sometime in early January, 1982 on unrelated matters and that "while at the station, a conversation ensued regarding the instant case during which the police 'were getting on [her] telling [her] she was in the area and [had] seen Mumia, . . . do it . . . intentionally. They were trying to get me to say something that the other girl said.'" *See PCRA Appeal Op.* at 96 (quoting 6/29/82 Tr. at 129). It is undisputed that she never testified at trial implicating petitioner in the murder. When defense counsel sought to question Jones further regarding this statement, the prosecution objected. Because defense counsel claimed that he was unaware of this incident prior to Jones' testimony, court was recessed briefly to afford counsel an opportunity to interview Jones on this subject. *See id.* at 96. At sidebar, defense counsel informed the court that, if permitted, Jones would testify that unnamed police officers told her that if she implicated petitioner as White had done, then she too would be able to "work the streets" without police interference. *See id.* at 96-97. The prosecution's objection regarding this proffered testimony was sustained, apparently on the ground that it was irrelevant because Jones was called to testify concerning her recollection of the events on the night of the murder and not as to any alleged agreement between the police and White. *See* 6/29/82 Tr. at 138-42; *PCRA Appeal Op.*, at 97 n. 21.[49]

As I understand petitioner's claim, he argues that this evidentiary ruling was improper

[49]Additionally, the PCRA court did not permit Jones to testify about this incident at the PCRA hearing stating that the witness had already testified concerning this area at trial. *See PCRA Jones Op.* at 7 & n.5.

because Jones' testimony was relevant to show bias on the part of White as a result of an agreement with the police. The state court's evidentiary ruling that testimony regarding any police deal with White was outside the scope of the defense's proffer is clearly correct because nowhere in the record does it show that the defense offered witness Jones for that purpose. Moreover, if the testimony of Jones was offered to prove the truth of a deal between White and the police, that testimony clearly was subject to a hearsay objection.

Next, petitioner claims that he was sufficiently prejudiced by the PCRA court's ruling so as to deprive him of due process. Even if the state court's ruling to exclude Jones's testimony was improper, I find that this claim lacks merit because petitioner has failed to demonstrate that this decision rendered his trial fundamentally unfair. The state court determined that petitioner had presented no evidence of any "deals" made by the Commonwealth with White or Jones in exchange for favorable testimony even after the Pennsylvania Supreme Court remanded the issue for a supplemental hearing, as neither White nor Jones was called as a witness by petitioner at the original PCRA hearing. *See supra*, III.1.D; *PCRA Appeal Op.* at 97.[50] Additionally, while the credibility of Jones's trial testimony was an issue for the jury in 1982, the PCRA court found Jones's PCRA testimony to be incredible and the Pennsylvania Supreme Court accepted that finding as binding. *See supra*, III.2.D; *PCRA Appeal Op.* at 99. Moreover, the state supreme court determined that even if Jones had been found to be credible, her statement was not exculpatory. *See PCRA Appeal Op.* at 100. Thus, affording the proper deference to the state court's factual findings, and having already determined that these findings were not

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[50]Petitioner even recalled White as a witness at trial after Jones had been on the stand and never even asked White about the alleged "deal." *See* 6/29/82 Tr. at 180-98.

unreasonable, I must conclude that the absence of this proffered testimony did not cause petitioner any prejudice. Consequently, the state court's decision was not contrary to or an unreasonable application of Supreme Court precedent.

D. Unreasonable Determination of Facts in Light of Evidence Presented

See supra, III.1.D, & III.2.D as the factual issues supporting petitioner's first two claims are relevant to this claim as well.

E. Evidentiary Hearing

Petitioner concedes that no evidentiary hearing is required on this claim. *See* P14 at 9.

III.11 THE COURT STRIPPED PETITIONER OF HIS RIGHT TO SELF-REPRESENTATION BY REQUIRING THAT VOIR DIRE BE CONDUCTED ONLY BY BACKUP COUNSEL OR THE COURT IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE 5TH, 6TH, 8TH OR 14TH AMENDMENTS.

A. Allegations in Support of Claim

Petitioner states that he was permitted to proceed *pro se* after clear differences between his counsel and him became apparent. He further submits that after two days of *pro se* voir dire, the court ruled that further voir dire must be conducted by the court or by back-up counsel on the grounds that the process was proceeding too slowly and that jurors were uncomfortable with questioning by petitioner. Consequently, petitioner argues, the jurors were given a misimpression as to who was conducting the defense and as to the impropriety of petitioner's conduct. Finally, petitioner complains that Jackson was not counsel of his choice. *See* P1 ¶¶ 374-386.

B. Violation of Federal Constitution, Law or Treaty

Petitioner argues that he was deprived of his rights to self-representation and to a fair and reliable determination of guilt and penalty. First, petitioner contends that his removal prejudiced the jury against him and interfered with "the most important decision . . . in shaping his defense." *See* P14 at 52 (quoting *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979)). Second, petitioner contends that the court's decision prejudiced him in front of the jury, where his appearance is essential to his right to self-representation. *See* P14 at 53 (citing *McKaskle v. Wiggins*, 465 U.S. 168 (1984)). Third, petitioner argues that the speed of the proceedings is irrelevant to his *pro se* right. *See* P14 at 53 (citing *McKaskle v. Wiggins*, 465 U.S. 168 (1984); *Faretta*, 422 U.S. 806). Finally, petitioner asserts that his right to counsel of his choice was

violated. *See* P14 at 54 (citing *United States v. Romano*, 849 F.2d 812, 819 (3d Cir. 1988)).

Respondents argue that because of the slow pace of voir dire, the court was asked to conduct voir dire for both sides, which it has the power to do. *See* R23 at 90 (citing Pa. R. Crim. P. 1106(c)). Respondents explain that petitioner actually remained as counsel, but simply did not conduct voir dire, which no cited case shows is error. *See* R23 at 91. Finally, respondents maintain that the right to counsel of choice concerns only retained and not appointed counsel. *See* R23 at 92.

C. "Contrary to" or "Unreasonable Application of" Clearly Established Federal Law

The claim was fairly presented to the state courts, and thus the exhaustion requirement is satisfied. *See* Direct Appeal Br. at 18-22; Amend. St. PCRA Pet. ¶¶ 120-24; St. PCRA Mem. at 109-14. Moreover, it was adjudicated on the merits by the state courts. *See Abu-Jamal*, 555 A.2d at 851-52; *PCRA Op. C.L.* ¶¶ 122-28, 232-34; *PCRA Appeal Op.* at 108-109. Therefore, it is subject to the strictures of § 2254(d).

In *Farretta v. California*, the Supreme Court held that a criminal defendant has a constitutional right to represent himself at trial if he makes a clear and unequivocal assertion of this right and a knowing and intelligent waiver of his right to counsel. *See* 422 U.S. 806, 835 (1975). The Court cautioned, however, that this right is not without limits. For example, a trial judge may terminate self-representation if the defendant engages in purposefully disruptive behavior. *See id.* at 834 n.46. Additionally, a state may appoint "standby counsel" to assist the defendant or to resume the defense in the event that defendant's self-representation is terminated. *Id.* In *McKaskle v. Wiggins*, the Court found that a defendant's *Faretta* rights encompassed,

inter alia, the right "to control the organization and content of his own defense, . . . to *participate* in voir dire, . . . and to address the court and the jury at *appropriate* points in the trial." 465 U.S. 168, 174 (1984) (emphasis added).

Petitioner first claims that he was stripped of his *Faretta* rights when the trial court took over the voir dire questioning. This assertion is patently incorrect.[51] The record reflects and the state supreme court correctly held that petitioner's right to represent himself during voir dire was not violated because there is "no requirement, constitutional or otherwise, that the parties, through counsel or *pro se*, be permitted in to engage in voir dire questioning." *Abu-Jamal*, 555 A.2d at 852 (relying on Pennsylvania Rule of Criminal Procedure 1106(d) which affords the trial judge the discretion to determine the manner in which voir dire is conducted). Petitioner points to no Supreme Court precedent to the contrary. Additionally, the state court properly concluded that because the trial judge observed that petitioner's questioning "was unnecessarily lengthy and often improper" and that "many of the venirepersons were 'visibly shaken and uncomfortable,'" he had not abused his discretion in taking over the questioning of prospective jurors. *Id.* at 851-52 (citation omitted). Indeed, only one juror had been selected after two days of questioning. *See id.* at 851; *see also* 6/8/82 Tr. at 2.137-2.139; 6/9/82 Tr. at 3.2-3.4. Accordingly, because petitioner's right to self-representation was not terminated at this stage, the state court's decision was neither contrary to nor an unreasonable application of *Faretta*.[52]

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[51]At the PCRA hearing, petitioner's counsel even stated that the record reflected that petitioner was not removed as his own counsel during voir dire, but was removed after his trial had begun. *See* 7/28/95 Tr. at 67.

[52]Petitioner also argues that because back-up counsel thereafter resumed voir dire questioning, counsel was "de facto" elevated into the role of lead counsel, thereby functionally removing defendant from and/or interfering with his self-representation. However, I already

Petitioner next argues that because back-up counsel subsequently was permitted to continue voir dire questioning, he was denied his *McKaskle* right to perform attorney functions in front of the jury. This argument is without merit for two reasons. First, while the *McKaskle* Court stated that a *pro se* defendant has the right to "participate in voir dire," 465 U.S. at 174, the Court did not indicate that this right encompasses the questioning venirepersons. Quite the contrary, in the portion of the *McKaskle* opinion evaluating back-up counsel's conduct "outside the presence of the jury," the Court cited an exchange that occurred between the defendant and back-up counsel "during the course of questioning a witness on voir dire." *McKaskle*, 465 U.S. at 180. It follows, therefore, that voir dire questioning does not transpire "in front of the jury" as petitioner contends. Thus, the fact that petitioner was not permitted to question every venireperson does not constitute a violation of the Sixth Amendment as interpreted in *McKaskle* and *Faretta*, 422 U.S. at 821.[53] Second, even making the strong assumption that the right to self-representation necessarily includes the questioning of potential jurors, it is nonetheless untenable to posit that this right is inalienable, especially when it is beyond reasoned argument that the right to self-representation itself is waiveable. In this case, petitioner allowed back-up counsel to conduct voir dire questioning, *see* 6/9/82 Tr. at 3.106-.124, and this unquestionably effected a waiver of any right he possessed personally to question the venire. For both of these reasons, the trial court's decision to allow, upon petitioner's consent, back-up counsel to assume voir dire

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have concluded, *supra*, that petitioner continued to represent himself throughout the voir dire process. Accordingly, this argument is unpersuasive.

[53]I note that petitioner was by no means absent from the voir dire process. Indeed, in consultation with his back-up counsel, petitioner was in control of the exercise of defense challenges. *See, e.g.,* 6/9/82 Tr. at 3.143, 3.160, 3.166, 3.197, 3.237, 3.246. Thus he was not denied the right "to participate in voir dire," which *McKaskle* requires that he be afforded.

questioning was not contrary to or an unreasonable application of clearly established federal precedent, and petitioner's *McKaskle* claim consequently is unpersuasive.

Finally, petitioner contends that by removing him and inserting back-up counsel to continue voir dire questioning, the state court denied his right to counsel of choice. In support of this argument, petitioner cites *United States v. Romano*, 849 F.2d 812, 819 (3d Cir. 1988). First, I note that this authority does not represent clearly established Supreme Court precedent as required under § 2254(d). Nonetheless, petitioner's cited case is inapposite. The *Romano* court held that a defendant removed from *pro se* status has the right to retain counsel of her choice. *See* 849 F.2d at 818-19. Petitioner, however, fails to recognize that the Constitution does not afford him a right to state-funded counsel of his choice. *See generally Morris v. Slappy*, 461 U.S. 1, 22 (1983) (Brennan, J., concurring) (noting that indigent defendants do not enjoy a right to choose their counsel); *Siers v. Ryan*, 773 F.2d 37, 44 (3d Cir. 1985), *cert. denied*, 490 U.S. 1025 (1989) (stating that there is no absolute right to appointed counsel of one's choice); *United States v. Dolan*, 570 F.2d 1177, 1183 (observing that the absolute right to self-representation does not imply the absolute right to appointed counsel of one's choice). Therefore, because petitioner, an indigent defendant, was represented by appointed counsel and never proposed to retain any other counsel of his choice, this claim also is without merit, and its denial by the state courts was not contrary to or an unreasonable application of federal law.[54]

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[54]Petitioner, on numerous occasions, demanded that the court allow John Africa, a non-lawyer, to represent him. Retained counsel of one's choice, however, must be just that–licensed legal counsel. *See Wheat v. United* States, 486 U.S. 153, 159 (1988) ("Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court.") (footnote omitted); *United States v. Wilhelm*, 570 F.2d 461, 464-66 (3d Cir. 1978) (holding that there is no Sixth Amendment right to insist upon lay representation).

D. Unreasonable Determination of Facts in Light of Evidence Presented

Petitioner's motion does not address the specific fact-findings underlying this claim.

E. Evidentiary Hearing

Petitioner concedes that an evidentiary hearing on this claim is not required. *See* P14 at 9.

III.12 REMOVAL OF PETITIONER FROM TRIAL VIOLATED RIGHTS UNDER THE 5TH, 8TH AND 14TH AMENDMENTS.

A. Allegations in Support of Claim

Petitioner contends that on five consecutive days, his assertion of his right to self-representation resulted in his expulsion from the courtroom. Petitioner claims that he was also ejected from the courtroom due to his objections to an *in camera* hearing and the court's refusal to make the proposed evidence to be discussed *in camera* part of the record, despite the fact that the evidence and hearing concerned the shooting of petitioner. Moreover, petitioner asserts that at no time when ejected was he able to monitor the trial or communicate with back-up counsel. Finally, petitioner alleges that because he perceived that his constitutional rights were being denied, he declined to testify on his own behalf. *See* P1 ¶¶ 387-414.

B. Violation of Federal Constitution, Law or Treaty

Petitioner complains that he was deprived of his rights to self-representation, to assist in his defense, to confront witnesses against him, and to a fair and accurate determination of guilt and punishment. First, petitioner argues that he had a right to be present at all critical phases of trial. *See* P14 at 54 (citing *Faretta*, 422 U.S. at 819-21). Moreover, petitioner suggests that this right is not waivable in a capital case. *See id.* at 54-55 (citing *Diaz v. United States*, 223 U.S. 442 (1912); *Lewis v. United States*, 146 U.S. 370 (1892); *Hopt v. Utah*, 110 U.S. 574 (1884)). Second, even assuming that petitioner's *pro se* right was waivable, petitioner asserts that it is improper to remove a defendant for insisting on his constitutional rights. *See id.* at 55-56 (citing *United States v. Dougherty*, 473 F.2d 1113, 1126-27 (D.C. Cir. 1972)). Finally, petitioner contends that his removal was unconstitutional because it was not narrowly tailored, as he could

neither follow nor influence events. *See id.* at 56 (citing *United States ex rel. Boothe v. Superintendent*, 506 F. Supp. 1337, (E.D.N.Y.) *rev'd on procedural grounds*, 656 F.2d 27 (2d Cir. 1981)).

Respondents answer that petitioner's removal was proper because such was a consequence of his disruptive behavior and because protective instructions to the jury were given. *See* R23 at 93-97. Respondents point out that persistent disruptions are grounds to remove or bind and gag a defendant. *See id.* at 97 (citing *Illinois v. Allen*, 397 U.S. 337 (1970)). Next, respondents argue that there is no requirement that a trial court provide "technological equipment" so that a removed defendant may follow his trial. *See id.* at 98. In any event, respondents emphasize that petitioner never has made a showing that ameliorative means were available at his trial in 1982. *See id.* Finally, respondents assert that petitioner failed to demonstrate prejudice in state court and that, at any rate, no prejudice resulted because both counsel agreed that Jackson kept petitioner informed and because it is clear that petitioner was unwilling to cooperate at all. *See id.* at 98-99.

C. "Contrary to" or "Unreasonable Application of" Clearly Established Federal Law

The claim was fairly presented to the state courts, and thus the exhaustion requirement is satisfied. *See* Amend. St. PCRA Pet. ¶¶ 125-130; St. PCRA Mem. at 115-34. Moreover, it was adjudicated on the merits by the state courts. *See PCRA Op. C.L.* ¶¶ 55, 128-29; *PCRA Appeal Op.* at 109-10. Therefore, it is subject to the strictures of § 2254(d).

"One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." *Illinois v. Allen*, 397

U.S. 337, 338 (1970) (citing *Lewis v. United States*, 146 U.S. 370 (1892)). However, in *Allen*, the Supreme Court held that a defendant's right to be present at trial can be forfeited if, "after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." 397 U.S. at 343. In addition to removing a defendant, the Court opined that there are at least two other constitutionally permissible ways to handle a disruptive defendant: binding and gagging him and citing him for contempt. *See id.* at 343-44. The Court, however, stressed that the trial court must be afforded sufficient discretion to respond to the circumstances of each case. *See id.* at 343.

The state courts properly identified *Allen* as controlling law and found that petitioner's claim was meritless. The PCRA court stated that despite its warnings that petitioner would be removed because of his disruptive behavior, petitioner persisted and consequently was removed from the courtroom. *See PCRA Op. C.L.* ¶ 128 (citing, *e.g.*, 6/17/82 Tr. at 1.44-1.128). The PCRA court also cited several instances of petitioner's similar obstructive behavior throughout pretrial proceedings. *See id.* (citing 6/1/82 Tr. at 31-93; 6/2/82 Tr. at 2.79-2.92; 6/3/82 Tr. at 3.17, 3.42; 6/4/82 Tr. at 4.110-4.125; 6/7/82 Tr. at 177-78; 6/8/82 Tr. at 2.138-2.144; 6/9/82 Tr. at 3.18-3.40). The state supreme court also found that the record was "replete" with instances where petitioner was unwilling to cooperate with the court and/or his counsel and where petitioner was argumentative with the court despite repeated warnings that his behavior would cause him to be removed. *See PCRA Appeal Op.* at 109.

After reviewing the entire record, I conclude that the state court's decision to remove petitioner was not contrary to or an unreasonable application of *Allen*. *Allen* holds that it is

constitutionally permissible to remove an obstructive defendant from the courtroom after he has been warned that his continued behavior would lead to removal.[55] This is precisely what happened in this instance. Petitioner was warned repeatedly that his disruptions would lead to his removal. *See, e.g.*, 6/18/82 Tr. at 2.87-2.88. On one occasion, petitioner responded, "Judge, you can remove me again and again and again and again and again and again," indicating that he intended to continue his outbursts. *See* 6/24/82 Tr. at 85. Moreover, each time petitioner was removed, the court instructed the jury to draw no adverse inference from his absence. *See, e.g.,* 6/22/82 Tr. at 5.24, 6/23/82 at 6.129; 6/24/82 Tr. at 95. Finally, petitioner was given every opportunity to return to the courtroom if he was willing to behave. *See, e.g.*, 6/19/82 Tr. at 4; 6/22/82 Tr. at 5.90; 6/24/82 at 7. Therefore, I conclude that petitioner's claim is without merit.

Citing *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972), petitioner also claims that because he was properly insisting on his constitutional right to represent himself, his removal was in error. This argument is incorrect for two reasons. First, § 2254(d)(1) requires that a decision of the state court be contrary to or an unreasonable application of clearly established federal law, *i.e.*, Supreme Court precedent. Petitioner has failed to identify any Supreme Court precedent for his proposition. Second, *Dougherty* is inapposite. The *Dougherty* court held that "[t]he possibility that reasonable cooperation may be withheld, and the right later waived, is not a reason for denying the right of self representation at the start." 473 F.2d 1126. Thus, in that case, the defendants' possible future disruptive behavior could not serve to justify the trial court's

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[55]While *Allen* also contemplates holding a defendant in contempt for his continued disruptions, that remedy may be insufficient where it appears that the defendant will be undeterred by this charge. *See Allen*, 397 U.S. at 345; *see also* 6/17/82 Tr. at 1.110 ("THE DEFENDANT: Again, those warnings of contempt are meaningless to me.").

denial of the defendants' right to *pro se* representation in the first instance. *See id.* Nowhere does the *Dougherty* opinion address the propriety of an accused's removal from the courtroom due to obstreperous behavior that already has occurred.

Petitioner's reliance on *United States ex rel Boothe v. Superintendent*, 506 F. Supp. 1337 (E.D.N.Y. 1981), *rev'd*, 656 F.2d 27 (2d Cir. 1981), is likewise misplaced. Petitioner cites *Boothe* for the proposition that a due process violation stemmed from the trial court's failure to provide a technological mechanism by which petitioner could monitor the proceedings during the periods of his removal. Yet this case is neither Supreme Court precedent as required by § 2254(d)(1), nor is it good law. As such, petitioner has failed to cite any case, let alone Supreme Court precedent as required by AEDPA, that requires a trial court to provide technological means for a removed defendant to monitor his trial. Moreover, petitioner has made no showing in state court that such technology even was available in the Philadelphia courts at the time of his 1982 trial. At any rate, there are indications in the record that petitioner's counsel made every effort to keep petitioner informed regarding what transpired in his absence.[56] At one point during trial, Jackson stated to the court:

> I would like to say for the record, Your Honor, that most of the communication has been one way in that aside from Mr. Jamal not wanting to cooperate with me I nevertheless at each instance that he has been brought into the courtroom I have tried to tell him what I intended to do, or when he is not in the courtroom either to tell him what has happened or what I intend to do.

6/29/82 Tr. at 6. Therefore, I conclude that the state court's failure to provide an alternative mean, other than his counsel, for petitioner to follow the trial on the occasions when petitioner

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[56]Indeed, petitioner made no allegation to the contrary in his PCRA proceeding. *PCRA Appeal Op.* at 109.

had been removed from the courtroom due to his disruptive behavior was not contrary to or an unreasonable application of federal law.

For the foregoing reasons, habeas relief pursuant to this claim will be denied.

D. Unreasonable Determination of Facts in Light of Evidence Presented

Petitioner's motion does not challenge the reasonableness of fact-findings related to this claim.

E. Evidentiary Hearing

Petitioner concedes that no evidentiary hearing is required on this claim. *See* P14 at 9.

III.13 EXCLUDING PETITIONER FROM TWO *IN CAMERA* CONFERENCES VIOLATED HIS RIGHTS UNDER THE 5TH, 6TH, 8TH AND 14TH AMENDMENTS.

A. Allegations in Support of Claim

Petitioner submits that he was absent from two in camera conferences. The first conference occurred on June 18, 1982, and concerned the denial of back-up counsel's state supreme court appeal to be removed from the case, the removal of juror Dawley, and the prosecutor's admission that he and witness Chobert had been together inadvertently in a hotel dining room where jurors were present. The second conference, which occurred on June 28, 1982 on the record in chambers despite petitioner's request to conduct it in open court, concerned the admissibility of evidence that an officer other than Faulkner shot petitioner. *See* P1 ¶¶ 415-436.

