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

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| SAHARRIS ROLLINS, | : | CIVIL ACTION |
| | : | |
| Petitioner, | : | 00-1288 |
| | : | |
| v. | : | |
| | : | |
| MARTIN HORN, Commissioner, Pennsylvania Department of Corrections, et al., | : | |
| | : | |
| Respondents. | : | |

**MEMORANDUM AND ORDER**

**JOYNER, J.** **July 26, 2005**

This case has been brought before this Court by Petition of Saharris Rollins for Writ of Habeas Corpus. For the reasons which follow, the Petition shall be partially granted and leave given to the Commonwealth to conduct a new sentencing hearing.

## Facts and Procedural History

On March 5, 1987, Petitioner Saharris Rollins was convicted by a Philadelphia County Court of Common Pleas jury of murder in the first degree, robbery, and possession of an instrument of crime.[1] The jury sentenced Rollins to death on March 6, 1987,

[1] As summarized by the Pennsylvania Supreme Court's opinions disposing of Rollins' direct appeal of his conviction and sentence and collateral appeal under the Pennsylvania Post Conviction Relief Act, the evidence at trial supported the following description of Rollins' crimes:

Rollins and a companion arrived at the home of Violeta Cintron at approximately one o'clock in the morning on January 22, 1986. Rollins had come to Violeta's house looking her husband, Jose Carrasquillo, with whom Rollins had conducted drug deals in the past. Rollins requested some cocaine from Violeta. When Violeta was about to hand over the cocaine, however, Rollins announced that he wished to trade methamphetamine for the cocaine

finding that Rollins' lack of significant prior criminal activity was outweighed by two aggravating circumstances: that the killing was committed during the perpetration of another felony, and that the killing created a grave risk of harm to others.

On May 11, 1987, the Philadelphia County Court of Common Pleas denied Rollins' post-verdict motions and sentenced him to death for murder in the first degree, with consecutive terms of ten to twenty and two and one-half to five years for the robbery and weapons convictions. On May 30, 1989, Rollins' petition for a new trial was denied. The Pennsylvania Supreme Court affirmed Rollins' conviction and sentence upon direct appeal on September 13, 1990, finding that (1) the evidence was sufficient to support a conviction, (2) the trial court did not err in admitting evidence of Rollins' other crimes, (3) trial counsel was not

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rather than pay cash. Violeta refused this offer, and Rollins left the premises.

Rollins returned to Violeta's house a few minutes later, this time armed with an automatic handgun, and demanded the cocaine from Violeta. Raymond Cintron, Violeta's brother, dropped Violeta's one-year old son, whom he had been holding, and began wrestling with Rollins for control of the gun. Several shots were fired in the ten-by-eleven foot room, hitting Raymond, as well as a stereo speaker, a lamp, and a wall. After Raymond fell to the floor, Rollins picked him up and fired more shots into his body. Rollins then fled the scene. While fleeing, Rollins came face-to-face with Dalia Cintron, one of Violeta's sisters, and pointed his gun at her as he made his escape. Raymond subsequently died from the gunshot wounds.

Rollins was arrested three days after this incident as a result of his involvement in another shooting. On January 25, 1986, Rollins and a companion arrived at the home of Richard Campbell. Campbell, who had been warned of Rollins' arrival, greeted him with a shotgun; a gunfight immediately ensued in which Rollins was wounded. Rollins was picked up by police a short distance from the Campbell residence. Ballistic tests later revealed that the weapon Rollins used in the Campbell shooting was the same one used to kill Raymond Cintron.