B. Violation of Federal Constitution, Law or Treaty

Petitioner alleges that his rights to be present, to self-representation, to a public trial, and to a fair and reliable determination of guilt were violated by his absence at these conferences. *See* P14 at 57-58 (citing *Faretta*, 422 U.S. at 819 n.5; *Hopt v. Utah*, 110 U.S. 574, 579 (1884); *United States v. Gagnon*, 470 U.S. 522, 526 (1985)). Petitioner argues first that his exclusion from the June 18, 1982 *in camera* conference violated his right to self-representation. *See id.* at 58-59 (citing *McKaskle*, 465 U.S. at 178-79). Second, petitioner contends that his right to be present was violated because the conferences concerned more than mere scheduling or purely legal matters. *See id.* at 59 (citing *Hopt*, 110 U.S. at 579). Third, petitioner claims that he was denied his right to a public trial. *See id.* at 59-60 (citing *United States v. Simone*, 14 F.3d 833, 840-41 (3d Cir. 1994)). Petitioner adds that his right to be present improperly was conditioned

on his waiver of his right to a public trial. *See id.* at 60.

Respondents answer first that petitioner no longer was proceeding *pro se* when he was excluded from the June 18, 1982 conference. *See* R23 at 102. Second, respondents argue that petitioner has failed to substantiate his presence claim because he has not explained how his presence was necessary to defend against the charge. *See id.* at 103 (citing *Kentucky v. Stincer*, 482 U.S. 730 (1987); *United States v. Gagnon*, 470 U.S. 522, 526 (1985); *Snyder v. Massachusetts*, 291 U.S. 97 (1934)). Finally, respondents urge that petitioner's claim of right to a public trial was procedurally defaulted in state court. *See id.* at 104 (citing *Coleman v. Thompson*, 501 U.S. 722 (1991)). Respondents alternatively note that the public trial right does not apply to bench or trial conferences. *See id.* (citing *Waller v. Georgia*, 467 U.S. 39, 47 (1984); *Richmond News Inc. v. Virginia*, 448 U.S. 555, 598 n.23 (1982) (Brennan, J., concurring); *United States v. Smith*, 787 F.2d 111, 114 (3d Cir. 1986)).

C. "Contrary to" or "Unreasonable Application of" Clearly Established Federal Law

The claim was fairly presented to the state courts, and thus the exhaustion requirement is satisfied. *See* Amend. St. PCRA Pet. ¶¶ 105-09; St. PCRA Mem. at 82-97, 118, 124-25; St. PCRA Appeal Br. at 90.[57] Moreover, it was adjudicated on the merits by the state courts. *See PCRA Op. C.L.* ¶¶ 54-56; *PCRA Appeal Op.* at 110. Therefore, it is subject to the strictures of § 2254(d).

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[57]Respondents argue that the public trial portion of petitioner's claim is defaulted because petitioner failed to present it to the state courts. This assertion is incorrect, however, as petitioner addressed the public trial issue in his PCRA appeal brief, albeit in the same, cursory fashion as he has argued the issue to this court. *See* St. PCRA Appeal Br. at 90; P14 at 60. Respondents may not interpret identical text to allege a public trial claim in one instance and not in the other.

While it is axiomatic that a criminal defendant has a right to self-representation, that right is not absolute. As I have already discussed, *see supra*, III.11, a trial judge may terminate self-representation if the defendant engages in purposefully disruptive behavior. *See Faretta,* 422 U.S. at 834 n.46. In petitioner's case, the record clearly reflects that because petitioner had been "deliberately disruptive," the trial court terminated his *pro se* status at the end of the proceedings on June 17, 1982. *See* 6/17/82 Tr. at 1.123 ("COURT: . . . My position is that you have deliberately disrupted the orderly progression of this trial. Therefore, I am removing you as primary counsel and I am appointing Mr. Jackson to take over as primary counsel."); *see also* 6/18/82 Tr. at 2.2-2.6 (informing the court, *inter alia*, that the state supreme court denied defendant's petition to stay the court's order reinstating Jackson as primary counsel). Moreover, I already have determined that the trial court's decision to remove petitioner was proper. *See supra*, III.11, III.12. Accordingly, the Pennsylvania courts' denial of petitioner's claim that his absence from a June 18, 1982 *in camera* conference violated his *Faretta* rights was not contrary to or an unreasonable application of federal law because he no longer was proceeding *pro se* at that stage of the proceedings.

Petitioner next submits that his right to be present under both the Fifth and Sixth Amendments was violated by his absence from these two *in camera* conferences. The Supreme Court has explained that "[t]he constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, . . . but we have recognized that this right is protected by the Due Process Cause in some situations where the defendant is not actually confronting witnesses or evidence against him." *United States v. Gagnon*, 470 U.S. 522, 526 (1985). Under a Sixth Amendment analysis, the question is whether the defendant's absence

from the conference interfered with his opportunity for effective cross-examination. *See Kentucky v. Stincer*, 482 U.S. 730, 739-40. Under a Fifth Amendment analysis, the court must determine whether the defendant's "presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." *Gagnon*, 470 U.S. at 526. The Court stressed, however, that "'[t]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.'" *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107-08 (1934)).

In the instant case, petitioner's presence was not required at the June 18, 1982 conference by either the Sixth or Fifth Amendments. The June 18, 1982 conference involved a recantation of the state supreme court's decision to deny defense counsel's petition to stay the trial court's order to reinstate him as primary counsel, the dismissal of a juror who had deliberately and intentionally violated the sequestration order (and to which dismissal both attorneys agreed), and the prosecutor's statement that he inadvertently was in the same hotel dining room as members of the jury when preparing witness Chobert over dinner. Because this conference involved purely legal and collateral discussions, defendant's opportunity for effective cross examination was not implicated. Second, because petitioner has failed to demonstrate that his absence interfered with fundamental fairness or his ability to defend against the charges, I conclude that defendant's presence likewise was not mandated by the Fifth Amendment. Petitioner's counsel was present at this conference and did participate in the discussion and decisions concerning each topic.

The June 28, 1982 conference involved a discussion regarding a piece of evidence that the trial court ruled to be inadmissible hearsay. Specifically, the prosecution produced two police officers at defense counsel's request for the defense to interview regarding whether they had any

information that an officer other than Faulkner shot petitioner. *See* 6/28/82 Tr. at 28.3. Defense counsel declined to interview the officers in a separate room because he believed that petitioner would distrust his representations as to what the officers said. *See id.* at 28.6-28.7. Accordingly, defense counsel requested permission to interview the officers on the record and in the presence of petitioner. *See id.* at 28.6-28.8. The court granted this request. Although petitioner desired to be present for the questioning, he refused to attend the interview in chambers because it would be non-public. *See id.* at 28.10-28.11. It is clear from the record that the purpose of this interview was to allow defense counsel an opportunity to explore whether there existed evidence that another officer shot petitioner. Because these officers were not yet intended trial witnesses and because the trial court simply was permitting defense counsel to investigate potential testimony, a task which otherwise would not require petitioner's presence, I find that the Sixth Amendment did not mandate petitioner's presence. Moreover, because petitioner has failed to demonstrate how he could have done or gained anything by attending this interview, because defense counsel's inquiry concerned a speculative and collateral issue, and because petitioner chose not to attend, I find that petitioner's absence from this interview did not violate due process. Indeed, the officers never were called as witnesses during the trial and petitioner never has challenged that decision. Accordingly, the state courts' denial of this right to presence claim was not contrary to or an unreasonable application of federal law.

Finally, petitioner claims that he was denied his right to a public trial. A defendant's right to a public trial is grounded in the Sixth Amendment, which provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . .

."[58] U.S. Const. amend. VI. In *Waller v. Georgia*, the Supreme Court considered the scope of this right and held that the Sixth Amendment public trial right extended to a suppression hearing because of its critical importance and resemblance to a bench trial. *See* 467 U.S. 39, 46-47 (1984). The court based this conclusion on its observation that public trials are essential to the criminal justice system because they ensure that the judge and prosecutor perform their duties responsibly, encourage witnesses to come forward, and discourage perjury. *See id.* at 46. Furthermore, the Court instructed that a party seeking to close such a hearing to the public must meet the tests set forth in *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501 (1984), wherein the Court determined that this party "must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceedings, and it must make findings adequate to support the closure." *Waller*, 467 U.S. at 48; *see also Press-Enterprise*, 464 U.S. at 510.

The observations expressed in *Waller* underlying the public trial right, however, are not implicated by either of the state court *in camera* conferences. First, none of the topics discussed in the June 18, 1982 conference raise concerns about prosecutorial or judicial misconduct, or the possibility of perjury that a public trial right is designed to protect. Moreover, unlike the suppression hearing in *Waller*, each of these issues concerned questions of law or routine collateral matters and were not determinative of petitioner's guilt or innocence. *See United*

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[58]The Supreme Court has noted that while the right to an open trial largely has been evaluated under the First Amendment, the explicit right afforded by the Sixth Amendment is no less protective of that right. *See Waller v. Georgia*, 467 U.S. 39, 46 (1984). Accordingly, while petitioner has not alleged a First Amendment violation, caselaw analyzing the right to an open trial under the First Amendment also will inform this inquiry.

States v. Norris, 780 F.2d 1207, 1210-11 (5th Cir. 1986) (distinguishing *Waller* because the non-public exchanges at issue concerned technical legal and routine administrative issues that did not raise the public trial objectives cited in *Waller*); *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 605 (3d Cir. 1969) (pre-*Waller* case stating that non-public collateral discussions, including discussions regarding the appointment of counsel, conferences regarding a question of law, motions for severance or bail, and chambers conferences on matters not properly for the jury, were not unconstitutional). Therefore, the right to a public trial was not implicated by this *in camera* conference and the trial court's decision was neither contrary to nor an unreasonable application of federal law.

The purpose of the June 28, 1982 conference was to afford defense counsel an opportunity to explore potential witness testimony. Because the nature of this inquiry was speculative, because the conference involved a collateral evidentiary issue, and because defense counsel was interviewing the officers to determine whether they would be potential witnesses or would lead him to potential evidence, the *in camera* examination of the two officers was proper. *See Norris*, 780 F.2d at 1210-11; *Rundle*, 419 F.2d at 605. Accordingly, for the above stated reasons, petitioner's absence from two *in camera* conferences was neither contrary to nor an unreasonable application of clearly established federal precedent construing the right to a public trial.

D. Unreasonable Determination of Facts in Light of Evidence Presented

No specific findings of fact are challenged with respect to this claim.

E. Evidentiary Hearing

Petitioner concedes that no evidentiary hearing is required on this claim. *See* P14 at 9.

III.14 IMPROPER PROSECUTORIAL TRIAL SUMMATION IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE 5TH, 6TH, 8TH AND 14TH AMENDMENTS.

A. Allegations in Support of Claim

Petitioner alleges that the following prosecutorial conduct during summation violated his constitutional rights:

(1) The prosecutor told the jury that an acquittal would be untouchable and that a guilty verdict would be subject to multiple appeals "so that may not be final";

(2) At trial he ridiculed petitioner's assertion of rights to self-representation and assistance of counsel by suggesting that Officer Faulkner died unprotected by rights, by linking petitioner's confrontations with the court to his alleged confession, as evidence of "arrogance and hostility and injustice," and by unfairly commenting on petitioner's failure to take the stand;

(3) He improperly appealed to community sentiment and other irrelevant factors by arguing that his community was "outraged," and "demand[ed] justice";

(4) He improperly vouched for the credibility of two witnesses (Robert Chobert and Priscilla Durham); and

(5) He alleged that the defense's failure to present evidence was indicative of the weakness of its case, even though he knew that most of the evidence was excluded or unavailable to the defense.

See P1 ¶¶ 437-451.

B. Violation of Federal Constitution, Law of Treaty

Petitioner argues that he was deprived of his rights to be free from compelled testimony and to a fair and reliable determination of guilt. Specifically, petitioner asserts that improper closing argument "so infected" his trial with unfairness that it violated due process. *See* P14 at

61 (citing *Davis v. Zant*, 36 F.3d 1538, 1545 (11th Cir. 1994); *Lesko v. Lehman*, 925 F.3d 1527, 1541 (3d Cir. 1991); *Floyd v. Meachum*, 907 F.2d 347, 353 (2d Cir. 1990)). Respondents answer that petitioner has failed to meet both this standard and his habeas burden to demonstrate that the state court's decision was contrary to or an unreasonable application of federal law. *See* R23 at 105.

C. "Contrary to" or "Unreasonable Application of" Clearly Established Federal Law

The claim was fairly presented to the state courts, and thus the exhaustion requirement is satisfied. *See* Amend. St. PCRA Pet. ¶¶ 131-32; St. PCRA Mem. at 134-43. Moreover, it was adjudicated on the merits by the state courts. *See Abu-Jamal,* 555 A.2d at 854-55; *PCRA Op. C.L.* ¶¶ 130-34 ; *PCRA Appeal Op.* at 110-13. Therefore, it is subject to the strictures of § 2254(d).

Petitioner alleges that the prosecutor's misconduct prejudiced specifically his rights under the Fifth and Sixth Amendments and generally deprived him of due process as guaranteed by the Fourteenth Amendment. In the context of specific constitutional guarantees, the court must determine whether the prosecutor's comment "so prejudiced [that] specific right . . . as to amount to a denial of that right." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Absent such a violation, the court must evaluate whether, in the context of the entire trial, "the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly*, 416 U.S. at 645); *see also Werts v. Vaughn*, 228 F.3d 178, 198 (3d Cir. 2000) (stating that a prosecutor's remarks must be evaluated in the context of the entire trial).

In *Berger v. United States*, the Supreme Court described the limits of a prosecutor's proper argument: "He may prosecute with earnestness and vigor–indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." 295 U.S. 78, 88 (1935). However, the Court also has instructed federal habeas courts considering claims of prosecutorial misconduct to distinguish between "ordinary trial error of a prosecutor and that sort of egregious misconduct . . . amount[ing] to a denial of constitutional due process." *Donnelly*, 416 U.S. at 647-48; *see also Werts,* 228 F.3d at 198 (noting that this determination at times may require the court to draw a fine line).

Thus, the due process inquiry proceeds in two steps. First, the court must determine whether the cited remark is constitutionally improper. Second, assuming the prosecutor's comment overstepped permissible bounds, the court must determine whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (citing *Kotteakos v. United States*, 328 U.S. 750 (1946)). This second facet of the inquiry is in essence a harmless error analysis. *United States v. Zerbach*, 47 F.3d 1252, 1264 (3d Cir. 1995) (citing *United States v. Young*, 470 U.S. 1, 11-12 (1985)). Only if both of these prongs are satisfied will improper prosecutorial commentary rise to the level of a due process violation, and mandate the habeas relief sought by Jamal.[59] With this

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[59] As one example of a way in which improper prosecutorial comments would not give rise to constitutional concerns, consider the Supreme Court's decision in *Lawn v. United States*, 335 U.S. 339 (1958). The essence of the *Lawn* holding was summarized adeptly in *Young*, wherein the Court stated:

framework in mind, I will consider petitioner's allegations of error.

1. "Appeal after Appeal" Comment

Petitioner claims that the prosecutor's closing argument improperly shifted the burden to him by suggesting that his conviction would not be final. *See* P14 at 62 (citing *Caldwell v. Mississippi*, 472 U.S. 320 (1985)). In support of his claim, petitioner cites the following language:

> [Y]ou as a unit are in a position of deliberating and reaching a decision and a decision of finality to a certain degree. If your decision of course were to acquit, to allow the Defendant to walk out, that is fine. There is nothing I can do and there is nothing that the judge of anyone could do that would affect that in any way. If you find the Defendant guilty of course there would be appeal after appeal and perhaps there could be a reversal of the case, or whatever, so that may not be final.

See id. (citing 7/1/82 Tr. at 146). Respondents retort that petitioner's reliance on *Caldwell* is

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> The petitioners in *Lawn* sought to have the Court overturn their criminal convictions for income tax evasion on a number of grounds, one of which was that the prosecutor's closing argument deprived them of a fair trial. In his closing argument at trial, defense counsel in *Lawn* had attacked the Government for "persecuting" the defendants. He told the jury that the prosecution was instituted in bad faith at the behest of federal revenue agents and asserted that the Government's key witnesses were perjurers. The prosecutor in response vouched for the credibility of the challenged witnesses, telling the jury that the Government thought those witnesses testified truthfully. In concluding that the prosecutor's remarks, when viewed within the context of the entire trial, did not deprive petitioners of a fair trial, the Court pointed out that defense counsel's "comments clearly invited the reply."

470 U.S. at 11. The broad import of this holding is that the effect of improper commentary is highly circumstance-specific, and that the requisite effect on the jury's decision is something that must be substantiated in a particularized way.

misplaced because *Caldwell* applies only at sentencing. Accordingly, respondents submit that the test properly applied to comments made during closing argument is whether the trial was so infected with unfairness that it violated due process. *See* R23 at 105-08 (citing *Darden v. Wainwright*, 477 U.S. 168, (1985); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)). Respondents further point out that it was accurate to tell the jury that appeals could follow and that nothing said was misleading or inaccurate. *See id.* at 108 (citing *Dugger v. Adams*, 489 U.S. 401, 07 (1989); *Romano v. Oklahoma*, 512 U.S. 1, 14 (1994); *California v. Ramos*, 463 U.S. 992 (1983); *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991)).

On direct appeal, the Supreme Court of Pennsylvania addressed this claim on the merits, despite finding that petitioner had waived it. *See Abu-Jamal*, 555 A.2d at 854. The court noted that because this argument was directed at the prosecutor's comments in the guilt, rather than penalty phase of trial, the appropriate standard was whether in the context of the entire trial, the jury was prejudiced by the prosecutor's comments. *See id.* Accordingly, the court determined that the Supreme Court's rule in *Caldwell* was inapplicable to this claim. *See id.* at 855. Citing the trial court's repeated instructions to the jury that counsel's arguments were neither evidence nor statements of the law, and its instructions concerning the Commonwealth's burden of proof, the state supreme court found that "[i]n the context of the entire summation, it is clear that the prosecutor was not attempting to suggest that the jury should resolve any doubts by erring on the side of conviction because an error on the side of acquittal would be irreversible." *Id.* at 854-55.

I find that this decision was neither contrary to nor an unreasonable application of Supreme Court precedent. First, the state court was correct when it determined that *Caldwell* is inapplicable. *See Darden*, 477 U.S. at 183 n.15 ("*Caldwell* is relevant only to certain types of

comment-those misleading the jury at to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision."); *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (citing *Darden*, 477 U.S. at 183 n.15). Second, examined in the context of the entire trial, this comment did not deprive petitioner of a fair trial. Indeed, the prosecutor's remarks, when viewed in their entirety, stressed the importance of the jury's responsibility and merely added to defense counsel's comments regarding the role of the jury. *See Abu-Jamal*, 555 A.2d at 855 (stating that the prosecutor prefaced his comment by referencing defense counsel's statement regarding the role of the jury and by imploring that the power of the jury is immense) (citing 7/1/82 Tr. at 145). Moreover, the prosecutor's comment was neither misleading nor inaccurate. Finally, the trial judge repeatedly instructed the jury that counsel's arguments were not evidence. *See id; see also generally Darden*, 477 U.S. at 181-83 & n.15 (finding that a prosecutor's comment did not deny the petitioner a fair trial where the prosecutor's comment neither manipulated nor misstated the evidence, where the objectionable comment was invited by defense counsel's argument, where the weight of evidence was heavy against the petitioner, and where the trial judge instructed jurors that counsel's arguments were not evidence). Thus, considering the totality of these circumstances, this remark did not so infect petitioner's trial as to render it unconstitutional. Even if it was error to so comment, such is not the "sort of egregious misconduct . . . [that would] amount[] to a denial of constitutional due process." *Donnelly*, 416 U.S. at 647-48. Nor would such an error have had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623. Therefore, the decisions of the state courts are not contrary to clearly established Supreme Court precedent and do not involve an unreasonable application of such law.

2. Denigrating Petitioner's Constitutional Rights

Petitioner also argues that the prosecutor "denigrated" and "ridiculed" his assertion of constitutional rights.

a. Comments Regarding Sixth Amendment Rights

Petitioner maintains that the prosecutor's closing argument relied on non-evidence of petitioner's disputes with the court in commenting improperly on petitioner's assertion of his Sixth Amendment *pro se* right. *See* P14 at 62-63 (citing *Sizemore v. Fletcher*, 921 F.2d 667, 671 (6th Cir. 1990); *United States v. McDonald*, 620 F.2d 559, 563 (5th Cir. 1980); *Fields v. Leaply*, 30 F.3d 986, (8th Cir. 1994); *Lesko v. Lehman*, 925 F.2d 1527, (3d Cir. 1991)). In support of this argument, petitioner cites primarily the following language:

> Will you understand that the Defendant is on trial for taking somebody's life, too. That is one thing we hadn't heard too much about. It maybe true and indeed it is true that Daniel Faulkner on December 9th, at 3:51, as he looked up at the barrel of this gun did not have an opportunity to ask for any type of counsel, or to make any kind of abusive remarks in relation to anybody, the system, the laws or anything. No one quickly ran down and said, "Do you want an attorney?"

See id. at 62 (citing 7/1/82 Tr. at 147-48).

Petitioner also argues that the prosecutor "improperly commented on Jamal's 'arrogant' *pro se* confrontations with the court," citing the following passage:

> Perhaps you may find those very consistent with the type of evidence that you have seen and as a matter of fact what you may have even seen in this courtroom. This sort of thing, ladies and gentlemen, when you arrive at the hospital and with the action that

> was just done and you say, "I shot him and I hope he dies."[60] . . . All of this and in particular the conduct of this Defendant. I plead to you consider the thrust of such arr[o]gance and hostility and injustice.

See id. at 63 (citing 7/1/82 Tr. at 169, 186). Respondents answer that no case holds that a defendant's trial conduct may not be noted in summation. *See* R23 at 110. Respondents add that because petitioner failed to raise this argument in state court, any objection to the reference regarding petitioner's trial conduct is defaulted. *See* R23 at 110. Finally, respondents suggest that because character evidence alone may justify acquittal, it is not error to address character in closing. *See* R23 at 110.

Contrary to respondents' assertion, I find that this claim was fairly presented and considered at the state level. *See PCRA Op. C.L.* ¶131 (referencing petitioner's arguments that the prosecutor improperly commented on petitioner's assertion of his *pro se* right and his confrontations with the court resulting therefrom). Accordingly, the court may proceed to consider petitioner's claim, subject to the strictures of § 2254(d).