See generally Commonwealth v. Rollins, 580 A.2d 744, 746-47 (Pa. 1990) ("Rollins I") and Commonwealth v. Rollins, 738 A.2d 435, 439-40 (Pa. 1999) ("Rollins II").

ineffective for failing to object to evidence of prior crimes, (4) there was sufficient evidence to support the jury's finding that Rollins knowingly created a grave risk of death to others, and (5) the sentence of death was not excessive or disproportionate. Commonwealth v. Rollins, 580 A.2d 744 (Pa. 1990) (hereafter, "Rollins I"). Re-argument was denied on November 15, 1990, and Rollins' conviction became final when the time to file a petition for certiorari expired on or about February 13, 1991.[2]

Rollins filed a petition for relief under the Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541 et seq., on November 12, 1996, asserting claims of ineffective assistance of counsel, trial court error, and prosecutorial misconduct. The trial court denied the PCRA petition without an evidentiary hearing. The Pennsylvania Supreme Court affirmed this denial on appeal, holding that Rollins' claims of trial court error and prosecutorial misconduct were waived because they were not raised on direct appeal, and rejecting Rollins' ineffective assistance of counsel claims on the merits. Commonwealth v. Rollins, 738 A.2d 435 (Pa. 1999) (hereafter,

[2] A conviction becomes final where the judgment of conviction has been rendered, the availability of appeal exhausted, and the time for petition for certiorari has elapsed. Teague v. Lane, 489 U.S. 288, 295 (1989) (citing Allen v. Hardy, 478 U.S. 255, 258 n. 1 (1986)); see also 42 Pa. Cons. Stat. § 9545(b)(3) ("For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.")

"Rollins II"). The Pennsylvania Supreme Court further denied Rollins' request for re-argument on November 12, 1999. See Commonwealth v. Rollins, 1999 Pa. LEXIS 3412 (Pa. 1999).

Rollins filed this Petition for Writ of Habeas Corpus before this Court on March 10, 2000, seeking relief from his death sentence on substantially the same grounds as those asserted in his PCRA petition. Initially, Respondents contend that Petitioner's claims of prosecutorial misconduct and trial court error are procedurally defaulted and now unreviewable because the Pennsylvania Supreme Court declined to address them in 1999. Alternatively, Respondents submit that all of Petitioner's claims are meritless. We shall first consider the issues of exhaustion and procedural default.

## Discussion

Because Petitioner's habeas petition was filed in 2000, its review is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996).

### I. REVIEWABILITY OF PETITIONER'S CLAIMS

### A. Exhaustion of State Court Remedies

Under the AEDPA, a federal court cannot grant a writ of habeas corpus unless the applicant has first exhausted all state

court remedies. 28 U.S.C. § 2254(b)(1). The exhaustion requirement ensures that state courts have the first opportunity to review federal constitutional challenges to state convictions and preserves the role of the state courts in protecting federally guaranteed rights. Caswell v. Ryan, 953 F.2d 853, 857 (3rd Cir. 1992) (citing Rose v. Lundy, 455 U.S. 509, 515 (1982)).

To satisfy the exhaustion requirement, a petitioner must demonstrate that he "fairly presented" every claim in the federal petition to the state courts, including the highest state court in which the petitioner was entitled to review. Whitney v. Horn, 280 F.3d 240, 250 (3rd Cir. 2002). A claim is "fairly presented" if the petitioner presents the 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." McCandless v. Vaughn, 172 F.3d 255, 260 (3rd Cir. 1999). Even if the state court refuses to hear a claim because it is time-barred or waived, the claim is still exhausted as long as the state court is given the opportunity to address it. Pursell v. Horn, 187 F. Supp. 2d 260, 288-89 (W.D. Pa. 2002) (citing Bond v. Fulcomer, 864 F.2d 306, 309 (3rd Cir. 1989) (holding that presentation of an untimely petition to the state's highest court satisfied the exhaustion requirement)); see also Laird v. Horn, 159 F. Supp. 2d 58, 91 (E.D. Pa. 2001)(concluding that petitioner had exhausted claim where it was presented to the Pennsylvania Supreme Court on

PCRA review and rejected on the grounds of waiver).

Petitioner has clearly satisfied the exhaustion requirement in this case. Fifteen of Petitioner's sixteen claims were presented to the state courts, almost verbatim, in Rollins' petition for post-conviction relief.[3] See Rollins PCRA petition, November 12, 1996; Rollins II, 738 A.2d 435 (1999). Although the Pennsylvania Supreme Court did not reach the merits of every one of Rollins' PCRA claims, the claims were properly exhausted because the court was fairly given the opportunity to address them.

**B. Procedural Default**

The doctrine of procedural default bars federal habeas review whenever a state court declines to consider a prisoner's federal claim and rests its decision to abstain on an "independent and adequate" state procedural rule. Wainwright v. Sykes, 433 U.S. 72, 81, 86-87 (1977); see generally, Harris v. Reed, 489 U.S. 255, 262-63 (1989). If, however, a petitioner's federal claim is defaulted by a state procedural rule that is not "independent" of federal law or otherwise "adequate," the federal court may proceed to consider the merits of his claim. Furthermore, a federal habeas court may always review the merits

[3] The only claim which does not appear in Rollins' PCRA petition is Count XV, seeking relief on the grounds that Judge Castille of the Pennsylvania Supreme Court should have recused himself from Rollins' proceedings. This claim was exhausted, however, on January 22, 1999, when the Pennsylvania Supreme Court denied Rollins' motion for Judge Castille's recusal.

of a defaulted claim if the petitioner can establish "cause and prejudice" or a "fundamental miscarriage of justice" to excuse the procedural default. Carpenter v. Vaughn, 296 F.3d 138, 146 (3rd Cir. 2002) (citing Coleman v. Thompson, 501 U.S. 722, 750 (1991)).

In determining whether a state procedural rule is "adequate," the reviewing court must determine whether the rule was "firmly established and regularly followed" at the time that the alleged procedural default occurred. Ford v. Georgia, 498 U.S. 411, 423-24 (1991) (citing James v. Kentucky, 466 U.S. 341, 348-51 (1984)); Pursell, 187 F. Supp. 2d at 292 n. 10; Laird, 159 F. Supp. 2d at 74. The relevant inquiry is whether the procedural rule was applied in a "consistent and regular" manner in the "vast majority of cases" at the time the alleged default occurred. Doctor v. Walters, 96 F.3d 675, 684 (3rd Cir. 1996) (citing Dugger v. Adams, 489 U.S. 401, 410 n. 6 (1989)).

Respondents contend that the doctrine of procedural default bars federal habeas review of Petitioner's claims of trial court error and prosecutorial misconduct because the Pennsylvania Supreme Court in Rollins II declined to reach the merits of these claims. Because Rollins did not raise these claims on direct appeal in 1990, the Pennsylvania Supreme Court held that they were waived for the purposes of Rollins' PCRA petition. Rollins II, 738 A.2d at 440-41.

On its face, the Post-Conviction Relief Act excludes waived issues from the class of cognizable PCRA claims. 42 Pa. Cons. Stat. § 9543(a)(3). However, between 1978 and 1998, it was the practice of the Pennsylvania Supreme Court to apply a relaxed waiver doctrine in capital cases. Pursell, 187 F. Supp. 2d at 293; Laird, 159 F. Supp. 2d at 74-75; Commonwealth v. Albrecht, 720 A.2d 693, 700 (Pa. 1998). Under the relaxed waiver doctrine, the Pennsylvania Supreme Court reviewed the merits of all claims raised in capital cases, whether on direct appeal or in post-conviction proceedings, regardless of any waiver by the defendant.[4] This practice was so well-established that, in 1997, the Third Circuit concluded that the Pennsylvania Supreme Court had a "practice of reaching the merits of claims in PCRA petitions in capital cases regardless of the failure of the