While the Supreme Court has not addressed the question whether a prosecutor's comment on an accused's Sixth Amendment right is constitutionally improper, the Third Circuit confronted the issue in *United States ex rel. Macon v. Yeager*, 476 F.2d 613 (3d Cir.), *cert. denied*, 414 U.S. 855 (1973). In *Macon*, the court reasoned that the situation presented to the Supreme Court in *Griffin v. California*, 380 U.S. 609 (1965) (prosecutorial comment on an

[60] Petitioner misquotes this language. The full record reads: "This sort of thing, ladies and gentlemen, when you arrive at the hospital and with the action that was just done and you speak out and you proclaim almost in a boastful and defiant way you say, "I shot him and I hope he dies." *See* 7/1/82 Tr. at 169.

accused's Fifth Amendment right not to testify), was analogous to its consideration of the constitutionality of a prosecutor's comments regarding a defendant's Sixth Amendment right to counsel. *See* 476 F.2d at 615 ("[W]e perceive little, if any, valid distinction between the privilege against self-incrimination and the right to counsel."). Accordingly, the *Macon* court adopted the Supreme Court's approach in *Griffin* and found that to evaluate a prosecutor's comment on a Sixth Amendment right, "the relevant question is whether the particular defendant has been harmed by the state's use of the fact that he engaged in constitutionally protected conduct." *Id.* at 616 (emphasis omitted).

Thus, this court should engage in a three-part analysis: (1) whether the remarks, in fact, comment on a Sixth Amendment right;[61] (2) assuming the comment concerned such a right, whether the defendant was so harmed as to render the comment a constitutional error; and (3) assuming constitutional error is found, whether that error was harmless under the appropriate Supreme Court standard. *See generally Macon*, 476 F.2d at 616.

Regarding petitioner's first cited excerpt, the Supreme Court of Pennsylvania found not only that petitioner had taken the comment out of context, but that it was "clear that the point being expressed by the prosecution was simply that the jury should consider not only the fact that the defendant's life was at stake in this trial, but also that a life, that of Officer Faulkner, was unjustly taken and that the jury should consider that loss in rendering its verdict." *See PCRA*

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[61]I note that the Fifth Circuit has divided such remarks into two categories: "comments that 'strike at the jugular' of a defendant's story and those dealing only tangentially with it." *United States v. McDonald*, 620 F.2d 559, 563 (5th Cir. 1980).

Appeal Op. at 110-11.[62] The state court further concluded that the portion of the comment that referenced petitioner's trial behavior was "rather innocuous" and did not exceed the bounds of permissible "oratorical flair." *See id.* at 111. Considering the remarks in their proper context, I find that they only tangentially comment on petitioner's Sixth Amendment right to counsel. I agree with the state supreme court that properly construed, the plain reading of the text suggests that the prosecutor was arguing that while a capital trial is a serious matter, the crime of which petitioner was accused was an equally grave incident. Accordingly, because the reference to the right to an attorney was marginal to the prosecution's central and proper argument, the remark does not rise to the level of constitutional error.

Regarding petitioner's second cited excerpt, the state supreme court noted in a footnote that it had considered the comments in context and found them to be within the bounds of permissible prosecutorial argument that intent to kill had been established. *See PCRA Appeal Op.* at 111 n.38. The court further noted that in any event, the particular comments regarding petitioner's conduct at trial were not prejudicial to petitioner. *See id.* I agree that the challenged remarks were a part of the prosecutor's proper argument that the element of intent to kill had been established. *See* 7/1/82 Tr. at 168-170.

This observation, however, does not resolve the legal question of whether a defendant's conduct at trial can be referenced in a prosecutor's closing argument. First, I note that just

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[62]Citing the trial record, the state supreme court placed the excerpt in its proper context, "Immediately preceding the challenged remarks, the prosecution stated: 'Let me tell you this, let me make this clear, you have heard constantly, constantly you have heard about the facts that this Defendant is on trial for his life. You have heard this all the time. Let me also add this ...'" *PCRA Appeal Op.* at 111 n.37 (citing 7/1/82 Tr. at 147).

because petitioner's conduct arguably was related to the assertion of a constitutional right, it does not follow that comment on such conduct necessarily amounts to comment on the right itself. To the extent the prosecutor was addressing petitioner's conduct, he did so in the context of corroborating petitioner's statement at the hospital, not with reference to the constitutional right petitioner claimed led him to this conduct. Further, while the parties have not cited any cases on this point, this question can be resolved on other grounds. Assuming that the prosecutor's comment on petitioner's trial conduct even could be construed as remarking on a constitutional right, and further assuming that such a comment is also improper, I find that the comment certainly did not cause sufficient harm to petitioner so as to render it a constitutional error. Indeed, the reference to petitioner's behavior at trial was made in passing and was rather minute considered in the context of the entire trial. Additionally, it is clear that the prosecution's argument focused on the circumstances surrounding petitioner's confession and not on petitioner's conduct at trial.

Therefore, I find that these comments did not rise to the level of constitutional error. Moreover, even if it was error to so comment, such clearly is not the "sort of egregious misconduct . . . [that would] amount[] to a denial of constitutional due process." *Donnelly*, 416 U.S. at 647-48. Nor would such an error have had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623. The state courts' denial of this claim consequently does not violate clearly established Supreme Court precedent and does not involve an unreasonable application of such law.

b. Comments Regarding Fifth Amendment Right Not to Testify

Petitioner suggests that the closing argument was improper because it penalized him for

exercising his right not to testify. *See* P14 at 63-64 (citing *Griffin v. California*, 380 U.S. 609, 614 (1965); *Gravely v. Mills*, 87 F.3d 779, (6th Cir. 1996); *Lesko v. Lehman*, 925 F.2d at 1544 (citing *United States v. Chaney*, 446 F.2d 571, 576 (3d Cir. 1971)); *United States v. Alfonso-Perez*, 535 F.2d 1362 (2d Cir. 1976)). In support of this argument, petitioner points to the following language:

> [A]lthough they have no burden to do anything, of all that they had, all that was presented to them over that period of time you saw what the defense put on, and they don't have any burden that is true, but – [objection overruled].[63] Are they suggesting that there was a third man, a fourth man, or is he doing this all for his brother? I ask you to look through all of this, as well as any other strategy or tactics you have seen during the course of this whole particular trial and recognize it for what it is.

See id. at 63 (citing 7/1/82 Tr. at 171-72). Respondents answer that the prosecutor's argument about "defense evidence" was merely a rebuttal to the defense's theory of the case. *See* R23 at 110.

It is well-settled that a prosecutor may not comment on a defendant's failure to testify. In *Griffin*, 380 U.S. 609, the Supreme Court held that a prosecutor's remarks regarding an accused's failure to testify constituted a violation of the Fifth Amendment. 380 U.S. 614. Moreover, while the *Griffin* Court evaluated a prosecutor's comments in the trial's sentencing phase, the Third Circuit has held that the *Griffin* rule applies to both the guilt and penalty phases of trial. *See Lesko v. Lehman*, 925 F.2d 1527, 1541-42 (3d Cir. 1991). The test in this circuit for determining whether a violation of *Griffin* has occurred is '"whether the language used was manifestly

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[63]Petitioner again misconstrues the record as the objection was not here overruled, but was noted to be taken up after closings. *See* 7/1/82 Tr. at 172, 188.

intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" *Lesko*, 925 F.2d at 1544 (citations omitted).

The Supreme Court of Pennsylvania reviewed this comment and concluded that because "[t]he prosecution here simply commented on the defense evidence, arguing that it was not sufficient to overcome the prosecution's evidence of guilt," that petitioner failed to support his Fifth Amendment claim. *PCRA Appeal Op.* at 111. Although the state court did not reference specifically *Griffin*, I find that the court's decision was not contrary to or an unreasonable applicable application of the teachings of that case. Examined in its entirety, the challenged prosecutorial remark neither commented on petitioner's decision not to testify, nor could the jury naturally or necessarily take it to be such a comment. The statement merely drew the jury's attention to the weaknesses in the defense's theory or theories of the case as put forth by the defense in their evidence and cross-examination.

3. Inflaming and Prejudicing the Jury

Next, petitioner maintains that the prosecutor may not urge conviction to preserve community values, civil order, or to prevent future lawlessness. *See* P14 at 64-65 (citing *United States v. Johnson*, 968 F.2d 768, 771 (8th Cir. 1992); *United States v. Monaghan*, 741 F.2d 1434 (D.C. Cir. 1984); *Commonwealth v. LaCava*, 666 A.2d 221 (Pa. 1995)). In support of his contention that the prosecutor violated this standard, petitioner quotes the following language:

> This is one vicious act. This is one uncompromising vicious act. This is one act that the people of Philadelphia, all of them, all of you everywhere is outraged over. This act demands action. This act demands a reasonable view and the result of responsibility and courage. . . . An officer of the law who serves two years in service and assists individuals throughout that time, some of whom have

> testified here. He helped a rape victim and mother of the victim and the last arrest he ever made. That man as a member of the Police Force comes back from war and is faced with a war on the street right at 13th and Locust. Ladies and gentlemen, I ask you, all of us, the Commonwealth, the people of this city, reach out to you and demand justice. Look right at that intent to kill and that man who did it with that weapon and say, "The evidence is clear to us. You are guilty of first degree murder."

See id. at 64-65 (citing 7/1/82 Tr. at 172, 187).

This circuit has explained that a prosecutor's comments may not be "directed to passion and prejudice rather than to an understanding of the facts and of the law." *Lesko*, 925 F.2d at 1545 (citation omitted). Moreover, such prosecutorial comments are unconstitutional where they "so infect[] the trial with unfairness as to make the conviction a denial of due process." *Darden*, 477 U.S. at 181; *Lesko*, 925 F.2d at 1546.

The Supreme Court of Pennsylvania reviewed this passage and found that "the challenged comments do not impermissibly urge the jury to convict on some generalized grounds, such as to protect or preserve civil order. Rather the comments were limited to a plea to convict . . . based solely on the actions committed." *PCRA Appeal Op.* at 112. Under the relevant standard, this court finds that the prosecutor's remark, although perhaps ill-advisedly referencing a "war on the street," was an appeal to convict based on the evidence submitted in the case and was insufficiently prejudicial to undermine the court's confidence in the fairness of petitioner's conviction. Because the comment urged the jury to convict based upon actions of which the jury properly was made aware through the presentation of evidence, because it constituted one minor phrase in the context of the entire trial, and because the trial judge repeatedly instructed the jury that arguments of counsel were not to be considered as evidence, petitioner's trial was not

infected with unfairness as a result. Any error that arguably could be perceived in the comment certainly does not amount to "egregious misconduct" amounting to a denial of due process. The decision of the state supreme court adopting this reasoning consequently was not contrary to or an unreasonable application of federal law.

4. Vouching for Two Witnesses and Taking Advantage of the Court's Rulings Precluding Petitioner from Presenting a Defense

Petitioner next argues that a prosecutor cannot discuss witness credibility based on evidence not in the record. *See* P14 at 65-66 (citing *United States v. Eyster*, 948 F.2d 1196, 1206 (11th Cir. 1991); *United States v. Krubs*, 788 F.2d 1166, 1176-77 (6th Cir. 1986)). Specifically, petitioner claims that the prosecutor's vouching for Chobert was an improper exploitation of excluded evidence regarding Chobert's bias and motive. Second, petitioner claims that the prosecutor's mention that a person named James LaGrand was present when Durham heard petitioner's confession unfairly bolstered Durham's testimony with evidence not in the record. *See* id. (citing *Eyster*, 948 F.2d at 1207-08; *Miller v. Pate*, 386 U.S. 1 (1967)). Respondents answer that because the alleged impropriety of the prosecutor's argument as to Chobert was based on a deal which did not exist, the prosecutor's argument was proper. *See* R23 at 114. Further, respondents urge that the prosecutor did not improperly vouch for Durham because the fact of LaGrand's presence was in evidence. *See* R23 at 114.

It is axiomatic that a prosecutor may not vouch for the credibility of a government witness through personal knowledge or other information outside the evidence presented to the jury. *See Young*, 470 U.S. at 17-18; *United States v. Walker*, 155 F.3d 180, 184 (3d Cir. 1998). The Supreme Court has recognized that a prosecutor's vouching for the credibility of a witness

raises two concerns: (1) "such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and [(2)] the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Young*, 470 U.S. at 18-19 (citation omitted). The Third Circuit determined in *Walker* that in order to find prosecutorial vouching, "two criteria must be met: (1) the prosecutor must assure the jury that the testimony of a Government witness is credible; and (2) this assurance is based on either the prosecutor's personal knowledge, or other information not contained in the record." *Walker*, 155 F.3d at 187. Finally, if the court determines that the prosecution improperly vouched for a witness, the court must next consider whether that vouching so infected the trial with unfairness that constitutional due process was violated under the *Darden* standard.

Regarding Chobert, the Supreme Court of Pennsylvania determined that because petitioner failed to prove the existence of any promise of "penal benefits in connection with Chobert's suspended license," and because the prosecutor merely argued from the evidence, the prosecutor made no improper personal assurances that Chobert's testimony was credible. *See PCRA Appeal Op.* at 112. I agree that petitioner's vouching claim regarding witness Chobert is without merit. Petitioner challenges the following prosecutorial language: "Robert Chobert. What motivation would Robert Chobert have to make up a story within thirty-five to forty-five minutes later?" *See* P14 at 65 (citing 7/1/82 Tr. at 181-82). I already have determined that the state court's factual findings that there was no Commonwealth deal with Chobert and that cross-examination concerning Chobert's probationary status was inadmissible were not unreasonable

determinations. *See supra*, III.1.D.2. Moreover, it is clear from this language that the prosecutor was suggesting that because Chobert gave his statement to the police shortly after the murder, he had little time to fabricate it. Accordingly, because the time and date of Chobert's statement were in evidence, I find that the prosecutor was arguing based upon that evidence and not upon some personal knowledge or other information outside the record before the jury. He was not personally vouching for the witness.

Regarding Durham, the state supreme court found that Durham's trial testimony did not clearly indicate the point at which she claimed LaGrand to have been present.[64] *See PCRA*

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[64]The Supreme Court of Pennsylvania identified the relevant portion of the trial transcript as follows:
BY MR. McGill: (for the prosecution)
Q. Now also normally in reference to giving the statements to the police when would it be that you would give a statement to the Philadelphia police, in what kind of situation?
A. In an official capacity, if I myself call them. As far as police business, I have no interference. I don't have to make statements to the police...
Q. Okay.
A. When they bring in prisoner, that's their prisoners and we don't have anything to do with it.
Q. Would you, for example, if it was a crime that occurred in the hospital then would you become actively involved and give statements if you were a witness or in any way connected with it?
A. Yes. It would have to be within the hospital.
Q. So your duties, then, really were limited in terms of responded [sic] to interviews in the normal course of events to your supervisor in the hospital, which you did.
A. Right.
Q. And the next time that you had an opportunity, I believe..well, the next time that you told anything to the police was when they came to you on February the 9th?
A. Right.
Q. Was there any other security officer in that general area there?
A. Yes.
Q. There? Who?
A. Officer James Legrand [sic].
Q. He is also a security officer?
A. Yes, he is.

See PCRA Appeal Op. at 112 (citing 6/24/82 Tr. at 123-24).

Appeal Op. at 112. Further, the state court reasoned that even if "the challenged comment of the prosecution implies that the testimony established that LaGrand was present when Appellant allegedly made the confession that he had killed Officer Faulkner," rendering the comment an unfair representation of the trial testimony, it could not "conclude that this representation had the unavoidable effect of prejudicing the jury to the point that it could not render a true verdict." *See id* at 112-13. I find that the state court's determination was not contrary to or an unreasonable application of federal law. Assuming, as the state court did, that the comment did unfairly represent Durham's trial testimony, I find that the statement was not constitutionally improper. Although the references to LaGrand were ambiguous (both Durham's and prosecutor McGill's), there was testimony concerning the presence of LaGrand at at least one point during the trial. The ambiguities of Duham's testimony in this regard could be argued by both counsel and the failure of the Commonwealth to call LaGrand as a corroborating witness could easily have been held against the prosecution. Moreover, in the context of the prosecutor's entire closing, the reference to LaGrand was isolated. Accordingly, I conclude that the prosecutor's remark concerning the presence of LaGrand neither produced substantial and injurious effect, nor constituted the sort of egregious conduct that amounts to a denial of constitutional due process. The Pennsylvania Supreme Court's finding to this effect thus was neither contrary to nor an unreasonable application of United States Supreme Court precedent.

5. Taking Advantage of Court's Rulings

Petitioner further suggests that in his closing argument the prosecutor generally misrepresented the availability of evidence to petitioner, thereby insinuating that the defendant's failure to present evidence in support of his theory was due to the fact that such evidence did not

exist. *See* P14 at 66-67 (citing *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1992); *Davis v. Zant*, 36 F.3d 1538, 1548 (2d Cir. 1990)). In support of his argument, petitioner cites the following language:

> [F]ifty-seven statements all given to the defense, with one hundred and twenty-five other statements all given to the defense, with all sorts of medical reports and ballistic reports and chemical reports and property receipts and all physical evidence. . . . all that was presented to them over that period of time you saw what the defense put on.

See P14 at 66-67 (citing 7/1/82 Tr. at 171). Respondents maintain that the reference to defense evidence was responsive to the defense suggestion of a conspiracy. *See* R23 at 115.

The state supreme court found this argument by the petitioner to be "preposterous," determining that it was clear that considered in its proper context, the prosecutor was responding to defense counsel's argument that the charges resulted from a conspiracy to frame petitioner. *See PCRA Appeal Op.* at 113. I agree with the state court that this argument is without merit. The prosecutor's arguments did not misstate or manipulate the evidence. Moreover, defense counsel's argument invited the prosecutor's response which went no further than to address that argument. *See generally Werts v. Vaughn*, 228 F.3d 178, 199 (3d Cir. 2000) (discussing the invited response rule). Finally, in the overall context of both closings, I do not find that this remark under any stretch of the imagination to be such "egregious misconduct" as to constitute a denial of due process. Accordingly, the state court's decision was not contrary to or an unreasonable application of clearly established Supreme Court precedent.

6. Argument Taken as a Whole

Lastly, petitioner asserts that a new trial is required because he suffered "substantial

prejudice" as a result of the cumulative effect of the prosecutor's improper arguments that were numerous and severe. *See* P14 at 67-68 (citing *Floyd*, 907 F.2d at 353-55 (2d Cir. 1990); *Davis*, 36 F.3d at 1545; *Lesko*, 925 F.2d at 1541). Petitioner adds that no curative instruction was given. *See id.* (citing *Floyd*, 907 F.2d at 355-56). Respondents argue that because none of the prosecutor's arguments were improper, they collectively command no greater significance. *See* R23 at 116. The state supreme court found respondents' argument to be persuasive and determined that petitioner's totality claim was "unavailing." *See PCRA Appeal Op.* at 113. While respondents' argument is persuasive in this instance, I note that it is not necessarily correct in every case. Indeed, the cumulative effect of individual instances of prosecutorial misconduct can amount to a constitutional violation where each instance, standing alone, does not warrant relief. *See, e.g., Lesko v. Lehman,* 925 F.2d 1527, 1546 (3d Cir. 1991) (finding that considered in isolation, the prosecutor's appeal to vengeance did not warrant relief, but that when considered together with another prosecutorial error, habeas relief was required). In any event, I find that the totality of the prosecutor's closing did not so infect petitioner's trial as to render it unfair or amount to a denial of constitutional due process. Accordingly, relief is not warranted pursuant to this claim, and the state supreme court's decision to this effect was not contrary to or an unreasonable application of clearly established federal law.

D. Unreasonable Determination of Facts in Light of Evidence Presented

No findings of fact are challenged with respect to this particular claim.

E. Evidentiary Hearing

Petitioner concedes that no evidentiary hearing is required on this claim. *See* P14 at 9.

III.15 APPELLATE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE.

A. Allegations in Support of Claim

Petitioner alleges that appellate counsel failed to review the full trial record, did not even possess the full trial record, failed to raise meritorious defenses, and had a conflict of interest due to a close personal relationship with petitioner's trial counsel. *See* P1 ¶¶ 452-457.

B. Violation of Federal Constitution, Law or Treaty

Petitioner claims that he was deprived of his rights to counsel and to a fair and reliable determination of guilt and penalty. Specifically, petitioner argues that all issues waived for failure to raise them on direct appeal are the result of appellate counsel's ineffective assistance. *See* P14 at 68 (citing *Evitts v. Lucy*, 469 U.S. 387 (1985)). Petitioner further asserts that appellate counsel's direct appeal brief was constitutionally insufficient because it contained only a two paragraph discussion of the evidence of the case. *See id.*

Respondents argue that effective appellate advocacy involves selection of issues. *See* R23 at 117 (citing *Jones v. Barnes*, 463 U.S. 745 (1983)). Further, the failure to appeal an issue is not presumed to show ineffective assistance. *See id.* (citing *Sistrunk v. Vaughn*, 96 F.3d 666 (3d Cir. 1996)). In any event, respondents claim that the appellate brief raised many of the same issues that have been invoked throughout the course of petitioner's case. *See* R23 at 117. Moreover, respondents note that although appellate counsel was unavailable to testify at the PCRA hearing due to medical reasons, Jeremy Gelb, son and associate of appellate counsel, testified at the PCRA hearing that counsel's appellate work was uniformly excellent and that the entire record was reviewed. *See* R23 at 117 n.47.

C. "Contrary to" or "Unreasonable Application of" Clearly Established Federal Law

The claim was fairly presented to the state courts, and thus the exhaustion requirement is satisfied. *See* Amend. St. PCRA Pet. ¶ 163; St. PCRA Mem. at 174. Moreover, it was adjudicated on the merits by the state courts. *See PCRA Op. F.F.* ¶¶ 83-88 & *C.L.* ¶¶ 217-23.[65] Therefore, it is subject to the strictures of § 2254(d).

The PCRA court considered this claim and determined that because petitioner failed to offer any evidence to support his contention that appellate counsel was ineffective, his claim constituted mere "abstract allegations" and necessarily failed. *See PCRA Op. C.L.* ¶ 217, 219-220, 223. Because appellate counsel was unavailable, the court permitted Jeremy Gelb, an attorney who worked under her supervision in connection with the appeal, to testify. *See id. F.F.* ¶ 83. However, the court found that Gelb's testimony actually disproved petitioner's theory. *See id. C.L.* ¶ 218. For example, the court found that Gelb testified that: (1) he did not purport to know all of the issues considered or counsel's strategic reasoning for raising a certain issue or not; (2) appellate counsel was an excellent advocate; and (3) appellate counsel read the entire record. *See id.*; *see also, e.g.*, 7/31/95 Tr. at 217-218, 236-237, 244-246 (record reflecting same). Accordingly, the PCRA court rejected petitioner's claim as lacking merit.

In order to succeed with an ineffective assistance of counsel claim, petitioner must satisfy the two-pronged *Strickland* test: First, he must prove that his appellate counsel's performance was deficient, falling below an objective standard of reasonableness, and second, that petitioner

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[65]The Supreme Court of Pennsylvania did not mention this issue is its opinion affirming the PCRA court's decision. However, because the court affirmed the PCRA decision in whole, I will presume that the state supreme court did consider this issue on the merits.

was prejudiced as a result of that deficient conduct. *See Strickland*, 466 U.S. at 687, 694. I conclude that petitioner has failed to satisfy both *Strickland* prongs.

Petitioner claims that appellate counsel's performance was deficient because she failed to review the full trial record, did not even possess the full trial record, failed to raise meritorious defenses, and had a conflict of interest due to a close personal relationship with petitioner's trial counsel. Petitioner, however, has failed to support his claim. First, the state court found that appellate counsel read the trial record. As explained in the next section, I find that this conclusion is reasonable. In any event, petitioner likewise fails to explain the portion of the record to which he refers. Did counsel fail to read the transcript of a given day's proceedings? A single page? Consequently, petitioner's bare allegation fails for lack of specificity. Petitioner also fails to point to any case law that mandates that appellate counsel read every word contained in the record below before her performance can be deemed effective. Accordingly, petitioner has not met his burden to show that his appellate counsel's performance fell outside the "wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Petitioner likewise neglects to articulate any prejudice suffered as a result of his appellate counsel's alleged failure to read the full record.

Second, I find that petitioner's allegation that appellate counsel did not possess the entire record is supported in the PCRA record. Nevertheless, petitioner fails to demonstrate any prejudice resulting therefrom. Petitioner merely asserts that one of the missing transcripts concerned a pre-trial hearing where attorney Jackson was requesting additional funds for expert services. However, petitioner also asserts that appellate counsel did argue on direct appeal that the court's restriction of funds for experts constituted error. I fail to perceive how the absence of

a transcript referencing an issue that *was* raised on appeal necessarily results in prejudice.

Third, there is no requirement that appellate counsel raise every claim. *See Sistrunk v. Vaughn*, 96 F.3d 666, 670 (3d Cir. 1996). "Appealing losing issues 'runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions.'" *Id.* (citation omitted). In fact, the very process of sifting the weak arguments and selecting the strong for appeal is the hallmark of an effective appellate advocate. *See id.* I find that while petitioner contends that appellate counsel failed to assert numerous meritorious claims, petitioner has failed to articulate with any specificity the claims to which he refers and the prejudice suffered as a result. Indeed, should petitioner be referring to any of the claims asserted herewith, to the extent that I have found them to be without merit, no prejudice could have resulted. In any event, because petitioner has not substantiated this bare allegation, I find that petitioner's claim must fail.[66]

Petitioner likewise fails to substantiate his allegation that appellate counsel represented him while burdened by a conflict of interest. Petitioner merely asserts that his trial and appellate counsel shared a "close personal relationship." P1 ¶ 456. While the Supreme Court has "held that prejudice is presumed when counsel is burdened by an actual conflict of interest, *see Strickland*, 466 U.S. at 692, petitioner has failed to demonstrate that such a conflict existed in this case. In fact, petitioner has not even elaborated upon this "close personal relationship," let

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[66]Petitioner also asserts that because the direct appeal brief addressed the case evidence in only two paragraphs that counsel was somehow ineffective. Petitioner neither proves that this was somehow outside the realm of reasonableness under prevailing attorney norms, nor that he suffered prejudice therefrom. Accordingly, I reject his ineffectiveness claim insofar as it is based on this assertion.

alone established how it constitutes an actual conflict of interest (other than to suggest in a footnote that trial counsel worked for appellate counsel as an investigator prior to going to law school and that she encouraged him to go to law school). Accordingly, for the foregoing reasons, I find that the PCRA court's decision regarding petitioner's ineffective assistance of appellate counsel claim was not contrary to or an unreasonable application of federal law.

D. Unreasonable Determination of Facts in Light of Evidence Presented

Regarding this claim, petitioner challenges as unreasonable findings of fact 88 and 86. Finding 88 states, "as a result of Mr. Gelb's testimony, . . . that appellate counsel's work was uniformly excellent." *PCRA Op. F.F.* ¶ 88. Petitioner contends that there is no support in the record for this finding. Petitioner, however, is mistaken. Gelb testified at the PCRA hearing that "I have tremendous regard for appellate Counsel. And I've known appellate Counsel's work for a good long time. And I think that Counsel's work has been uniformly excellent over the years." 7/31/95 Tr. at 244. Moreover, counsel's brief, raising twenty points of error, many of which are again raised before this court, speaks for itself. *See id.* at 236. Because I determine that the record supports Finding 88, the court's conclusion is reasonable in light of the evidence presented.

Finding 86 states that appellate counsel reviewed the entire trial record. *See PCRA Op. F.F.* ¶ 86. Petitioner asserts that the PCRA court blocked the testimony of attorney Steven Hawkins who allegedly would have testified that appellate counsel conceded to him that she had not read the entire record. Accordingly, petitioner claims that finding 86 is unreasonable. While I cannot consider counsel's proffered hearsay, I can review the record, and based on that record the court's finding is unreasonable. *See supra* (finding that petitioner's allegation that appellate

counsel did not possess the entire record is supported in the PCRA record). Yet petitioner has failed to establish that this finding "resulted in" the PCRA court's denial of relief. 28 U.S.C. § 2254(d)(2). Indeed, in support of its decision the PCRA court also noted that Gelb met with Jackson at length on at least two occasions, and that she also met with petitioner. *See PCRA Op. F.F.* ¶ 85. Moreover, the court also relied on the testimony of Jeremy Gelb generally, and it is worth reiterating that the reasons he gave for his opinion as to the quality of appellate counsel's performance were his extensive experience with appellate counsel and her work, not her review of any given documents in petitioner's case. *See* 7/31/95 Tr. at 244. It also is worth repeating that testimony to the effect that the twenty points of error were raised in the brief prepared by appellate counsel had been presented before the PCRA court. *See id.* at 236. Accordingly, no relief is warranted on the basis of this unreasonable factual determination.

E. Evidentiary Hearing

Petitioner asserts that an evidentiary hearing is mandatory on this claim. *See* P27 at 1. Petitioner urges that Hawkins would testify that Gelb admitted she did not review the trial proceedings, that such testimony was wrongly barred, and that pre-trial proceedings were not transcribed in a timely manner. *See* P27 at 6-7. Because petitioner has failed to satisfy the *Strickland* prejudice prong regarding his complaint that appellate counsel did not read the entire record, I find that attorney Hawkins' testimony would be superfluous. Accordingly, petitioner has not proffered clear and convincing evidence which, if believed, would entitle him to relief. Therefore, his request for a hearing regarding this claim must be denied. *See* 28 U.S.C. § 2254(e)(2)(B).

III.16 RACIALLY DISCRIMINATORY EXERCISE OF PEREMPTORY CHALLENGES IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE 5TH, 6TH AND 14TH AMENDMENTS.

A. Allegations in Support of Claim

Petitioner contends that whereas the assistant district attorney peremptorily struck only four of twenty-eight white venirepersons, he struck eleven of fifteen black members of the venire. Petitioner also suggests that it was prosecutorial practice to maintain at all times a count of the number of remaining black venirepersons. As such, petitioner concludes that there was a demonstrable practice of striking blacks in racially discriminatory fashion. Finally, petitioner asserts that in light of the actions taken in this case, the results of a ten-year study covering capital cases in Philadelphia, and a videotape documenting the discriminatory voir dire practices of the Philadelphia District Attorney's office, there is no race-neutral explanation for the exercise of peremptory challenges in this case. *See* P1 ¶¶ 458-492.

B. Violation of Federal Constitution, Law or Treaty

Petitioner complains that the use of peremptory strikes in this case violates his constitutional rights under *Batson v. Kentucky*, 476 U.S. 79 (1986). *See* P14 at 69 (citing *Batson*, 476 U.S. 79; *Simmons v. Bayer*, 44 F.3d 1166 (3d Cir. 1995)). Petitioner argues that the statistics in this case, in other cases tried by prosecutor McGill, and in Philadelphia cases generally, form a prima facie case that peremptory strikes were employed in a racially discriminatory fashion in this case. Moreover, petitioner claims that no race-neutral explanation was given by the prosecutor for his strikes of black panelists.

Respondents argue that petitioner has failed to show facts to support his claim. *See* R23 at 118-121. Specifically, they assert that petitioner has not demonstrated the number and race of

potential jurors in the venire, the race of all of the prospective jurors struck by petitioner or the prosecutor, and the racial composition of petitioner's jury. *See id.* at 122-23 & n.52 (citing *Walker v. Vaughn*, 53 F.3d 609, 612-13 (3d Cir. 1995); *Deputy v. Taylor*, 19 F.3d 1485 (3d Cir.1994)). Respondents also note that petitioner failed to supplement the record at the PCRA hearing because he chose not to call the prosecutor as a witness, even though he was under subpoena and available to testify. *See id.* at 120-21 & n.51 (citing *Johnson v. Love*, 40 F.3d 658, 664-65 (3d Cir. 1994)). Moreover, respondents postulate that the prosecution's willingness to accept some black jurors undercuts petitioner's prima facie case. *See id.* at 121-22. Finally, respondents argue that petitioner failed to demonstrate facts and circumstances supporting an inference of intentional discrimination. *See* R23 at 121-29 (citing *Batson*, 476 U.S. at 96).

C. "Contrary to" or "Unreasonable Application of" Clearly Established Federal Law

The claim was fairly presented to the state courts, and thus the exhaustion requirement is satisfied. *See* Direct Appeal Br. at 1-5; Amend. St. PCRA Pet. ¶¶ 135-38; St. PCRA Mem. at 144-47. Moreover, it was adjudicated on the merits by the state courts. *See Abu-Jamal*, 555 A.2d at 848-50; *PCRA Op. F.F.* ¶¶ 290-91 & *C.L.* ¶¶ 138-46; *PCRA Appeal Op.* at 113-14. Therefore, it is subject to the strictures of § 2254(d).

In deciding *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court lessened the burden of proof required to show discrimination in the exercise of peremptory challenges that had been articulated previously in *Swain v. Alabama*, 380 U.S. 202 (1965). It did so by eliminating the requirement that a defendant demonstrate a pattern of purposeful racial

discrimination over several of the prosecutor's trials.[67] Under *Batson*, a three-step process now applies. First, the defendant must make a prima facie showing that the prosecutor exercised peremptory challenges based on race. Second, upon the requisite showing, the burden shifts to the state which must articulate a race-neutral explanation for striking the jurors in question. Lastly, the trial court must determine whether the defendant has proven purposeful discrimination. *See Batson*, 476 U.S. at 96-98; *see also Hernandez v. New York*, 500 U.S. 352, 358 (1991).

Further, to establish a prima facie case,

> the defendant must first show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there could be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Batson, 476 U.S. at 96 (internal citations omitted). Finally, as examples of other relevant circumstances, the Supreme Court noted that the trial court should consider "a 'pattern' of strikes against black jurors included in the particular venire" and "the prosecutors' questions and statements during *voir dire* examination and in exercising his challenges." *Id.* at 97.

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[67]Petitioner challenges the Commonwealth's conduct as violative of the Fifth, Sixth and Fourteenth Amendments. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court noted that the discrimination claim was governed by equal protection principles and expressly avoided the merits of petitioner's Sixth Amendment claim. *See Batson*, 476 U.S. at 84 n.4. Additionally, this circuit has noted that "[t]he equal protection analysis of the Fifth Amendment, which governs this case, is identical to that used for the Fourteenth Amendment." *United States v. Clemmons*, 843 F.2d 741, 745 n.3 (3d Cir.), *cert. denied*, 488 U.S. 835 (1988). Accordingly, petitioner's claim is governed by *Batson*.

The Court's opinion in *Batson* was issued on April 30, 1986. On January 13, 1987, the Supreme Court provided for the retroactive application of *Batson* to all cases pending on direct appeal at the time *Batson* was decided. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). The Pennsylvania Supreme Court affirmed petitioner's conviction after direct appeal on March 6, 1989; therefore, *Batson* applies to petitioner's claim.

In 1988, the Third Circuit further specified the factors to be considered in determining whether a prima facie case has been established, and articulated a five-factor test:

> 1) how many members of the cognizable racial group are in the venire panel from which the petit jury is chosen;
> (2) the nature of the crime;
> (3) the race of the defendant and the victim;
> (4) the pattern of strikes against racial group jurors in the particular venire; and
> (5) the prosecutor's statements and questions during selection.

United States v. Clemons, 843 F.2d 741, 748 (3d Cir.), *cert. denied*, 488 U.S. 835 (1988); *see also Deputy v. Taylor*, 19 F.3d 1485, 1492 (3d Cir. 1994) (citing *Clemons*, 843 F.2d at 747 and *Jones v. Ryan*, 987 F.2d 960, 970 (3d Cir. 1993)).[68]

Because petitioner's trial took place four years before *Batson* was decided, there understandably is no reference whatsoever in the trial record to a prima facie case or to race-

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[68]Respondents argue that petitioner's *Swain* claim is procedurally defaulted as not raised in state court. This assertion, however, is incorrect in part as petitioner did raise this claim under both *Swain* and *Batson* on direct appeal. *See* Direct Appeal Br. at 1-5. In any event, because the Court's decision in *Batson* altered the *Swain* standard while petitioner's case still was on direct appeal, petitioner's claim is governed by *Batson*.

neutral reasons.[69] Indeed, petitioner's trial counsel did not even raise a *Swain* challenge to the selection of the jury, which would have been in accord with the law as stated at the time. *See Abu-Jamal*, 555 A.2d at 849. In any event, in its March 6, 1989 opinion on direct appeal, the Pennsylvania Supreme Court concluded that petitioner never established the first prong of the

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[69]In 1995, the Supreme Court explained that the race-neutral reason need not be persuasive or even plausible, but simply facially valid. *See Purkett v. Elem*, 514 U.S. 765, 768 (1995).

Although race-neutral reasons were not stated by the prosecutor at trial, on direct appeal, the Commonwealth argued that the following reasons were apparent from the face of the record,

> (the notation 'black' indicates that the venireperson was noted as being black on the record at trial): **1.** Janet Coates (black; bias against police, listened to petitioner on radio) (N.T. 6/7/82, 129-130, 133); **2.** Alma Austin (stipulated to be black at PCRA hearing; strong feelings against death penalty) (N.T. 6/8/82, 2.51-54); **3.** Verna Brown (black; listened to petitioner on radio) (N.T. 6/8/82, 2.82); **4.** Beverly Green (race not of record [attempted stipulation withdrawn at PCRA hearing]; hesitant in answering questions) (N.T. 6/8/82, 3.242-245); **5.** Genevieve Gibson (black; listened to petitioner on radio) (N.T. 6/10/82, 4.78); **6.** Giatano Ficordimondo (race not of record; age 22, never served on jury) (N.T. 6/10/82, 4.96); **7.** Webster Reddick (black; hesitant in answering, strong reservations about death penalty) (N.T. 6/10/82, 4.222-224, 226-230); **8.** John Finn (race not of record; clergy, hesitant in answering questions) (N.T. 6/11/82, 5.75-82); **9.** Carl Lash (black; hearing problem, former prison counsellor) (N.T. 6/11/82, 5.105, 110-111, 113-114); **10.** Delores Thiemicke (race not of record; age 24, unemployed, never served as juror) (N.T. 6/11/82, 5.192-193); **11.** Gwendolyn Spady (black; listened to petitioner on radio) (N.T. 6/15/82, 53) **12**. Mario Bianchi (race not of record; listened to petitioner on radio, misunderstood presumption of innocence) (N.T. 6/15/82, 111-113); **13.** Wayne Williams (black; age 21, listened to petitioner on radio) (N.T. 6/15/82, 171-173); **14.** Henry McCoy (black; daughter worked at same radio station as petitioner, and expressed strong opinions) (N.T. 6/15/82, 223-225, 229-232); **15.** Darlene Sampson (stipulated to be black at PCRA hearing; listened to petitioner on radio, opposed to death penalty, indicated that she could not be fair if trial lengthy) (N.T. 6/16/82, 276, 281-291, 293-297).

R23 at 119-19 n.49. Because I conclude that the state court's determination that petitioner has failed to establish a prima facie case under *Batson* is not an unreasonable application of Supreme Court precedent, I do not reach this issue.

Batson evaluation, that is, that a prima facie case exists.[70] *See id.* at 850. The court cited three reasons for its conclusion. First, the court held "that mere disparity of number in the racial make-up of the jury, though relevant, is inadequate to establish a prima facie case." *Id.* The court stressed that "[t]he ultimate composition of the jury is affected not only by the prosecutor's use of peremptories, but by the defendant's use of such, by challenges for cause (more acute in capital cases because of the *Witherspoon* inquiry) and by jurors' inability to serve for personal reasons."[71] *Id.* Second, the court found that there was no "pattern" in the prosecutor's use of peremptories. *See id.* Third, the court found that the prosecutor's statements and comments during voir dire did not support any inference of purposeful racial discrimination. *See id.* As such, the court stated that "we do not hesitate to conclude that no such case is made out here." *Id.*

The state supreme court also made the following factual determinations upon which it relied to reach its conclusion that petitioner failed to demonstrate a prima facie case: (1) that it cannot be ascertained from the record whether any of the venire, who were dismissed by petitioner when it was his turn to pass first on their acceptability, were black and might have been acceptable to the Commonwealth; (2) that there was at least one instance where petitioner

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[70]The Pennsylvania Supreme Court first determined that petitioner had waived his claim that the prosecutor engaged in the discriminatory use of peremptory challenges. *See Abu-Jamal*, 555 A.2d at 849. The court then went on to explain that in capital cases it had, at times, relaxed this waiver rule. *See id.* Without saying whether it was relaxing the waiver rule or not in this case, the Pennsylvania Supreme Court proceeded to analyze the situation under the *Batson* standards. *See id.*

[71]Even petitioner's counsel conceded at trial that more black venirepersons than white venirepersons would be excused for cause because of their responses to the *Witherspoon* question. 6/15/82 at 59, 65.

removed a black juror already deemed acceptable by the Commonwealth; (3) that the Commonwealth used fifteen of its twenty available challenges and the record reflected that eight of those challenged were black; (4) that had petitioner not exercised a peremptory challenge to excuse the black venire person acceptable to the Commonwealth, the first two jurors seated would have been black; and (5) that the replacement during trial of the first juror chosen, a black woman, with an alternative, a white man, was entirely beyond the Commonwealth's control. *See Abu-Jamal*, 555 A.2d at 850. Finally, the state supreme court made no finding, and there is no evidence in the record, as to the number of black persons in the venire.[72]

After the PCRA hearing, the PCRA court made findings of fact and conclusions of law on petitioner's *Batson* claim. *See PCRA Op. F.F.* ¶¶ 290-291 & *C.L.* ¶¶ 138-146. Although the court concluded that the issue had been previously litigated, it nevertheless allowed evidence to be submitted. *See id. C.L.* ¶ 141. The only evidence submitted by petitioner was a stipulation with the government that two persons, in addition to the eight found by the state supreme court, who were struck by the Commonwealth were black. *See id. F.F.* ¶¶ 290-91. Prosecutor McGill was under subpoena and available as a witness, but petitioner elected not to call him. *See infra*, note 75 and accompanying text. The PCRA court concluded that because the state supreme court's determination that petitioner had failed to make out a prima facie case did not turn on the number of black venire persons who were removed, petitioner's stipulation failed to suggest that

[72]In his memorandum, petitioner contends that there were approximately eighty overall members of the venire. *See* P14 at 15. However, petitioner makes no reference to the record or to any of the findings of fact by the various state courts to support this allegation. In his petition for relief, petitioner states that there were fifty members of the venire, thirty-five of whom were white and fifteen who were black. *See* P1 ¶ 461. Again, no record support is cited for this statement.

the supreme court's analysis of his *Batson* claim was incorrect. *See PCRA Op. C.L.* ¶¶ 142, 146.

On appeal of the denial of state collateral relief, the Pennsylvania Supreme Court noted that, by stipulation, there was an additional fact for it to consider, *i.e.*, that there were two more African American venire persons stricken by the prosecution. *See PCRA Appeal Op.* at 114. The state supreme court, however, decided that this fact did not alter its original conclusion that petitioner failed to establish a prima facie case of discrimination. *See id.*

There is no reference by counsel to any portion of the record that shows the number of persons in the entire venire, the number of African Americans in the entire venire, the number and race of those persons stricken for cause (due to the *Witherspoon* inquiry or otherwise), or the race, other than of one person, of those persons stricken through peremptory challenges by petitioner. Petitioner had an opportunity to supplement the record at the PCRA hearing, but declined to do so, except for the one aforementioned stipulation. The prosecutor was available as a witness, but petitioner chose not to call him. There was no reason for the government to have done so. *See generally Johnson v. Love*, 40 F.3d 658, 665 (3d Cir. 1994) ("Where the prosecutor is foreclosed by the court from putting his explanation on the record, in the absence of a prima facie case, there is simply no justification for putting the burden on the state of coming forward with a satisfactory explanation in post-conviction relief proceedings that may occur many years after the conviction."). Furthermore, petitioner points to no improper statement or question by the prosecutor during jury selection.

The Pennsylvania Supreme Court obviously applied the correct legal standard, *i.e.*, *Batson*. As such, the state court did not "apply a rule that contradicts the governing law set forth" by the Supreme Court. *See Terry Williams*, 529 U.S. at 405. Moreover, the facts of the

instant case are different from those in *Batson* because the prosecutor in *Batson* used his peremptory challenges to strike all four black members of the venire, resulting in that defendant's trial and conviction by an all white jury. *See Batson*, 476 U.S. at 83. Thus, there is not a set of materially indistinguishable facts and the state court's decision cannot be challenged on that basis. *See Terry Williams*, 529 U.S. at 406 ("A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.").

The issue, then, is whether there was an unreasonable application of *Batson* in petitioner's case. In view of the factual findings of the state court,[73] I conclude that its determination that no prima facie case was established is not an unreasonable application of *Batson*. Again, I stress that in *Terry Williams*, the Supreme Court explained that in making the unreasonable application inquiry, a federal habeas court should ask whether the state court's application of clearly established federal law was objectively unreasonable, which is different from an incorrect application of federal law. *See Terry Williams*, 529 U.S. at 409-10; *Matteo*, 171 F.3d at 889. Indeed, the AEDPA standard requires federal habeas courts to give greater deference to state court applications of law to fact than did prior law. It is clear that in this case, the decision of the state courts is neither objectively unreasonable, nor did it result in an outcome that cannot reasonably be justified under Supreme Court precedent. *See Terry Williams*, 529

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[73]Regarding those facts relevant to his *Batson* challenge, petitioner makes no claim under § 2254(d)(2) that there was an unreasonable determination of facts in light of the evidence presented. As such, the factual determinations of the state court are presumed correct. *See* 28 U.S.C. § 2254(e)(1).