[4] The Pennsylvania Supreme Court applied the relaxed waiver doctrine in dozens of capital cases between 1978 and 1998. See, e.g., Commonwealth v. Brown, 551 Pa. 465, 711 A.2d 444, 455 (1998)("This Court generally applies a relaxed waiver rule in capital cases because of the permanent and irrevocable nature of the death penalty); Commonwealth v. Morales, 549 Pa. 400, 701 A.2d 516, 520 n.13 (1997)(". . .this Court's practice has been to address all waived issues which have been raised in PCRA death penalty petitions"); Commonwealth v. Morris, 546 Pa. 296, 684 A.2d 1037, 1042 n.11 (1996)("While we agree that some of the issues presented . . . could be deemed waived pursuant to the PCRA, we will nevertheless address all of the Appellant's claims . . . because it is this Court's practice to address all issues arising in a death penalty case irrespective of a finding of waiver"); Commonwealth v. DeHart, 539 Pa. 5, 650 A.2d 38, 48 (1994)("Although Appellant concedes that this issue is technically waived because it was not previously raised below, we will nonetheless address it because we have not been strict in applying our waiver rules in death penalty cases."); Commonwealth v. Abu-Jamal, 521 Pa. 188, 555 A.2d 846, 854 (1989)(same); Commonwealth v. Frey, 504 Pa. 428, 475 A.2d 700, 707 n.4 (1984)(same); Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937, 955 n.19 (1982)(same). For more Pennsylvania Supreme Court cases applying the doctrine of relaxed waiver, see Louis M. Natali, "New Bars in Pennsylvania Capital Post-Conviction Law and Their Implications for Federal Habeas Corpus Review," 73 Temp. L. Rev. 69, 86 n.127 (2000).

petition to meet the appropriate procedural criteria." Banks v. Horn, 126 F.3d 206, 214 (3rd Cir. 1997). It was not until 1998 that the Pennsylvania Supreme Court, in Commonwealth v. Albrecht, 720 A.2d at 700, announced that it was ending its "practice" of declining to apply ordinary waiver principles in PCRA appeals pursuant to the relaxed waiver doctrine.

At the time of Rollins' direct appeal in 1990, the Pennsylvania Supreme Court did not apply the PCRA rule excluding waived claims in a consistent and regular manner. Rather, the Pennsylvania Supreme Court appeared to disregard the PCRA waiver rule in favor of a more relaxed standard permitting review of all capital claims, even those not raised on direct appeal. Because the PCRA waiver rule applied by the Pennsylvania Supreme Court in Rollins' appeal was not "firmly established and regularly followed" until 1998, several years after the alleged procedural default occurred, it is not an adequate bar to federal habeas review of Petitioner's trial court error and procedural misconduct claims.

## II. APPLICABLE STANDARDS OF REVIEW FOR PETITIONER'S CLAIMS

The standard pursuant to which petitions for habeas corpus are reviewed under the AEDPA is set forth at 28 U.S.C. § 2254(d):

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a 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.

The AEDPA standard of review is quite narrow, and highly deferential to reasonable state court judgments.

For the purposes of AEDPA review, "clearly established Federal law" is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision. Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003)(citing Williams v. Taylor, 529 U.S. 362, 405, 413 (2000); Bell v. Cone, 535 U.S. 685, 698 (2002)). A state court's decision is "contrary to clearly established precedent" if the state court applies a rule that contradicts the governing law set forth in the Supreme Court's cases or if the state court confronts a set of facts that are materially indistinguishable from a decision of the Court and nevertheless arrives at a result different from that precedent. Lockyer, 538 U.S. at 73; Williams, 529 U.S. at 405-06. A state court need not be aware of the relevant Supreme Court cases, let alone cite them, as long as neither the reasoning nor the result of state court's decision contradicts the governing federal law. Early v. Packer, 537 U.S.

3, 8 (2002).

Under the "unreasonable application" clause, a federal court may grant the writ of habeas corpus if the state court identifies the correct legal principle but unreasonably applies that principle to the facts of the case. Williams, 529 U.S. at 413. However, a federal court may not issue the writ simply because it concludes in its independent judgment that the state court applied the established law erroneously or incorrectly. Lockyer, 538 U.S. at 75-76 (quoting Williams, 529 U.S. at 411). In that respect, "an unreasonable application of federal law is different from an incorrect application of federal law." Williams, 529 U.S. at 410 (emphasis in original).

Of course, AEDPA scrutiny is applicable only if the state court adjudicated the petitioner's claims "on the merits." 28 U.S.C. § 2254(d); see Chadwick, 312 F.3d at 605; Appel v. Horn, 250 F.3d 203, 210 (3rd Cir. 2001). "Adjudicated on the merits" has a well settled meaning: a decision finally resolving the parties' claims, with res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground. Rompilla v. Horn, 355 F.3d 233, 247 (3rd Cir. 2004) (citing Sellan v. Kuhlman, 261 F.3d 303, 312 (2nd Cir. 2001)). Where the state court has not reached the merits of a claim thereafter presented to a federal habeas court, the deferential AEDPA standards do not apply, and the federal court

must exercise de novo review over legal questions and mixed questions of law and fact. Appel, 250 F.3d at 210. However, the state court's factual determinations are still presumed to be correct, rebuttable upon a showing of clear and convincing evidence. Appel, 250 F.3d at 210.