U.S. at 409; *Matteo*, 171 F.3d at 890. Moreover, federal law as set forth in *Batson* does not require a contrary outcome. *See Matteo*, 171 F.3d at 888; *Werts*, 228 F.3d at 197.

Because I conclude that the state court's decision–that petitioner failed to make out a prima facie case of discrimination–was not contrary to or an unreasonable application of clearly established federal law, there is no need to proceed to the second prong of the *Batson* analysis, wherein the government is required to articulate a race-neutral reason for the strike. For the foregoing reasons, relief pursuant to this claim will be denied.

D. Unreasonable Determination of Facts in Light of Evidence Presented

Petitioner does not specifically identify any unreasonable factual determinations that warrant relief under this claim.

E. Evidentiary Hearing

Petitioner maintains that an evidentiary hearing is mandatory on this claim. *See* P27 at 1. There no longer is such a requirement. Petitioner seeks to supplement the record with various items of evidence. Petitioner contends that he attempted to present new statistical and video evidence during review of the denial of his PCRA petition, but that the Supreme Court of Pennsylvania denied his motion to remand for a hearing. *See* P27 at 7. Accordingly, petitioner argues for an evidentiary hearing to present statistics and the testimony of a qualified statistician in order to substantiate his allegations about prosecutor McGill. *See* P27 at 7-8. Petitioner also argues that he needs discovery of McGill's jury selection notes. *See* P27 at 8. I will consider each piece of proposed evidence in turn.

In his traverse, petitioner seems to contend that this evidence is being offered to show that

race-neutral explanations for the prosecutor's strikes were a pretext for discrimination. *See* P29 at 24-5.[74] The state courts, however, never reached the issue of race-neutral explanations because petitioner did not meet the first prong of the *Batson* test by establishing a prima facie case. Moreover, I have concluded that this decision of the state courts is not an unreasonable application of *Batson*. As such, any evidence offered by petitioner to satisfy the third prong of the *Batson* test, *i.e.*, that the prosecutor's race-neutral explanations were a pretext for discrimination, is not relevant here. At any rate, I also conclude that petitioner has failed to develop the factual basis of this claim in state court and that petitioner has not demonstrated that he can overcome the hurdles imposed by § 2254(e)(2)(A) & (B). As such, petitioner's request for a hearing regarding this claim must be denied.

Specifically, petitioner states that he has identified six other cases in which prosecutor McGill evidenced a pattern of discrimination in the use of his peremptory strikes. He seeks to present that evidence, along with discovery concerning other cases tried by McGill. To determine whether petitioner is eligible for an evidentiary hearing under § 2254(e), the court must ask whether the factual basis of this claim was developed in state court and if not, who is to blame for the incomplete record. It is clear that the factual record concerning this claim was not fully developed in state court, and I conclude that petitioner is at fault for the incomplete record. Obviously, this information was available in 1995 at the time of petitioner's PCRA hearing.

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[74]Petitioner asserts that his claim is not defaulted because he stated a prima facie case under *Batson* and was prepared to prove pretext, but was prevented from so doing because the state court erroneously concluded that he failed to state the requisite prima facie case. *See* P27 at 8-9.

Petitioner, however, elected not to call the prosecutor to question him.[75] Thus, petitioner failed to develop an adequate state court record on this issue. Moreover, he does not meet the requirements of § 2254(e)(2)(A) & (B). Therefore, petitioner will not be permitted an evidentiary hearing to present evidence regarding McGill's use of peremptories in this or other cases.

Petitioner also seeks to submit a study of ten years of Philadelphia capital cases

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[75]Petitioner seems to imply that he was precluded from calling the prosecutor to testify at his PCRA hearing. This is incorrect. At his PCRA hearing, petitioner issued a subpoena to prosecutor McGill. On July 27, 1995, McGill appeared before the PCRA court to ask when his testimony would be needed. *See* 7/27/95 Tr. at 29. It appears from the record that petitioner's counsel informed McGill when petitioner would call him as a witness, probably the following day. *See id.*; *see also id.* at 244 (Weinglass stating that although he was not sure, McGill would be in court sometime the following day).

The prosecution filed a motion to preclude the testimony of McGill on the basis that petitioner's counsel had not provided an offer of proof regarding McGill's testimony. *See* 7/31/95 Tr. at 277-78. Petitioner's counsel then stated that the prosecutor's testimony was needed concerning the following key issues: (1) *Batson*; (2) *Brady*; (3) prosecutorial misconduct; and (4) new evidence . *See id.* at 279-85. Accusing petitioner and his counsel of attempting to "try Mr. McGill for trying Mr. Jamal," prosecutor Grant argued that each area of inquiry, except that relating to petitioner's *Batson* claim, should be precluded on the basis that it is either irrelevant or that the testimony should be elicited instead from those with first-hand knowledge. *See id.* at 285-92. The PCRA court ruled that petitioner needed to lay the proper foundation by calling the other relevant witnesses before calling McGill to testify. *See id.* at 298. As such, the court stated that "[w]e will keep McGill in abeyance for the time being." *Id.*

On August 2, 1995, petitioner's counsel stated that he would like to call McGill to testify the following day. *See* 8/2/95 Tr. at 246. The court reiterated that calling McGill to testify at that time was "premature" because petitioner still had not laid the proper foundation. *See id.* at 246-47.

On August 3, 1995, the parties entered into a stipulation that three venire persons, Darlene Sampson, Beverly Greene, and Alma Lee Austin, would under oath state that they identify themselves as African Americans and "that they were among the venire persons drawn and congregated in 253, that they were voir dired by both sides, and that they were all three peremptorily struck." *See* 8/3/95 Tr. at 257-59. On August 4, 1995, petitioner's counsel determined that in light of the stipulation entered the previous day regarding the three venire persons, he did not need the testimony of McGill. *See* 8/4/95 Tr. at 117-20. As such, McGill did not testify at the PCRA hearing because petitioner elected not to call him. Therefore, I find that petitioner failed to develop the record concerning his *Batson* claim.

conducted by Professors Baldus and Woodworth of the University of Iowa. This study apparently makes several conclusions regarding the use of peremptory strikes by the Philadelphia District Attorney's office. Petitioner, however, neglects to mention the time period that this study covered, namely 1983 to 1993. *See* R23 at 129 n.60. Thus, because it did not cover the period of the time during which petitioner's 1982 trial was conducted, I conclude that it is irrelevant to petitioner's *Batson* claim. *See generally McKleskey v. Kemp*, 481 U.S. 279, 292 (1987) (petitioner "must prove that the decisionmakers in *his* case acted with discriminatory purpose.") (emphasis original). In addition, petitioner did attempt to submit this study to the Pennsylvania Supreme Court on August 1, 1998, one year after briefing had been concluded before the Pennsylvania Supreme Court on the appeal of the denial of state collateral relief. The state supreme court rejected the submission because of its lateness, as petitioner did not even seek leave of court to file the application to remand. Again, the failure to develop an adequate state court record was the result of the petitioner's own actions. Accordingly, he is now barred from commanding a federal evidentiary hearing to present the Baldus-Woodworth study.

Next, petitioner seeks to submit a study of cases from 1987 through 1991 concerning the percentages of strikes of blacks in all cases and in cases by prosecutor McGill. Once again, this proffered evidence does not relate to 1982, the time of petitioner's trial. Moreover, the evidence was not fairly presented to the state courts and the failure to do so was the fault of petitioner. Therefore, petitioner will not be permitted an evidentiary hearing to produce this study of cases.

Finally, petitioner seeks to submit a videotape made by another Assistant District Attorney in Philadelphia, Jack McMahon. Although this tape was created in 1987, its existence was not publicly known until April 1997. However, the tape is irrelevant because its production

occurred five years after petitioner's trial and because it relates to the views of McMahon, not those of McGill.

For the foregoing reasons, petitioner's request for a hearing to supplement his *Batson* claim will be denied. Furthermore, because petitioner has failed to demonstrate good cause for discovery of McGill's jury selection notes, especially in light of the fact that petitioner chose not to pursue McGill's testimony at the PCRA hearing, petitioner's request for discovery also will be denied. *See* Rule 6(a) Foll. § 2254 (articulating the "good cause" standard for discovery in habeas corpus actions).

III.17 COURT COMMUNICATION WITH JUROR AND SUBSEQUENT REMOVAL OF JUROR IN VIOLATION OF THE 5TH, 6TH, 8TH AND 14TH AMENDMENTS.

A. Allegations in Support of Claim

Plaintiff complains that, without consulting counsel, the court denied juror Dawley's request to take her cat to the veterinarian while the jury was sequestered. When she did so anyway, the court dismissed her as a juror. Petitioner further alleges that the court acted in bad faith and was motivated by personal bias. *See* P1 ¶¶ 493-498.

B. Violation of Federal Constitution, Law or Treaty

Petitioner argues that he was deprived of his rights to trial by jury and to a fair and reliable determination of guilt. He asserts that it is clear error to remove a juror without first notifying counsel. *See* P14 at 70 (citing *United States v. Rapp*, 871 F.2d 957 (11th Cir. 1989); *United States v. Taylor*, 562 F.2d 1345 (2d Cir. 1977); *United States v. McDuffie*, 542 F.2d 236 (5th Cir. 1976)).

Respondents answer that Jackson approved the removal of juror Dawley. *See* R23 at 130. Respondents further assert that petitioner does not point to any controlling Supreme Court precedent indicating the unconstitutionality of the court's actions.

C. "Contrary to" or "Unreasonable Application of" Clearly Established Federal Law

The claim was fairly presented to the state courts, and thus the exhaustion requirement is satisfied. *See* Amend. St. PCRA Pet. ¶¶ 133-34; St. PCRA Mem. at 143-44.[76] Moreover, it was

[76]Respondents argue that this claim is procedurally defaulted because petitioner never raised it as a due process claim before the Pennsylvania Supreme Court on PCRA appeal. While petitioner may not precisely have framed his claim in terms of due process on PCRA appeal, he

adjudicated on the merits by the state courts. *See PCRA Op. C.L.* ¶¶ 135-37; *PCRA Appeal Op.* at 114-15. Therefore, it is subject to the strictures of § 2254(d).

To constitute a viable basis for habeas relief under §2254(d)(1), a state court decision must be contrary to or an unreasonable application of clearly established federal law. The Supreme Court has indicated that "clearly established federal law" means Supreme Court precedent. *See Terry Williams*, 2000 WL at *23. Petitioner, however, has failed to cite any Supreme Court precedent giving rise to this claim. Accordingly, petitioner has not met his burden under §2254(d)(1), and relief pursuant to this claim cannot be granted.

In any event, the courts of appeals decisions to which petitioner cites do not indicate that habeas relief is appropriate here. First, each case states that where contact occurs between a juror and the court, the court should reveal the substance of its communications to counsel, thereby allowing the parties to discuss and decide in an informed way the proper course of action. *See Taylor*, 562 F.2d at 1365; *McDuffie*, 542 F.2d at 241. In petitioner's case, the court followed this procedure. *See* 6/18/82 Tr. at 2.35-36 (notifying counsel that the court crier called the prior evening to inform the court that a juror had violated the sequestration order); *id.* at 2.39-2.47 (court and counsel engaging in a discussion as to how to proceed and ultimately all–including defense counsel–agreeing that the juror must be dismissed); *id.* at 2.42-.43 (court offering to call juror Dawley in for questioning).[77] Second, these cases stress that in addition to proving that the

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did generally advance this contention before the PCRA court, and that conclusion was reviewed by the state supreme court. *See* Amend. St. PCRA Pet. at ¶¶ 134; *PCRA Op. C.L.* at ¶; *PCRA Appeal Op.* at 86 & n.7. Accordingly, this claim is properly before the court.

[77]Petitioner argues that "[t]he court admitted that he opposed seating this juror from 'the beginning' because of her 'attitude.'" *See* P14 at 70. Petitioner misstates the trial record. The

trial court erred, a defendant also must demonstrate that the error was prejudicial. *See, e.g.*, *Taylor*, 562 F.2d at 1365. Petitioner asserts that the dismissal prejudiced him because the juror was black and was the only juror chosen directly by him during voir dire. *See* P1 ¶ 495; P14 at 70. Yet these allegations do not begin to specify how Dawley's dismissal deprived him deprived him of any constitutional right or of a fair trial. *See, e.g.*, *McClain v. Swenson*, 435 F.2d 327, 331-32 (8th Cir. 1970) (finding that no prejudice had resulted where the petitioner had demonstrated neither that he had been deprived of a constitutional right nor that he had been deprived of a fair trial). Thus, even if I were to find error in the procedure followed by the state court (which I do not), petitioner has failed to demonstrate resultant prejudice. Accordingly, even if these courts of appeals cases were representative of "clearly established federal law," the trial court's decision to dismiss juror Dawley was neither contrary to nor an unreasonable application of the law contained therein.

D. Unreasonable Determination of Facts in Light of Evidence Presented

Regarding this claim, petitioner does not identify with specificity any factual determinations that are unreasonable in light of the evidence presented.

E. Evidentiary Hearing

Petitioner concedes that no evidentiary hearing is required on this claim because "the

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court said that he did not like juror Dawley's attitude only because she intentionally violated the court's order. *See* 6/18/82 Tr. at 2.39. The court also expressed concern that Dawley might repeat her actions during deliberations and that other jurors might do the same if Dawley remained on the jury. *See id.* at 2.40. Additionally, the court expressed that it was worried about seating this juror from the beginning, not because of her attitude, but because of her mental competency. *See* 6/18/82 Tr. at 2.45-4.46. This is clearly different from being "opposed" to seating her as petitioner contends. Indeed, the state court also said that whatever his worries, he does not select the jury, counsel does. *See* 6/18/82 Tr. at 2.46.

evidentiary record is complete and credibility determinations by the PCRA court are not at issue.” P14 at 9.

III.18 COURT REFUSAL TO EXCUSE FOR CAUSE AN UNFIT JUROR IN VIOLATION OF THE 5TH, 8TH AND 14TH AMENDMENTS.

A. Allegations in Support of Claim

Petitioner claims that even though juror Courchain said that he would be unable to be objective in the matter and was hostile towards Jackson, he was nonetheless empaneled over defense objection for cause. *See* P1 ¶¶ 499-504.

B. Violation of Federal Constitution, Law or Treaty

Petitioner argues that he was deprived of his rights to a jury trial and to a fair and reliable determination of guilt because the court failed to remove a biased juror. *See* P14 at 70-71 (citing *Irvin v. Dowd*, 366 U.S. 717 (1961); *Swain v. Alabama*, 380 U.S. 202 (1965); *Aldridge v. United States*, 283 U.S. 308 (1931); *United States v. Dellinger*, 472 F.2d 340, 367 (7th Cir. 1972)).

Respondents argue that the trial judge has discretion in ruling on a challenge for bias. *See* R23 at 131-132 (citing *Dennis v. United States*, 339 U.S. 162, 168 (1950); *Rosalus-Lopez v. United States*, 451 U.S. 182 (1981)). Second, respondents assert that because juror bias is a question of fact, the court's determination is presumed to be correct. *See id.* at 132 (citing *Patton v. Yount*, 467 U.S. 1025, 1036 (1984); *Wainwright v. Witt*, 469 U.S. 412, 429 (1985). Third, respondents contend that voir dire clarified Courchain's misunderstanding about familiarity with the case and impartiality as a juror, ultimately revealing that he could be impartial. *See id.* at 132-34.

C. "Contrary to" or "Unreasonable Application of" Clearly Established Federal Law

The claim was fairly presented to the state courts, and thus the exhaustion requirement is

satisfied. *See* Direct Appeal Br. at 6-8 . Moreover, it was adjudicated on the merits by the state courts. *See Abu-Jamal*, 555 A.2d at 850-51. Therefore, it is subject to the strictures of § 2254(d).

The Supreme Court often has stressed that "while impaneling a jury the trial court has a serious duty to determine the question of actual bias, and a broad discretion in its rulings on challenges therefor." *Dennis*, 339 U.S. at 168 (citations omitted). Actual bias, however, is not the mere existence of a preconceived notion, without more, as to the guilt or innocence of the defendant. Rather it occurs when the juror cannot set aside that preconceived notion and render a decision based upon the evidence presented in court. *See Irvin*, 366 U.S. at 723. Moreover, the question of bias is one of fact best determined by the trial court's own determinations as to impartiality, credibility and demeanor. *See Patton*, 467 U.S. at 1036; *Rosales-Lopez*, 451 U.S. at 188. Accordingly, the reviewing court should not easily second-guess the conclusion of the trial court who heard and observed the voir dire. *See Rosales-Lopez*, 451 U.S. at 188. Therefore, the question that the court must answer is whether there is fair support in the record for the state court's conclusion that juror Courchain would be impartial.

Based on the totality of juror Courchain's responses, I conclude that the trial judge's determination that Courchain would be a fair and impartial juror was not an unreasonable finding of fact. *See* 6/16/82 Tr. at 383 (Courchain answering that he could reach a verdict based solely on the evidence); *id.* at 385 (Courchain stating that he believed he could set aside anything he has read and determine guilt or innocence solely based on the evidence); *id.* at 396 (Courchain indicating that he would try to be a fair juror); *id.* at 409 (Courchain stating that he would base his verdict on "[w]hat I would hear in this court as the Judge directed . . . ."); *id.* at 409

(Courchain stating that he has no attitude against the defendant). *Cf. id.* at 385 (Courchain answering that it would be a little difficult for him to base his verdict on evidence he heard in the courtroom and not on what he has read about the case); *id.* at 389 (Courchain responding that he did not think that he could be fair to both sides); *see also Patton*, 467 U.S. at 1038-39 (noting that "it is not unusual on voir dire examination, particularly in a highly publicized criminal case" for testimony of challenged jurors to be ambiguous and at times contradictory and that the trial judge can best determine competency, impartiality and credibility). Therefore, the decision of the state court was not contrary to or an unreasonable application of clearly established federal law and relief on this claim must be denied.

D. Unreasonable Determination of Facts in Light of Evidence Presented

Patton indicates that the question of an individual juror's bias is an issue of historical fact properly resolved by the trial judge. *See* 467 U.S. at 1036-37. Petitioner, however, does not identify with specificity any factual findings that are unreasonable in light of the evidence presented in relation to this claim. As such, I conclude that the state court's holding was not predicated on any unreasonable factual determination.

E. Evidentiary Hearing

Petitioner concedes that no evidentiary hearing is required on this claim. *See* P14 at 9.

III.19 JUROR SECRET AND PREMATURE DELIBERATION IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE 5TH, 8TH AND 14TH AMENDMENTS.

A. Allegations in Support of Claim

Petitioner asserts that three white jurors formed a group, engaged in clandestine deliberations, and reached a conclusion prior to the end of trial. *See* P1 ¶¶ 505-07.

B. Violation of Federal Constitution, Law or Treaty

Petitioner claims that he was deprived of his rights to jury trial and to a fair and reliable determination of guilt. First, he argues that a new trial is warranted. *See* P14 at 71 (citing *United States v. Resko*, 3 F.3d 684, 689-90 (3d Cir. 1993)). Second, he argues that the PCRA court improperly excluded evidence of premature deliberation. *See id.* at 71.

Respondents answer that the only proffer concerning premature deliberation was hearsay evidence by petitioner's PCRA counsel, Hawkins, as to a conversation he had with a juror who allegedly stated that three other jurors engaged in premature deliberations. *See* R23 at 134-35 n.61. Respondents also assert that state law prohibits jurors themselves from impeaching their verdicts, *see id.* at 135, and that petitioner has not cited any Supreme Court case to the contrary. *See id.* at 135. Finally, respondents suggest that the state rule is substantially similar to Fed. R. Evid. 606(b), which has been upheld against constitutional challenge. *See id.* (citing *Tanner v. United States*, 483 U.S. 107 (1986); *United States v. Jones*, 132 F.3d 232, 246 (5th Cir. 1998); *United States v. Griek*, 920 F.2d 840, 842-43 (11th Cir. 1991)).

C. "Contrary to" or "Unreasonable Application of" Clearly Established Federal Law

The claim was fairly presented to the state courts, and thus the exhaustion requirement is

satisfied. *See* Amend. St. PCRA Pet. ¶¶ 142-43; St. PCRA Mem. at 148-49. Moreover, it was adjudicated on the merits by the state courts. *See PCRA Op. C.L.* ¶¶ 156-61; *PCRA Appeal Op.* at 115. Therefore, it is subject to the strictures of § 2254(d).

Petitioner has failed to explain how the state court's decision was contrary to or an unreasonable application of clearly established federal law. Indeed, petitioner has not even identified any controlling Supreme Court precedent. Accordingly, petitioner has not met his burden under §2254(d)(1) and relief cannot be granted pursuant to this claim.

In any event, a review of the PCRA record makes clear that petitioner's "premature jury deliberations" claim was nothing more than an unsupported allegation. Moreover, the PCRA court properly excluded the hearsay testimony of any of petitioner's attorneys who allegedly had a conversation with a juror who claimed that three other jurors deliberated behind closed doors. *See* 8/2/95 Tr. at 185-89. Indeed, the PCRA court held petitioner's proposed witness Hawkins in abeyance to afford petitioner's counsel an opportunity to provide legal support for his contention that Hawkins's testimony was admissible. *See id.* at 189. Petitioner never sought to introduce any other legal support or evidence to support this claim.[78]

D. Unreasonable Determination of Facts in Light of Evidence Presented

No findings of fact are identified with specificity by petitioner as unreasonable in light of the evidence presented concerning this claim.

E. Evidentiary Hearing

Petitioner argues that an evidentiary hearing is mandatory on this claim. *See* P27 at 1.

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[78]Petitioner makes no allegation of outside influences on any of the jurors.

Petitioner seeks to introduce the testimony of juror Davis who allegedly overheard premature jury deliberations, arguing that the PCRA court improperly excluded her proffered testimony. *See* P27 at 10. Respondents answer that such testimony is inadmissable. *See* R30 at 20. Petitioner, however, does not explain why the PCRA court's ruling was improper. Because I find that the PCRA court correctly ruled that the subject testimony was inadmissable, because former jurors are not permitted to impeach their own verdict under state law (as specifically decided by the Pennsylvania Supreme Court in the circumstances of this case) and petitioner has pointed to no federal law to the contrary, and because petitioner never sought to otherwise substantiate this claim with admissible evidence, petitioner is not now entitled to a hearing to correct his failure to support this claim at the state level. *See* 28 U.S.C. § 2254(e)(2).

III.20 JURY POOL COMPOSED IN VIOLATION OF 5TH, 8TH AND 14TH AMENDMENTS.

A. Allegations in Support of Claim

Petitioner claims that because jury pools in Philadelphia were drawn from the voter registration list and divided into five groups geographically, and because Philadelphia is composed of racially segregated neighborhoods, jury pools over-represented and under-represented particular racial groups at different times. Petitioner contends that the composition of the jury pool varied depending on the time of year and thus it was possible that it did not reflect a fair cross-section of the population. *See* P1 ¶¶ 508-12.

B. Violation of Federal Constitution, Law or Treaty

Petitioner alleges he was deprived of his rights to a jury drawn from a fair cross-section of the population and to a fair and reliable determination of guilt. First, he argues that the "rotation" of the jury pool resulted in different percentages of racial groups at different times of the year. *See* P14 at 71. Second, petitioner claims that the PCRA court improperly barred the testimony of the jury commissioner as to the manner of selecting a jury pool. *See* P14 at 71. Third, he argues that the PCRA court improperly oversimplified his argument, construing it as a basic challenge to juror selection from voter registration lists. *See* P14 at 71-72.

Respondents answer that petitioner's PCRA filing did not mention rotation of voter lists as the key issue and simply asserted that he was challenging juror selection based on non-random voter registration. *See* R23 at 137. Second, respondents assert that the PCRA court refused to hear the later rotation argument because it was not raised in a timely manner. *See* R23 at 137. Accordingly, respondents contend that the claim is procedurally defaulted, and that responsibility

for the failure to develop the record as to this claim lies with petitioner. *See* R23 at 137-38.

C. Procedural Default

In his amended petition for state post-conviction relief, petitioner argued that the jury pool did not reflect a fair cross-section of the community because the jury selection process was not "random" where it was drawn from voter registration lists. *See* Amend. St. PCRA Pet. ¶¶ 139-41. Petitioner essentially argued that the jury selection process, identical to that described in *Commonwealth v. Rosado*, No. 2467, 1993 WL 1156055 (Phila Ct. Com. Pl. April 15, 1993), was unconstitutional. *See* St. PCRA Mem. at 147-48. The PCRA court rejected this claim. *See PCRA Op. C.O.L.* at 147-55. Petitioner's amended PCRA petition and memorandum in support thereof never asserted that this selection process "rotated" voter lists, nor did the *Rosado* court describe the process as such. Consequently, petitioner failed to present his "rotation" argument to the PCRA court, and he therefore has failed to exhaust it. *See O'Sullivan v. Boerckal*, 526 U.S. 838, 847 (1999).

Additionally, when petitioner first tried to raise the "rotation" argument in his brief to the Supreme Court of Pennsylvania, that court refused to entertain it. Pennsylvania law now forecloses state court review of this claim. *See PCRA Appeal Op.* at 114. Although one consequence of this independent state procedural bar is that petitioner's failure to exhaust this claim is excused, another is that petitioner has procedurally defaulted it. *See McCandless*, 172 F.3d at 260. Procedurally defaulted claims are reviewable by this court only if petitioner demonstrates: (1) cause for his failure to comply with the procedural rule and prejudice suffered therefrom; or (2) actual innocence of the charge. *See Coleman*, 501 U.S. at 750. Petitioner fails even to allege any ground to allow the court to consider this procedurally defaulted claim. In

fact, petitioner makes absolutely no mention of the exhaustion requirement or procedural default regarding this claim. *See* P14 at 71-72. Therefore, the court may not review it on the merits.

D. Evidentiary Hearing

Petitioner asserts that an evidentiary hearing is mandatory on this claim. *See* P27 at 1. There is no longer any such requirement. Moreover, given that petitioner has failed to develop the factual basis for this claim in state court, he is not now entitled to an evidentiary hearing in this court unless he can overcome the barriers posed by 28 U.S.C. § 2254(e)(2)(A) and (B). Petitioner does not suggest that he is able to make the requisite showing. Accordingly, his request for an evidentiary hearing will be denied.[79]

[79]Petitioner's claims 21 through 24 will not be evaluated because they are mooted by the disposition of his 25th claim.

III.25 CONSTITUTIONAL DEFICIENCIES IN THE VERDICT FORM AND JURY CHARGE SUGGESTED THAT A FINDING OF MITIGATING CIRCUMSTANCES REQUIRED UNANIMOUS ACTION IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE 8TH AND 14TH AMENDMENTS.

A. Allegations in Support of Claim

Petitioner claims that the appearance of the verdict form unconstitutionally suggested to the jury that it could not consider any particular mitigating circumstance unless the panel agreed unanimously as to its existence. *See* P1 ¶¶ 596-602. He asserts that this confusion was compounded by the instructions that were intended to clarify the jury's role. *Id.* ¶ 602.

B. Violation of Federal Constitution, Law or Treaty

Petitioner argues that he was deprived of his right to a fair and reliable determination of punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. *See* P14 at 91-92 (citing *Mills v. Maryland*, 486 U.S. 367, 384 (1988); *McKoy v. North Carolina*, 494 U.S. 433 (1990)). Specifically, he asserts that a parallel exists between the facts of his case and those at issue in *Mills*, where the Court found "a substantial probability that reasonable jurors, upon receiving the judge's instructions . . ., and in attempting to complete the verdict form as instructed, may well have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Mills*, 486 U.S. at 384; *see also Boyde v. California*, 494 U.S. 370, 380 (1990) (modifying the *Mills* standard for reviewing jury instructions alleged to restrict a sentencer's consideration of relevant evidence by holding that the question properly asked by a reviewing court is "whether there is a reasonable likelihood that the jury [as opposed to a reasonable individual juror] has applied the challenged instruction in a way that prevents the consideration

of constitutionally relevant evidence").[80] Accordingly, petitioner claims, the penalty determination in his case was conducted in violation of *Mills*.

Respondents contend that petitioner's *Mills* argument was first raised in the 1995 PCRA hearing, where it was advanced only as an ineffective assistance of counsel claim. This claim was meritless, they assert, because trial counsel could not have been ineffective "in not predicting the 1988 *Mills* decision in 1982." R23 at 158 (citing *Sistrunk v. Vaughn*, 96 F.3d 666, 670-71 (3d Cir. 1996)). Respondents also allege that petitioner's claim fails on its merits. They posit that petitioner bases his argument solely on the jury verdict form, and does not focus at all on the instructions delivered by the trial court.[81] R23 at 159. They contend that this in itself

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[80]While the Third Circuit repeatedly has noted the applicability of the *Boyde* standard in assessing *Mills* claims, *see Banks v. Horn*, 2001 WL 1349369, at *16 (3d Cir. Oct. 31, 2001) and *Frey v. Fulcomer*, 132 F.3d 916, 921 (3d Cir. 1997), the court of appeals also has at least mentioned an alternate, arguably less stringent standard for determining whether *Mills* has been violated. *See, e.g.*, *Banks*, 2001 WL 1349369, at *13 ("Proper application of *Mills* requires at the outset that the reviewing court examine the entire jury instructions, posing the 'critical question' whether a reasonable jury *could have concluded* . . . that unanimity was required to find a mitigating circumstance.") (emphasis added); *Frey*, 132 F.3d at 923 ("[W]e must determine whether it is reasonably likely that the jury *could have understood* the charge to require unanimity in consideration of mitigating evidence.") (emphasis added). There is no dispute, however–and indeed, both *Frey* and *Banks* make this point explicitly–that the standard to be applied to *Mills* claims is that articulated in *Boyde*. Accordingly, I am concerned in evaluating petitioner's *Mills* claim with whether there is "a *reasonable likelihood* that the jury *has* applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380 (emphasis added).

[81]This, however, is inaccurate. Although the bulk of petitioner's *Mills* claim is concerned with the effect of the verdict form, petitioner explicitly contends that "[t]he court's instructions, far from correcting the jury's misunderstanding based on the form, would have compounded that misunderstanding." P1 ¶ 602. Accordingly, the effect of both the verdict sheet and the instructions have been raised by petitioner. Moreover, as respondents themselves concede, in evaluating a claim pursuant to *Mills v. Maryland*, "the [verdict] form cannot properly be viewed in isolation from the court's penalty phase instructions." R23 at 161.

Respondents also assert that *Frey* is unavailable to petitioner as a basis for relief because, under the AEDPA, habeas relief is available only to one in custody "pursuant to the judgment of

distinguishes petitioner's argument from that advanced successfully in *Frey v. Fulcomer*. *See* R23 at 162 (citing *Frey*, 132 F.3d 916, 923 (3d Cir. 1997)). Nonetheless, they assert that the jury explicitly was instructed that unanimity was required only if a particular aggravating circumstance was found to exist, or if no mitigating circumstances were found to exist. *See id.* They allege that the trial court's instructions did not indicate the need for unanimity in order to find any particular mitigating circumstance. *See id.*

Respondents also argue that the verdict form itself contained no indication that unanimity was a necessary prerequisite to the jury finding the existence of mitigating circumstances, and that it did not in any way contradict the trial court's clear instruction that such a finding need not be unanimous. Respondents rely on the Third Circuit's holding in *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991), a case they denote as factually apposite the instant matter, as support for their conclusion that "'[n]either the court nor the verdict sheet stated that the jury could weigh only those mitigating circumstances which it found unanimously." R23 at 161 (quoting *Zettlemoyer*, 923 F.2d at 308).

Petitioner did not raise the *Mills* issue at trial (*Mills* not having been decided), or on direct

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a State court" only if that order is "contrary to, or an unreasonable violation of clearly established Federal law as determined by the Supreme Court of the United States." R23 at 163 (quoting 28 U.S.C. § 2254). They assert that because *Frey* is a decision of the Third Circuit, it does not qualify under the AEDPA standard. This contention, however, is incorrect because *Frey* does not purport itself to be a basis for relief independent of *Mills*. Rather it simply is an application of *Mills*, with the holding of the Supreme Court being the legal basis for relief. It is indisputable that I may look to *Frey*–or to any other decision of the court of appeals–as an authoritative interpretation of the Supreme Court's holding. As stated by the Third Circuit in *Matteo*, "we do not believe federal habeas courts are precluded from considering the decisions of the inferior federal courts when evaluating whether the state court's application of the law was reasonable." 171 F.3d at 890.

appeal. He did raise it in his PCRA action. However, the PCRA court found that because petitioner had failed previously to raise this claim, it was waived. *PCRA Op. C.L.* ¶ 171. As such, the court concluded that *Mills* could not form the basis for post-conviction relief. *See id.* (citing 42 Pa. C.S. § 9543(a)(3)). In any event, noting that no evidence had been offered on the issue, the PCRA court went on to consider petitioner's *Mills* claim on its merits and found no constitutional violation, reasoning that similar verdict forms and instructions had been upheld by the Third Circuit in *Zettlemoyer* and by the Pennsylvania Supreme Court in several cases. *See id.* ¶¶ 172-73 (citations omitted).

In affirming the PCRA court's decision, the Pennsylvania Supreme Court also noted that petitioner had offered no evidence in support of this claim at the PCRA hearing. *See PCRA Appeal Op.* at 119. Moreover, the court distinguished *Mills* on the ground that the *Mills* verdict sheet, unlike that in petitioner's case, used the term "unanimously" in the context of both aggravating and mitigating circumstances. *See id.* The state supreme court further stressed that the unanimity requirement in petitioner's case was found only on page 1 of the verdict slip, whereas the mitigating circumstances were listed on page 3. *See id.* Additionally, the court found that the requirement that all twelve jurors sign the third page of the verdict slip was "of no moment since those signature lines naturally appear at the conclusion of the form and have no explicit correlation to the check list of mitigating circumstances." *Id.* The court therefore concluded that the structure of the form did not lead the jurors to believe that they must agree unanimously as to the existence of mitigating evidence before such factors could be considered. *See id.*

The Pennsylvania Supreme Court identified the correct federal law as determined by the

Supreme Court of the United States, *i.e.,* the *Mills* decision. As such, the state supreme court did not "apply a rule that contradicts the governing law set forth" by the Supreme Court. *See Terry Williams*, 529 U.S. at 405. The issue, then, is whether there was an unreasonable application of *Mills* in petitioner's case.[82]

C. "Contrary to" or "Unreasonable Application of" Clearly Established Federal Law

Preliminarily, this claim is properly before the court. Although the Commonwealth urges that petitioner raised the *Mills* issue only by way of a claim alleging ineffective assistance of counsel, both the PCRA court and the Pennsylvania Supreme Court indicated that the *Mills* claim was before them on its merits.[83] The PCRA court specifically stated that "[p]etitioner claims the

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[82]Indeed, it is important to reiterate here that the standards under which petitioner's *Mills* claim must be evaluated are those set forth in the AEDPA. This is to be contrasted with the Third Circuit's analysis in *Frey*, which employed pre-AEDPA standards in determining whether a violation of *Mills* had been effected in that case. Therefore, habeas relief will not be warranted pursuant to *Mills* if it is merely the case that, had I evaluated petitioner's *Mills* claim *ab initio*, I would have found it to be meritorious. *See Matteo*, 171 F.3d at 889. Put differently, a significant degree of deference is due the state supreme court's application of federal law. Instead, if petitioner is to be granted a writ of habeas corpus pursuant to this claim, it must necessarily be the case that the Pennsylvania Supreme Court's determination *Mills* had not been transgressed was "contrary to," or "involved an unreasonable application of" the United States Supreme Court's decision in that case. *See* 28 U.S.C. 2254(d)(1); *Terry Williams*, 529 U.S. at 405.

However, given, that the propriety of habeas relief based on this claim turns on the application of law (i.e. *Mills*) to facts, and that the facts of this case are materially distinguishable from those at issue in *Mills*–for example, the language employed by the verdict form and by the trial court in instructing the jury in petitioner's case diverges from that at issue in *Mills*–the "contrary to" standard for relief is inapplicable here. *See Terry Williams*, 529 U.S. at 406 ("[A] run-of-the-mill state-court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause."). Accordingly, the court will inquire whether the Pennsylvania Supreme Court, in denying petitioner's *Mills* claim, applied unreasonably that holding.

[83]While the PCRA court, as stated, indicated the applicability of a state law procedural bar to petitioner's *Mills* claim, nothing in its discussion of this claim supports the

verdict form in this case violated the rule in the later decided[84] case of *Mills v. Maryland*, 486 U.S. 367 (1988)." *PCRA Op. C.L.* ¶ 172; *see also PCRA Appeal Op.* at 119 ("Appellant . . . submits that the penalty phase verdict slip was constitutionally defective pursuant to the dictates of *Mills v. Maryland* . . . ."). Because the claim thus was fairly presented to the state courts, the exhaustion requirement is satisfied. *See* Amend. St. PCRA Pet. ¶¶ 149-50; St. PCRA Mem. at 154-60. Because it also was adjudicated on the merits by the state courts, *see PCRA Op. C.L.* ¶¶ 171-73; *PCRA Appeal Op.* at 119, it is subject to the strictures of § 2254(d).

Mills *and Its Application Within the Third Circuit*

In *Mills,* the petitioner argued that Maryland's capital sentencing scheme, as explained to the jury by the court's instruction and as implemented by the verdict form, was unconstitutional. This was so, he contended, because the verdict sheet and jury charge conveyed to the jury the false impression that unanimity was required if any given mitigating circumstance was to be found to exist, and thus considered by the panel in its sentencing determination. *See* 486 U.S. at 375-76. The Court agreed, holding that although it was unable to determine with certainty what

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Commonwealth's position that petitioner did not advance the *Mills* issue on its merits. Quite the contrary, it affirmatively indicated that petitioner had done so. *See PCRA Op. C.L.* ¶ 172.

[84]Although *Mills*, handed down on June 6, 1988, was decided after petitioner was sentenced to death, it nonetheless antedated the finality of petitioner's conviction, which was registered on October 1, 1990, when the United States Supreme Court denied his petition for a writ of certiorari. *See, e.g.*, *Gray v. Netherland*, 518 U.S. 152, 180 (1996) (noting that a conviction becomes final upon the United States Supreme Court's denial of a writ of certiorari on a defendant's direct appeal). Accordingly, no retroactivity analysis is mandated pursuant to *Teague v. Lane*, 489 U.S. 288, 299-301 (1989). *See Matteo*, 171 F.3d at 902 ("If the petitioner either seeks relief on the basis of a 'new rule' (i.e., a decision issued after the conviction became final) or seeks relief that would require the habeas court to announce (and retroactively apply) a new rule, *Teague* sharply restricts the habeas court's review."). The same can be said of *Boyde v. California*, decided on March 5, 1990.

the jury actually believed, there was a "substantial probability that reasonable jurors," upon considering the verdict form and the instruction, would have concluded that a mitigating circumstance which had been found to exist by less than a unanimous jury could not be considered.[85] 486 U.S. at 384. This, the Court found, violated the constitutional rule announced

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[85]This impression was created specifically by the combined effect of the jury charge and verdict form. The verdict sheet, as explained by the judge's instructions, was tripartite. Section I pertained to aggravating circumstances, and in explaining the jury's responsibilities vis-a-vis this section, the trial court stated: "[Y]ou must consider whether the aggravating circumstance . . . has been proven beyond a reasonable doubt. If you unanimously conclude that it has been so proven, you should answer that question yes. *If you are not so satisfied, then of course you must answer no*." *Mills*, 486 U.S. at 378 (emphasis original).

Section II concerned mitigating circumstances. That section of the form featured identical language, except that a preponderance of the evidence standard was articulated for the determination of the existence of mitigating circumstances. Specifically, it read: "Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked 'yes' has been proven to exist by a preponderance of the evidence and each mitigating circumstance marked 'no' has not been proven by a preponderance of the evidence . . . ." *Mills*, 486 U.S. at 387. The jury again was instructed to mark each answer "yes" or "no." In reviewing the impression created by the verdict form and this instruction, the Court found that "[a]lthough it was clear that the jury could not mark 'yes' in any box without unanimity, nothing the judge said dispelled the probable inference that 'no' is the opposite of 'yes,' and therefore the appropriate answer to reflect an inability to answer a question in the affirmative." *Id.* at 378. Put differently, just as the jury was instructed to indicate the absence of an aggravating circumstance if they were unable to agree to its existence, they implicitly were directed to follow this same procedure in the context of mitigating circumstances. However, the Court proceeded to point out that "[n]o instruction was given indicating what the jury should do if some but not all of the jurors were willing to recognize something about petitioner . . . as a mitigating factor." *Id.* at 379.

Section III was the balancing section; this was the place in which those aggravating circumstances found in Section I were to be weighed against the mitigating circumstances found in Section II. As the Court stated, however, "Section III instructed the jury to weigh only those mitigating circumstances marked 'yes' in Section II." Accordingly, the Court found that

> A jury following the instructions set out in the verdict form could be "precluded from considering, *as a mitigating factor*, [an] aspect of a defendant's character or record [or a] circumstanc[e] of the offense that the defendant proffer[ed] as a basis for a sentence less than death," if even a single juror adhered to the view that such a factor should not be so

in *Lockett v. Ohio* and applied in *Eddings v. Oklahoma* that in a capital case "the sentencer [may] not be precluded from weighing, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Eddings*, 455 U.S. 104, 110 (1982) (quoting *Lockett*, 438 U.S. 586, 604 (1978)) (emphasis original), *quoted in Mills*, 486 U.S. at 374. As explained by the Third Circuit, "[t]he source of this preclusion is irrelevant; whether its source is statutory . . . , the sentencing court . . ., or an evidentiary ruling . . ., the result is the same." *Frey*, 132 F.3d at 920. Indeed, where a jury returns a sentence of death after having been prevented from considering relevant mitigating evidence, that sentence must be invalidated.

As alluded to above, *Mills* repeatedly has been applied in this circuit. In *Zettlemoyer*, our Court of Appeals evaluated a jury charge that read, in pertinent part, as follows:

> The verdict, of course, must be unanimous. Again, if you find unanimously, beyond a reasonable doubt, the aggravating circumstance that I have mentioned . . . and no mitigating circumstances or if you find that the aggravating circumstance which I mentioned to you outweighs any mitigating circumstance you find, your verdict must be the death penalty. If, on the other hand, you find that the Commonwealth has not proven an aggravating circumstance beyond a reasonable doubt or if they have, that the mitigating circumstances outweight [sic.] the aggravating circumstances, then you must bring in a verdict of life imprisonment.
>
> . . . .
>
> Under the law . . . you are obligated by your oath of office to fix the penalty at death if you unanimously agree and find beyond a reasonable doubt that there is an aggravating circumstances [sic.] and either no mitigating circumstance or that the

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considered.

486 U.S. at 380 (quoting *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986)).

aggravating circumstance outweighs any mitigating circumstances.

923 F.2d at 307-08.

In holding this charge to be constitutionally permissible under *Mills*, the court of appeals engaged in a sentence-level parsing of the language employed. It especially was interested in the phrase "if you unanimously agree and find," contained in the second stanza above. The words "agree and" were of particular import because they served as a linguistic buffer between the unanimity requirement and the enterprise of determining the existence of mitigating circumstances. 923 F.3d at 308. Accordingly, the court found that "the word 'unanimously' in the latter part of the charge modified only the word 'agree.'" *Frey*, 132 F.3d at 922 (citing *Zettlemoyer*, 923 F.2d at 308). The effect of this language was that "the [*Zettlemoyer*] instruction was reasonably likely to have been understood by the jury to have meant something akin to: you must fix the penalty at death if you unanimously agree to the ultimate conclusion that either there is an aggravating circumstance and no mitigating circumstances or that the aggravating circumstance outweighs any mitigating circumstances." *Id.* This, of course, is distinguishable from a requirement that the penultimate conclusion as to the existence of a particular mitigating circumstance be the product of unanimous assent.

The *Zettlemoyer* instruction also included other language that confirmed its constitutional validity. For example, the segment of the instruction set forth above was repeated later in the charge, but in this second articulation the word "unanimously" was not employed. *See Frey*, 132 F.3d at 922 (highlighting this aspect of the *Zettlemoyer* charge). Moreover, in *Frey* the court found it significant that in this second repetition the *Zettlemoyer* charge "refer[ed] to aggravating

circumstances outweighing 'any mitigating circumstance you may find.'" 132 F.3d at 922. Upon considering these additional interpretive indicia in conjunction with the linguistic point concerning the phrase "agree and find," the *Zettlemoyer* court concluded that the instruction in that case did not create a reasonable likelihood that the jury believed that unanimity was a prerequisite for finding any particular mitigating circumstance.

The *Zettlemoyer* court further held that the verdict form in that case also did not create such an impression. The form read:

> (1) We the jury unanimously sentence the defendant to: ___ death ___ life imprisonment.
>
> (2) (To be used if the sentence is death)
> We the jury have found unanimously:
>
> _________ at least one aggravating circumstance and no mitigating circumstance. The aggravating circumstance is ______________.
>
> _________ the aggravating circumstance outweighs any mitigating circumstances. The aggravating circumstance is _________________________.

923 F.2d at 308. This sheet, the court held, "did not limit the mitigating circumstances that the jury could consider." 923 F.2d at 308. The court specifically focused upon the fact that "[alt]hough the jury was obliged to specify the aggravating circumstance it found, it had no such duty with respect to mitigating circumstances . . . ." *Id.* This "suggest[ed] that consideration of mitigating circumstances was broad and unrestricted," *id.*, and accordingly that the jury did not believe itself to be limited by the need for unanimity.

After thus considering both the verdict sheet and the instructions that accompanied it, the

Zettlemoyer court concluded that "[n]either the court nor the verdict sheet stated that the jury must unanimously find the existence of particular mitigating circumstances or that the jury could weigh only those mitigating circumstances which it found unanimously. Thus *Mills* is clearly distinguishable." 923 F.2d at 308.

The Third Circuit next revisited *Mills* in a meaningful way in *Frey*. At first glance, the operative facts in *Frey* appear to be virtually indistinguishable from those in *Zettlemoyer*. Indeed, the *Frey* court was candid in its recognition that "the verdict slip used in *Zettlemoyer* was substantially the same as the verdict slip used in the present case," 132 F.3d at 924, and that the instructions with which it was confronted were "similar in many respects to the charge at issue in *Zettlemoyer*." *Id.* at 922. Yet the court proceeded to make two points that are important from the perspective of the present determination. First, it reaffirmed that, in general terms, the impression that unanimity is required is generated by the combined effect of the jury charge and the verdict sheet. *Id.* (citing *Zettlemoyer*, 923 F.2d at 308 n.22). Accordingly, despite the similarities between the verdict forms, the *Frey* court held that "the discussion in *Zettlemoyer* regarding the propriety of the verdict slip is not controlling." 132 F.3d at 924. Second, and more importantly, the court held that although the *Frey* and *Zettlemoyer* charges were in many senses alike, the *Frey* instructions "differed significantly" from those evaluated in *Zettlemoyer*.

The court focused specifically on three aspects of the charge as creating the misimpression that all 12 jurors were obligated to agree as to the existence of any given mitigating circumstance. First, the *Frey* charge used the word "unanimously" "in close proximity to–within seven words of–the mitigating circumstances clause." 132 F.3d at 923 (quoting this portion of the charge: "if the jury unanimously finds at least one aggravating circumstance and

no mitigating circumstance . . ."). The effect of the temporal[86] proximity of these two concepts was the creation of "one sound bite" in which the requirement of unanimity and the enterprise of finding mitigating circumstances, to which that requirement does not rightfully apply, were joined. *Id.* Second, whereas the *Zettlemoyer* instruction employed the language "agree and find," the *Frey* charge omitted the words "agree and," leaving the complete phrase to read "unanimously finds . . . ." *See id.* Accordingly it could not be said, as it was in *Zettlemoyer*, that "unanimously" modified only "agree." Indeed, there was no defensible linguistic construction of the *Frey* instructions apart from the one ultimately endorsed by the court–the unanimity requirement pertained to the jury's task of determining the existence of mitigating circumstances. Third, other portions of the *Frey* instruction were more likely to heighten, rather than lessen, the panel's confusion. The court explained that "[u]nlike *Zettlemoyer*, where the court specifically instructed the jury that aggravating circumstances must be proven 'unanimously, beyond a reasonable doubt,' the trial court here did not stress that the different burdens that attach to aggravating and mitigating circumstances also entail different unanimity requirements." *Id.* at 923-24. This, the court indicated, likely cemented the jury's mistaken impression that it was obligated *not* to consider a mitigating circumstance that was found to exist by anything other than the entire panel.

Based on these important distinctions between the linguistically similar charges in

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[86]The term "temporal," as opposed to "spatial," is used here because the court's concern–as it was in *Frey*–is with the effect created by the instructions when spoken, not as written. *See Frey*, 132 F.3d at 923 (discussing the effect of the instructions on "the ear and . . . the mind"). Because the jury was presented with the charge auditorily, the degree to which the unanimity requirement and mitigating circumstances clause were presented in close proximity to each other is a matter of temporal, not spatial closeness.

Zettlemoyer and *Frey*, the *Frey* court determined–as the *Mills* court had–that although it could not say with absolute certainty that the jury operated under the impression that unanimity was required to find a given mitigating circumstance, the instruction "create[d] a risk that the death penalty was imposed in spite of 'factors which may call for a less severe penalty.'" 132 F.3d at 924-25 (quoting *Mills*, 486 U.S. at 376). This risk was sufficient to require the vacatur of Frey's death sentence under the pre-AEDPA standards applied by the court of appeals in that case. *See id.*

The Third Circuit's decision in *Banks v. Horn*, ___ F.3d ___, 2001 WL 1349369 (3d Cir. Oct. 31, 2001)–a post-AEDPA case, like the one at bar–marks the court of appeals's most recent application of *Mills* and virtually compels the result reached here. In *Banks* the court held that the Pennsylvania Supreme Court had applied *Mills* in an unreasonable fashion, and in so doing it again focused on both the jury instruction and the verdict sheet as sources of confusion over the unanimity requirement. It also addressed briefly the individual polling of the jurors as another potential source of confusion.

The *Banks* court commenced its analysis by examining the jury charge delivered by the trial court in that case, and by noting that the Pennsylvania Supreme Court did not undertake the sort of analysis of this instruction required by *Mills*. The state supreme court had held that "because the instruction 'mirrors the language found in the death penalty statute of our Sentencing Code [that] has previously been reviewed by this court and determined not to violate *Mills*,' Banks's claim was 'without merit.'" *Banks*, 2001 WL 1349369, at *13 (quoting *Commonwealth v. Banks*, 656 A.2d 467, 470 (Pa. 1995)). The problem with this approach was that the state supreme court failed to analyze the likely effect of the charge on the panel,

specifically "whether a reasonable jury could have concluded from the instruction that unanimity was required to find a mitigating circumstance." *Id.*[87] (citing *Mills*, 486 U.S. at 370).

The court of appeals undertook this appropriate inquiry by juxtaposing the instructions delivered by the trial court in *Banks* with those received by the jury in *Frey*. This comparison demonstrated that the relevant instructions in those cases were nearly verbatim replicas of each other, with any differences being purely semantic. Accordingly, the court had little difficulty concluding that the concern of jury confusion generated by the *Frey* charge was equally present in *Banks*, and thus that the result in the former dictated an analogous holding in the latter. *See id.* at *15 ("The instructions are in themselves ambiguous, allowing for a jury to infer that the requirement of unanimity applies both to aggravating and mitigating circumstances. There is no way that a juror would understand that a mitigating circumstance could be considered by less than all jurors."). Furthermore, while the trial court in *Banks* did differentiate between the "beyond a reasonable doubt" and "preponderance of the evidence" standards of proof that applied to aggravating and mitigating circumstances respectively, it notably failed to similarly distinguish between these contexts regarding the applicability of the unanimity requirement. As it had in *Frey*, *see* 132 F.3d at 923-24, the court of appeals found this aspect of the *Banks* charge to be

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[87]The Pennsylvania Supreme Court instead relied on its own precedents in concluding that Banks's sentencing proceedings comported with *Mills*. Yet as indicated by the Third Circuit, the court's task in conducting a federal habeas review is "not to ensure the consistency of the Pennsylvania Supreme Court's application of its law, but, rather, to assure proper application of the United States Supreme Court teachings." 2001 WL 1349369, at *12. Accordingly, the court is guided in this determination by *Mills* itself, and further by those interpretations of that holding that are binding on this court; namely, those of our court of appeals. *See, e.g.*, *Banks*, 2001 WL 1349369, at *14 ("While . . . *Frey* does not control our holding here, nonetheless our reasoning there regarding the *Mills* implications of a very similar jury charge is instructive and applicable.").

indicative of a *Mills* violation. *See* 2001 WL 1349369, at *16.

As for the verdict slip in *Banks*, the Third Circuit found that the Pennsylvania Supreme Court again failed to undertake the analysis required by *Mills*. Specifically, the state supreme court did not assess whether "the need for a unanimous finding of mitigating circumstances is one that 'a reasonable jury could have drawn from . . . the verdict form employed.'" 2001 WL 1349369, at *17 (quoting *Mills*, 486 U.S. at 375-76). After indicating the impropriety of the state supreme court's approach, the court of appeals undertook a de novo analysis of the verdict sheet and determined that "the form *does* suggest the need for unanimity." *Id.* at *17 (emphasis original).[88]

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[88]The verdict slip in *Banks* was analogous in structure to that at issue in *Mills*; both contained three sections, and in *Banks* each was presented on a separate page. The *Banks* form appeared as follows:

1. We the jury unanimously sentence the defendant in the above matter to
   ____ Death
   ____ Life Imprisonment

2. (To be completed if the Sentence is Death)
We the jury have found unanimously
   ____ At least one aggravating circumstance and no mitigating circumstances.

   The aggravated circumstance(s) (is) (are):
   1.____ In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.
   2.____ The defendant has a significant history of felony convictions involving the use or threat of violence to the person.
   3.____ The defendant has been convicted of another federal or state offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

   Or

In reaching this conclusion, the court focused primarily on the lead-in language to the second question. Because that question opened with the phrase "[w]e the jury have found unanimously," the court determined, "[b]y implication, everything that follow[ed] was found unanimously." 2001 WL 1349369, at *17. The court went on to explain that "[w]hat follow[ed was] a reference to both aggravating and to mitigating circumstances, with no additional language that would imply that there is a different standard for aggravating circumstances than there is for mitigating circumstances." *Id.* The court specifically noted the absence of affirmative language indicating that a mitigating circumstance could be found if only one juror believed it to exist. *See id.* at *18. These aspects of the verdict form, coupled with the jury

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____ One or more aggravating circumstances which outweigh any mitigating circumstance or circumstances.

The aggravated circumstance(s) (is) (are):
1.____ In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.
2.____ The defendant has a significant history of felony convictions involving the use or threat of violence to the person
3.____ The defendant has been convicted of another federal or state offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

The mitigating circumstance(s) (is) (are):
1.____ The defendant was under the influence of extreme mental or emotional disturbance.
2.____ The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
3.____ Any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense.

Banks, 2001 WL 1349369, at *17 (emphasis added).

charge, created a sufficient likelihood that the jury was confused as to the need for unanimity in the context of mitigating circumstances so as to render the sentencing determination constitutionally defective under *Mills*.[89] *See id.*

This Legal Background as Applied to the Instant Matter

As in *Banks*, the Pennsylvania Supreme Court failed in this case to "really apply[] the teachings of *Mills*." *Banks*, 2001 WL 1349369, at *12. Indeed, the deficiency in the state supreme court's analysis of petitioner's *Mills* claim was more significant than that which marked its consideration in *Banks*. Whereas in *Banks* the court at least addressed the constitutional implications of the jury charge, it did not even address this issue in petitioner's case. Instead, the court proceeded as follows: it first indicated that the *Mills* claim was before it, and further recognized that in *Mills* the unconstitutional confusion was created by both the jury instructions and the verdict sheet. *Abu-Jamal*, 720 A.2d at 119. However, it then proceeded to evaluate only the verdict sheet, stating that "the crux of Appellant's argument on this point is that the structure of the form was such that the jury would be led to believe that unanimity was required in order to find, and thus consider, a mitigating circumstance."[90] *Id.* This repeats, albeit in starker form, the

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[89]As indicated above, the court also addressed the effect of the jury poll that had been conducted in *Banks*. Specifically, it concluded its analysis of Banks's sentencing determination by noting that although the Pennsylvania Supreme Court had devoted a majority of its opinion in *Banks* to the issue fo the effect of the jury poll, this endeavor neither "add[ed] to or reduce[d] the confusion as to the *Mills* problem . . . ." *Banks*, 2001 WL 1349369, at *18.

[90]As indicated *supra*, the Pennsylvania Supreme Court was not incorrect when it indicated that the crux of petitioner's *Mills* claim is that the verdict form was misleading. However, by asserting that "[t]he court's instructions . . . would have compounded that misunderstanding," P1 ¶ 602, petitioner has placed in issue the effect of both the verdict sheet and the instructions in this case. The state supreme court accordingly was incorrect insofar as it determined that the effect of the jury charge was not raised at all by petitioner.

analytical error identified in *Banks*, in which the Third Circuit indicated that "[p]roper application of *Mills* requires at the outset that the reviewing court examine the entire jury instructions," and pose the "'critical question'" of whether the charge created a reasonable likelihood that the jury applied the instruction in a way that prevented the consideration of constitutionally relevant evidence. *Banks*, 2001 WL 1349369, at *13 (quoting *Mills*, 486 U.S. at 370); *see also Boyde*, 494 U.S. at 380. Clearly the failure to even evaluate the possibility that the jury charge confused the jury as to the existence of a unanimity requirement is a paradigmatic example of the "undert[aking of] a different inquiry from that required under *Mills*." *Id.* at *17.

Additionally, the Pennsylvania Supreme Court never mentioned, much less did it apply, the *Boyde* standard for evaluating claims pursuant to *Mills v. Maryland*. *See Abu-Jamal*, 720 A.2d at 119. Although the state supreme court did articulate the standard set forth in *Mills* itself–namely whether "the jury instructions, together with the verdict form, created a substantial probability that reasonable jurors may have believed that they were barred from considering mitigating evidence unless all twelve jurors agreed on the existence of any given circumstance," *id.*–this is significantly different from the standard articulated in *Boyde*. *See Frey*, 132 F.3d at 921 (distinguishing between the *Mills* and *Boyde* standards).

The jury charge in petitioner's case featured language that was equally, if not more, problematic than those at issue in *Banks* and *Frey*. The instruction began:

> Members of the jury, you must now decide whether the defendant is to be sentenced to death or life imprisonment. The sentence will depend upon your findings concerning aggravating and mitigating circumstances. The crimes code provides that a verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

N.T. 7/3/82 at 90. The above portion of the charge is literally identical to that delivered in *Frey*, and functionally indistinguishable from the equivalent portion of the *Banks* instruction.

The court next discussed the status of a Philadelphia police officer as a "peace officer" within the meaning of aggravating circumstance "A," pertaining to the killing of a "fireman, peace officer or public servant . . . who was killed in the performance of his duties." First Degree Murder Penalty Determination Sheet, *Commonwealth v. Abu-Jamal*, No. 1358 Jan. Term, 1982 (Phila. Ct. Com. Pls. July 3, 1982) at 2. It then continued:

> The Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. The defendant has the burden of proving mitigating circumstances, but only by a preponderance of the evidence. This is a lesser burden of proof than beyond a reasonable doubt. A preponderance of the evidence exists where one side is more believable than the other side. All the evidence from both sides, including the evidence you heard earlier during the trial-in-chief as to aggravating or mitigating circumstances is important and proper for you to consider. You should not decide out of any feelings of vengeance or sympathy or bias towards the defendant.
>
> Now, the verdict is for you, members of the jury. Remember and consider all of the evidence giving it the weight to which it is entitled. Remember that you are not merely recommending a punishment. The verdict you return will actually fix the punishment at death or life imprisonment. Remember again that your verdict must be unanimous. It cannot be reached by a majority vote or by any percentage. It must be the verdict of each and every one of you.
>
> Remember that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstances. Or, if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases, your verdict must be a sentence of life imprisonment.

N.T. 7/3/82 at 91-92.

The court then concluded its charge by informing the jury that its verdict would be recorded on a verdict sheet, and by reading the sheet aloud. In explaining the procedure properly

followed in filling out the slip, the court indicated that in the event the panel were to find (as it did not) the existence of at least one aggravating circumstance and no mitigating circumstance, it would find on page 2 of the form "all the aggravating circumstances. . . . Whichever one of these that you find, you put an "X" or check mark there and then put it in the front. Don't spell it out, the whole thing, just what letter you might have found." *Id.* at 94. Were the jury to find instead one or more aggravating circumstances which outweigh any existent mitigating circumstances (as it did), the court explained, it should similarly

> indicate which [aggravating circumstances] they were and put it on the front here, like a small number or (A) or (B) or (C) or whatever one you might find.
>
> And then, underneath that, [the form states]: "The mitigating circumstances(s) is/are–"
>
> And those mitigating circumstances appear on the third page here. They run from a little (A) to a little letter (H). And whichever ones you find there, you will put an "X" mark or check mark and then, put it on the front here at the bottom, which says mitigating circumstances. And you will notice that on the third or last page, it has a spot for each and every one of you to sign his or her name on here as jurors and date it down on the bottom, the date that you reach the verdict, and return it to the Court with this verdict report.

Id. at 94-95.

There are numerous aspects of this charge that created a reasonable likelihood that the jury believed that it was obligated to consider only mitigating circumstances that were found to exist by a unanimous panel. First, unlike the *Zettlemoyer* instruction, nowhere in the *Jamal* charge are the words "agree and" found between the words "unanimously" and "find." Instead, the phrase "unanimously finds" was repeated four times by the trial court in this case. *Compare, e.g.*, *Zettlemoyer*, 923 F.3d at 307-08 (restating the instruction that "you are obligated by your oath of office to fix the penalty at death if you *unanimously agree and find* beyond a reasonable

doubt that there is an aggravating circumstances (sic) and either no mitigating circumstance or that the aggravating circumstance outweighs any mitigating circumstances") (emphasis added) *with* N.T. 7/3/82 at 90 ("The crimes code provides that a verdict must be a sentence of death if the jury *unanimously finds* at least one aggravating circumstance and no mitigating circumstance, or if the jury *unanimously finds* one or more aggravating circumstances which outweigh any mitigating circumstances.") (emphasis added). Accordingly, the only linguistically plausible conclusion is that the word "unanimously" modified "find" in the *Jamal* instructions. As indicated above, when confronted with precisely this language the *Banks* and *Frey* courts found such to be telling evidence of a *Mills* violation. *See Banks*, 2001 WL 1349369, at *15 (adopting by reference the discussion of this language contained in *Frey*); *Frey*, 132 F.3d at 923.

Second, in *Zettlemoyer*, the instruction regarding the two conditions under which the death penalty could be imposed (i.e. were the jury to find an aggravating circumstance and no mitigating circumstance, or that the existent aggravating circumstances outweighed the mitigating circumstances) was repeated twice, the first time articulating the unanimity requirement and the second time with this requirement omitted. The court of appeals found that this second, error-free articulation lessened the likelihood of juror confusion. In *Jamal*, by contrast, while this instruction was repeated, its second articulation employed the unanimity language just as the first had. *See* N.T. 7/3/82 at 92 ("Remember that your verdict must be a sentence of death if you *unanimously find* at least one aggravating circumstance and no mitigating circumstances. Or, if you *unanimously find* one or more aggravating circumstances which outweigh any mitigating circumstances.") (emphasis added). Rather than alleviating the confusing effect of the first articulation, then, this second instruction reinforced it.

Third, because the portion of the *Jamal* charge in which the unanimity requirement was mentioned in close proximity to the mitigating circumstances clause was identical to its counterparts in *Frey* and *Banks*, the "sound bite" created was precisely the same. *See* N.T. 7/3/82 at 90 (" . . . if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance . . ."); *Banks* , 2001 WL 1349369, at *14 (" . . . if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstances . . ."); *Frey*, 132 F.3d at 923 (". . . if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance . . ."). Indeed, as in *Banks* and *Frey*, the *Jamal* instructions featured the articulation of the unanimity requirement within seven words of the mitigating circumstances clause. Notably, the *Banks* court's reaffirmation of the concern expressed in *Frey* regarding the placement of the mitigating circumstances clause in close proximity to language indicating the need for unanimity reinforces that such constitutes strong evidence of a *Mills* violation. *See* 2001 WL 1349369, at *14-15. Moreover, given the subsequent repetition of this language in the charge in this case, *see* N.T. 7/3/82 at 92, petitioner's jury, unlike the panel in *Frey*, was subjected to this sound bite twice.

Fourth, while the charge in this case distinguished between the burdens of proof associated with aggravating and mitigating circumstances, as in *Banks* the court did not indicate that different unanimity requirements also apply to these different types of circumstances. *See* 2001 WL 1349369, at *16 ("A reasonable juror could readily infer from the fact that the distinctions between the burden of proof were explained, but no mention was made of a distinction between a requirement of unanimity for a finding of aggravating circumstances and the requirement for mitigating circumstances, that the same requirement of unanimity applied.");

see also Frey, 132 F.3d at 924 (noting that the jury charge in that case did not "stress that the different burdens . . . also entail different unanimity requirements."). In *Zettlemoyer*, by contrast, the court indicated to the jury that to find an aggravating circumstance, it had to do so "unanimously, beyond a reasonable doubt." It made no equivalent statement regarding mitigating circumstances. No such discrepancy was contained within the *Jamal* charge, and thus, as indicated in *Frey*, "[i]t is what is *not* said here that is significant." *Id.* at 923.

Indeed, in petitioner's case the jury's tasks of finding aggravating and mitigating circumstances generally were presented as being equivalent, the burden of proof distinction aside. This is further evidenced by the fact that, in explaining the verdict form, the court stated:

> Page 2 lists all the aggravating circumstances. They go from small letter (A) to small letter (J). Whichever one of these that you find, you put an "X" or check mark there and then, put it in the front. Don't spell it out, the whole thing, just what letter you might have found.
>
> . . .
>
> [The] mitigating circumstances appear on the third page here. They run from a little (A) to a little letter (H). And whichever ones you find there, you will put an "X" mark or check mark and then, put it on the front here at the bottom, which says mitigating circumstances.

N.T. 7/3/82 at 94-95. As contrasted with the differential characterization of the jury's responsibilities in *Zettlemoyer*, the like treatment afforded the jury's tasks in this case increases rather than decreases the likelihood that the jury believed the unanimity requirement that applied to aggravating circumstances to be equally applicable in the context of mitigating circumstances.

Fifth, the need for unanimity in petitioner's case was reinforced by the following instruction: "Remember again that your verdict must be unanimous. It cannot be reached by a majority vote or by any percentage. It must be the verdict of each and every one of you." N.T.

7/3/82 at 92. This language specifically was identified in *Banks* as creating "'a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.'" 2001 WL 1349369, at *16 (quoting *Boyde*, 494 U.S. at 380). Moreover, this statement preceded immediately the second repetition of the above-described sound bite in which the unanimity requirement was articulated within seven words of the mitigating circumstances clause. This further indicates that there is a reasonable likelihood that the jury believed that this specific articulation of the unanimity requirement pertained to its task of finding mitigating circumstances.

Sixth, as indicated above, the charge in petitioner's case ended with the following language:

> [The] mitigating circumstances appear on the third page here. They run from a little (A) to a little letter (H). *And whichever ones you find there, you will put an "X" mark or check mark and then, put it on the front here at the bottom, which says mitigating circumstances. And you will notice that on the third or last page, it has a spot for each and every one of you to sign his or her name on here as jurors* and date it down on the bottom, the date that you reach the verdict, and return it to the Court with this verdict report.

N.T. 7/3/82 at 95 (emphasis added). This aspect of the charge, like some of those discussed previously, places in the closest temporal proximity the task of finding the existence of mitigating circumstances and the requirement that each juror indicate his or her agreement with the findings of the jury. The Pennsylvania Supreme Court addressed the placement of the signature lines at the end of the third page of the verdict sheet, on which the mitigating circumstances were listed, and held that this was "of no moment since those signature lines naturally appear at the conclusion of the form and have no explicit correlation to the checklist of the mitigating circumstances." *Abu-Jamal*, 720 A.2d at 119. Whether or not this is so, the state

supreme court's reasoning addresses the verdict form itself, not the court's explanation of that form. I express no opinion regarding the impression created by the appearance of 12 separate signature lines on the same page as the jury is required to indicate which, if any, mitigating circumstances it finds to exist. However, when articulated verbally in the court's charge, the proximity of these aspects of the verdict sheet do create at least an implicit correlation of the sort to which the state supreme court referred. Indeed, this aspect of the instructions indicates that there is a reasonable likelihood that the jury believed that it was precluded from considering mitigating circumstances that were not unanimously found to exist.

Seventh, the instruction in petitioner's case included no affirmative language indicating that a given mitigating circumstance could be considered by the panel even if it was not unanimously found to exist. Like the preceding six factors, the absence of such language also is indicative of a *Mills* violation. *See Frey*, 132 F.3d at 923 n.5; *see also Banks*, 2001 WL 1349369, at *18 (so holding in the context of the verdict form).

As for the effect of the verdict sheet in petitioner's case, such also was held by the Pennsylvania Supreme Court not to violate *Mills*.[91] Yet there is no need for a novel, in-depth

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[91]In rejecting petitioner's argument regarding the verdict slip, the Pennsylvania Supreme Court essentially described the form, indicated the lack of printed instructions on its second and third pages, dismissed petitioner's contention regarding the presence of the 12 signature lines on the same page as the mitigating circumstances, and concluded that "[a]s such," no *Mills* violation was present. However, the court never addressed the effect of the lead-in language. Moreover, it never really engaged in any sort of detailed analysis of the likely perception by the jury of its task, as shaped by the verdict form. Accordingly, this analysis was inconsistent with that mandated by *Mills*. Because, contrary to the court's ultimate determination, application of both the *Boyde* standard and the substantive holdings in *Mills*, *Banks* and *Frey* would have yielded the conclusion that the verdict form did create a reasonable likelihood that the jury concluded that unanimity was required to find a particular mitigating circumstance, the state supreme court applied *Mills* unreasonably. *See Matteo*, 171 F.3d at 890.

analysis of this form because, in a determinative respect, the slip used was identical to that employed in *Banks*.[92] In both cases, the form first required the jury to indicate whether the punishment imposed was death or life imprisonment. If the space indicating death was marked, the jury was directed to proceed to the second section of the form where it was to indicate which aggravating and mitigating circumstances it had found to exist. Upon examining this section of the form, however, the *Banks* court found "it only reasonable to conclude that the form itself [was] at least confusing, and more likely suggestive, regarding the need for unanimity as to mitigating circumstances." 2001 WL 1349369, at *17. This determination was a product of the lead-in language to this section, which read: "[w]e the jury have found unanimously." *Banks*, 2001 WL 1349369, at *17; *see also* First Degree Murder Penalty Determination Sheet, *Commonwealth v. Abu-Jamal*, No. 1358 Jan. Term, 1982 (Phila Ct. Com. Pls. July 3, 1982) at 1 (featuring this same language). Specifically, the *Banks* court stated that because this unanimity language led into "the overarching second question . . . [b]y implication everything that follows was found unanimously. What follows is a reference both to aggravating and to mitigating

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[92]In both cases, as well as in *Mills*, the verdict slip was comprised of three sections. In petitioner's case, as in *Banks*, each section occupied a different page. On the first page were two questions. The first was whether the punishment was to be death or life imprisonment, and the second, to be answered only in the event of a death sentence, queried whether this sentence resulted from a finding of at least one aggravating circumstance and no mitigating circumstance, or a finding that the existent aggravating circumstances outweighed the existent mitigating circumstances. The second section, on page 2, was simply a list of various aggravating circumstances, with a space next to each which was to be checked by the jury in the event that that particular circumstance was found to exist. The third section, on page 3, was the same as the second section, except that the listed circumstances were mitigating, and underneath the list were twelve signature lines and a date line, to be filled in upon the completion of the sentencing determination.

Notably, the sheet differed significantly from that used in *Zettlemoyer*, where the verdict form lack a space in which the jury was to specify the mitigating circumstance(s) it found to exist.

circumstances, with no additional language that would imply that there is a different standard for aggravating circumstances than there is for mitigating circumstances." 2001 WL 1349369, at *17. Accordingly, it concluded that "the structure and form of the verdict slip itself r[an] afoul of the dictates of *Mills*." 2001 WL 1349369, at *18. This analysis applies with equal force to the verdict form in petitioner's case, as no curative language of the sort described in *Banks* is found in the *Jamal* charge either. Accordingly, the incompatibility between the verdict sheet and the mandates of *Mills* that was found to exist in *Banks* is equally present here.[93]

To conclude, the jury charge and verdict form in this case created a reasonable likelihood that the jury believed that it was precluded from considering a mitigating circumstance that had not been found unanimously to exist. In the terms used by the *Banks* court, it is the case both that "the instructions are in themselves ambiguous, allowing for a jury to infer that the requirement of unanimity applies both to aggravating and mitigating circumstances," 2001 WL 1349369, at *16 and that "the structure and form of the verdict slip itself runs afoul of the dictates of *Mills*." *Id.* at *18. Yet the Pennsylvania Supreme Court failed even to address the *Boyde* standard or the consequence of the jury instructions in this case, much less to reach a reasonable conclusion regarding the effect of the *Jamal* charge, and compounded this error by unreasonably failing to perceive the probable impact of the verdict form on the jury's impression regarding the need for unanimity. Accordingly, when considered in light of the *Boyde* standard, *Mills*, and the interpretations of *Mills* set forth in *Frey* and *Banks*, this court is compelled to

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[93]As in *Banks*, the jurors were polled individually following the announcement of the verdict in this case. *See* N.T. 7/3/82 at 98-101. I find that this procedure was unremarkable, and in no significant sense different from the polling that transpired in *Banks*. Accordingly, I conclude that the effect of the jury poll on the likelihood for juror confusion was negligible, as the *Banks* court found it to have been. *See* 2001 WL 1349369, at *18.

conclude that the decision of the Pennsylvania Supreme Court in this case, "evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing [United States] Supreme Court precedent." *Matteo*, 171 F.3d at 890. Its decision was an objectively unreasonable application of federal law. By contrast, a reasonable application of this precedent necessarily yields the conclusion that the jury charge and verdict form produced a "reasonable likelihood that the jury has applied the . . . instruction [and form] in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380. Accordingly, the petition will be granted as to this claim.

D. Unreasonable Determination of Facts in Light of Evidence Presented

Petitioner does not identify with specificity any findings of fact regarding this issue which are unreasonable in light of the evidence presented.

E. Evidentiary Hearing

Although petitioner argues that an evidentiary hearing is mandatory on this claim, this request is moot given the claim's disposition.[94]

[94]Petitioner's claims 26 through 28 will not be evaluated because they are mooted by the disposition of his 25th claim.

III.29 DENIAL OF DUE PROCESS IN UNFAIR STATE POST-CONVICTION HEARINGS IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE 5TH AND 14TH AMENDMENTS.

A. Allegations in Support of Claim

Petitioner alleges that several factors indicate that Judge Sabo was biased against him, and that this prejudice resulted in deprivations of petitioner's right to due process as guaranteed by the Fifth and Fourteenth Amendments. He contends initially that Judge Sabo heard petitioner's PCRA petition after denying a motion to recuse himself. He also avers that the PCRA court was biased because he was a former deputy sheriff, a member of the fraternal order of police ("FOP"), and volunteered to sit on homicide cases. Petitioner adds that twenty-nine of thirty-two defendants sentenced to death by Judge Sabo were non-white. Additionally, he claims that Judge Sabo hurried the PCRA proceedings, quashed petitioner's subpoenas, blocked petitioner's evidence, and threatened petitioner's attorneys. Petitioner further asserts that the PCRA court's "running, bitter controversy" with petitioner in prior proceedings established grounds for recusal. Finally, petitioner also alleges that Justice Castille of the Supreme Court of Pennsylvania was biased because he had served as opposing counsel of record in petitioner's direct appeal from conviction and sentence and because he worked in the prosecutor's office at the time of trial. *See* P1 ¶¶ 629-77.

B. Violation of Federal Constitution, Law or Treaty

Petitioner alleges that he was deprived of his rights to due process, arguing that due process requires both fairness and the appearance of impartiality. *See* P18 at 84-85 (citing *Taylor v. Hayes*, 418 U.S. 488, 501 (1974); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *In re Murchison*, 349 U.S. 133, 136 (1955) (citing *Turney v. Ohio*, 273 U.S. 510, 532 (1927))). Moreover, petitioner asserts that due process affords him a meaningful opportunity to be heard. *See* P18 at

80 (citing *Matthews v. Eldridge*, 424 U.S. 319 (1976); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

Respondents answer that petitioner essentially seeks disqualification of Judge Sabo, and therefore that the appropriate standard for evaluating petitioner's claim is found in 28 U.S.C. § 4559(a) [sic.].[95] *See* R24 at 78. Respondents suggest that courts have given this statute a strict interpretation which requires disqualification only where deep-seated favoritism or antagonism is displayed which would make fair judgment impossible. *See id.* at 78-79 (citing *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

C. "Contrary to" or "Unreasonable Application of" Clearly Established Federal Law

The Supreme Court of Pennsylvania considered this claim on PCRA appeal and found it to be without merit. *See PCRA Appeal Op.* at 89-90. Indeed, the state supreme court thoroughly evaluated every aspect of the trial court's actions raised by petitioner. Regarding Judge Sabo's alleged bias, the court held that although "the judge's duty to maintain the judicial decorum of the proceedings was, at times, met with great resistance [by petitioner,] . . . we cannot conclude that any of Judge Sabo's intemperate remarks were unjustified or indiscriminate nor did they evidence a settled bias against [petitioner]." *See id.* The court also considered and rejected petitioner's contention that Judge Sabo's antipathy toward him during the PCRA proceedings was evidenced by the description of such in "several newspaper and magazine articles," *id.* at 89, holding that "[t]he opinions of a handful of journalists do not . . . persuade us that Judge Sabo's decision not to recuse himself was in error." *Id.* at 90. Regarding the allegation that Judge

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[95]It is clear that the statute to which respondents intend to refer is 28 U.S.C. § 455(a).

Sabo's rulings were partial to the prosecution, the court noted that

> many of the adverse rulings complained of were necessitated by the defense's repeated attempts to secure evidence which was only "believed" to exist or by its attempts to present witnesses who were clearly only peripherally, if at all, relevant to the scope of the PCRA proceedings or involved the court's denial of proffered testimony based upon the defenses's failure to establish a proper foundation for the admission thereof.

Id.

The court additionally found that the PCRA court's denial of defense discovery requests was proper because these requests were overbroad, typically concerning information petitioner merely "believed" to exist. *Id.* at 91. Finally, the court considered petitioner's assertion that "the judge maintained an adversarial relationship with [petitioner] during the actual trial in 1982, and that the judge's prior membership in the FOP presupposes his allegiance to the prosecution in this matter." *Id.* As for the nature of the relationship between petitioner and the trial court, the state supreme court held that "[o]ur review of the record evidences, first, that during trial in 1982, Judge Sabo displayed no such adversarial position towards [petitioner]. Rather, we find evidence therein that quite the contrary was true; that it was [petitioner] who, from the very beginning of the trial proceedings, openly criticized Judge Sabo and repeatedly asserted that he would not abide by the court's rulings." *Id.* The court also dismissed petitioner's claim relating to Judge Sabo's former affiliation with the FOP, stating that "[a] jurist's former affiliation, alone, is not grounds for disqualification." *Id.* (citing *Commonwealth v. Comer*, 716 A.2d 593 (Pa. 1998)). Consequently, the court determined that none of the PCRA court's rulings were improper. *See id.*

On its face, petitioner's claim raises several assertions of error in his post-conviction proceedings. First, I must decide whether errors that allegedly occurred during state post-

conviction proceedings are addressable through federal habeas corpus. Neither the Supreme Court nor the Third Circuit has addressed this issue. However, seven circuits (all except one that have considered the question) have held that such errors are not cognizable in habeas proceedings.[96] Moreover, district courts in the Second, Third and Seventh Circuits have followed this majority rule.[97] The Eighth Circuit has articulated adeptly the reasoning behind this principle:

> Adequacy or availability of the state post-conviction procedures is material here only in the context of exhaustion of state remedies of federally protected rights and not to review alleged trial errors. Errors or defects in the state post-conviction proceedings do not,

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[96]*See, e.g.*, *Morris v. Cain*, 186 F.3d 581, 585 n. 6 (5th Cir. 1999) ("our circuit precedent makes it abundantly clear that errors in state post-conviction proceedings will not, in and of themselves, entitle a petitioner to federal habeas relief"); *Williams-Bey v. Trickey*, 894 F.2d 314, 317 (8th Cir.) ("Section 2254 only authorizes federal courts to review the constitutionality of a state criminal conviction, not infirmities in a state post-conviction relief proceeding."), *cert. denied*, 495 U.S. 936 (1990); *Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir.), *cert. denied sub nom., Franzen v. Deeds*, 493 U.S. 1012 (1989); *Hopkinson v. Shillinger,* 866 F.2d 1185, 1219-20 (10th Cir. 1989), *cert. denied,* 497 U.S. 1010 (1990); *Bryant v. Maryland*, 848 F.2d 492, 493 (4th Cir. 1988) ("claims of error occurring in a state post-conviction proceeding cannot serve as a basis for federal habeas corpus relief"); *Spradley v. Dugger, 825 F.2d 1566, 1568 (11th Cir. 1987); Kirby v. Dutton*, 794 F.2d 245, 247-48 (6th Cir. 1986). *But see Dickerson v. Walsh*, 750 F.2d 150, 153-54 (1st Cir. 1984) (finding that claims of error during post-conviction proceedings are properly the subject of habeas review).

[97]*See, e.g.*, *Franza v. Stinson*, 58 F. Supp.2d 124, 152 (S.D.N.Y. 1999) ("While the Second Circuit has not yet addressed this issue, district court decisions within the Circuit have followed the majority rule.") (citations omitted); *Brockenbrough v. Snyder*, 890 F. Supp. 342, 344 (D. Del. 1995) ("Allegations of error in state post-conviction proceedings cannot serve as the basis for federal habeas relief.") (citation omitted); *Wickliffe v. Farley*, 809 F. Supp. 618, 624-25 (N.D. Ind. 1992) (finding that although the Seventh Circuit has not addressed the issue, a number of other circuits have and "[i]t is apparent that error in collateral state proceedings will not be the basis of habeas relief.") (citations omitted). *But see Cornish v. Vaughn*, 825 F. Supp. 732, 733 (E.D. Pa. 1993) (declining to agree with majority rule that bars habeas claims alleging ineffective assistance of counsel at post-conviction hearings); *Forrest v. Fulcomer*, CIV. A. No. 89-7377, 1990 WL 9370, at * 1-2 (E.D. Pa. Feb. 1, 1990) (finding that habeas relief is not restricted to errors bearing directly on the validity of the underlying state conviction).

> ipso facto, render a prisoner's detention unlawful or raise constitutional questions cognizable in habeas corpus proceedings. . . . Even where there may be some error in state post-conviction proceedings, this would not entitle appellant to federal habeas corpus relief since appellant's claim here represents an attack on a proceeding collateral to detention of appellant and not on the detention itself . . . .

Williams v. Missouri, 640 F.2d 140, 143-44 (8th Cir. 1991), *cert. denied* 451 U.S. 990 (1981). I find the discussion in *Williams* to be compelling, and I accordingly adopt the reasoning of the majority and hold that a viable habeas claim cannot be predicated on petitioner's allegation of error in his PCRA hearing. Accordingly, the state courts' denial of this claim was not contrary to or an unreasonable application of federal law.

D. Unreasonable Determination of Facts in Light of Evidence Presented

Petitioner alleges that Judge Sabo provoked petitioner at trial by removing him as *pro se* counsel and reinstating Jackson, to whose representation petitioner objected on the ground that he was unprepared. *See* P18 at 82-83. Petitioner also claims that Judge Sabo taunted him at trial. *See* P18 at 83. He admits, however, that he berated Judge Sabo at the penalty phase and at sentencing, *see* P18 at 84, but claims that this fact demonstrates that Judge Sabo should have recused himself. *See* P18 at 84-85. Petitioner further notes that Judge Sabo has been reversed more than any other judge in the country, that he has been criticized widely in the popular and academic press by both prosecutors and defenders, that he has been rated "unqualified" by some local attorneys, and that he was a long-standing member of the FOP. *See* P18 at 85-88. Petitioner asserts that in the PCRA proceedings, Judge Sabo admitted to being biased. *See* P18 at 89. In fact, petitioner claims that prior to the conclusion of the hearing, Judge Sabo announced that there would be federal appeals, thus indicating that the result was preordained. *See* P18 at

89-90. It is further alleged that Judge Sabo quashed subpoenas and excluded evidentiary proffers from the record so that his findings could not be challenged, that he established an impossibly accelerated schedule for PCRA hearings until the dates were changed on interlocutory appeal to the Supreme Court of Pennsylvania, that he responded to press criticism by suggesting that petitioner had neither law nor fact on his side and thus had to "scream like hell," that he barred impeachment of Chobert by prior statement, and that he incarcerated and fined petitioner's PCRA counsel. *See* P18 at 90-95. Petitioner claims that insofar as the state courts' factual determinations conflict with these assertions, those determinations uniformly were unreasonable. *See id.* at 100.

For reasons already stated, petitioner may not now raise post-conviction proceeding errors. Accordingly, I decline to review the referenced determinations of fact. I note, however, that I have already considered many of these state court fact findings and determined them to be reasonable, or, if unreasonable, not the basis of the state court's decision.

E. Evidentiary Hearing

Petitioner submits that an evidentiary hearing is discretionary on this claim. *See* P27 at 1. In so doing, he implicitly concedes a developed factual basis in the state court. *See* P14 at 10-13. His burden, then, is to provide clear and convincing evidence that the state court's factual determination is erroneous. He makes no attempt to so define the evidence he would muster. Nor does petitioner characterize his evidence as newly discovered clear and convincing proof of his innocence, as required under § 2254(e)(2). In any event, because I already have determined that errors in post-conviction proceedings are not cognizable on habeas review, petitioner's request for an evidentiary hearing on this claim will be denied.

CONCLUSION

Because the jury instructions and verdict form employed during the penalty phase of petitioner's case did not comport with the requirements delineated in *Mills v. Maryland* and *Boyde v. California*, Jamal's petition for a writ of habeas corpus will be granted as to claim 25. Those cases constitute clearly established federal law as determined by the Supreme Court of the United States. Particularly when analyzed in the context of *Frey* and *Banks*, decisions of the United States Court of Appeals for the Third Circuit, the decision of the Supreme Court of Pennsylvania approving the jury instructions and verdict sheet in this case involved an unreasonable application of federal law. The charge and verdict form created a reasonable likelihood that the jury believed it was precluded from considering any mitigating circumstance that had not been found unanimously to exist. Accordingly, the petition must be granted as to the sentencing phase of the trial. The Commonwealth of Pennsylvania may conduct a new sentencing hearing in a manner consistent with this opinion within 180 days of the Order accompanying this memorandum, during which period the execution of the writ of habeas corpus will be stayed, or shall sentence petitioner to life imprisonment.

The petition will be denied, however, as to the balance of the claims asserted wherein petitioner seeks a new trial or alleges constitutional defects in the state post-conviction proceedings. The court finds that petitioner has failed to make a substantial showing of the denial of a constitutional right in connection with those claims except as to claim 16. Accordingly, a certificate of appealability will be granted to petitioner as to claim 16 only.

While the court's holding regarding claim 25 similarly would warrant the grant of a certificate of appealability to respondents, such is unnecessary, as the court's opinion as to this

claim is automatically appealable by respondents. *See* 28 U.S.C. § 2253(a).

An appropriate order follows.

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

MUMIA ABU-JAMAL, Petitioner, v. MARTIN HORN, Commissioner, Pennsylvania Department of Corrections, ET AL., Respondents.	: : : : : : : :	CIVIL ACTION NO. 99-5089

Order

And now, this ____ day of December, 2001, upon consideration of petitioner's petition for habeas corpus relief (Doc. #1), petitioner's memorandum of law in support thereof (Doc. # 14), respondents' response thereto (Doc. # 22), respondents' memorandum of law in support thereof (Doc. # 23), petitioner's motion and memorandum to review for reasonableness the state court's findings of fact pursuant to 28 U.S.C. § 2254(d)(2) and the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution (Doc. # 18), respondents' memorandum in response thereto (Doc. # 24), petitioner's motion for an evidentiary hearing and memorandum in support thereof (Doc. # 27), respondents' memorandum in opposition thereto (Doc. #30), petitioner's supplemental memorandum of law (Doc. # 37) and respondents' response thereto (Doc. # 38), it is hereby ORDERED AND DECREED that:

1. Petitioner's Petition for Habeas Corpus Relief is DENIED except as to claim 25, as to which the petition is GRANTED;

2. The execution of the writ of habeas corpus is STAYED for 180 days from the date of this order, during which period the Commonwealth of Pennsylvania may conduct a new sentencing hearing in a manner consistent with this opinion;

3. After 180 days, should the Commonwealth of Pennsylvania not have conducted a new sentencing hearing, the writ shall issue and the Commonwealth shall sentence

petitioner to life imprisonment; and

4. A certificate of appealability is GRANTED to petitioner as to claim 16.

If either petitioner or respondents file an appeal to the United States Court of Appeals for the Third Circuit, the entry of this order will be stayed pursuant to E.D. Pa. Local R. 9.4(12) pending the disposition of that appeal.

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William H. Yohn, Jr., Judge