Turning to the case at hand, we must decide whether the Pennsylvania Supreme Court adjudicated any of Petitioner's claims, other than those regarding the effective assistance of counsel, "on the merits."[5] Before reaching the merits of any of Rollins' claims, the Pennsylvania Supreme Court declared that Rollins' claims of trial court error and prosecutorial misconduct were "waived" because they were not raised on direct appeal. Rollins II, 738 A.2d 440-41. The Pennsylvania Supreme Court then went on to decide Rollins' various ineffective assistance of counsel claims. In the course of deciding Rollins' claims of counsel's ineffectiveness, the Pennsylvania Supreme Court discussed the "merit" of the underlying claims. By way of example, when Rollins raised a claim that counsel was ineffective for failing to object to allegedly improper jury instructions, the Pennsylvania Supreme Court rejected the claim in the following manner:

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[5] Neither Petitioner nor the Commonwealth takes a definitive stance on this issue. Compare Petitioner's Memo p.43 and Petitioner's Reply p.55 (decision on the merits), with Petitioner's Reply p.3 (implying decision not on the merits); Compare Commonwealth's Reply p.65-66 (Court did not decide substantive Mills claim), with Commonwealth's Reply p.69, 73 (Court's decision on substantive Mills claim was reasonable).

> Appellant next claims that counsel was ineffective for failing to raise the issue that the jury instructions and the verdict slip indicated that the jury had to find unanimously any mitigating factor before it could give effect to that factor in its sentencing decision, thus violating the dictates of Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988). We find this claim to be meritless. The trial judge's charge to the jury virtually mirrored 42 Pa. Cons. Stat. § 9711(c)(1)(iv). N.T. 3/05/87 at 1855. We have previously stated that where a charge tracks this statutory language, it "does not state or infer a requirement that any mitigating circumstance must be unanimously recognized before it can be weighed against aggravating circumstances in reaching a verdict." Travaglia, 661 A.2d at 366. Likewise, the verdict form closely tracked the language of the statute. In reviewing a similar verdict slip, this court in Commonwealth v. Hackett, 534 Pa. 210, 627 A.2d 719 (1993) held that the verdict slip form did not infer a need for unanimity with regard to mitigating circumstances. We therefore reject this claim.

The Supreme Court employed this type of analysis for many of Rollins' claims of ineffectiveness – rejecting the claim that counsel was ineffective on the basis that the underlying claim lacked merit. Though the Pennsylvania Supreme Court discussed the merits of the underlying claims, we cannot say that it adjudicated those purportedly waived claims "on the merits."

From the outset, the Pennsylvania Supreme Court clearly and expressly announced that it would only address Rollins' ineffective assistance of counsel claims, as the claims of trial court error and prosecutorial conduct were waived. Rollins II, 738 A.2d at 440-41. The Pennsylvania Supreme Court discussed Rollins' waived claims only because Pennsylvania law requires a claimant proceeding with an ineffective assistance of counsel claim to show that the underlying claims have arguable merit.

Rollins II, 738 A.2d at 411; see Sistrunk v. Vaughn, 96 F.3d 666, 669 (3rd Cir. 1996) (discussing Pennsylvania's three-pronged ineffective assistance of counsel analysis). Generally, where a state court disposes of a federal claim on sufficient state law procedural grounds, but later discusses the merits of that claim in the alternative, the state law grounds control for the purpose of federal habeas review. See Sistrunk, 96 F.3d at 673-75 (honoring, for the purposes of procedural default, the state courts's disposal of a federal Batson claim on procedural grounds, although the state court also discussed the merits of the Batson claim in the context of a second ineffective assistance of counsel claim); see also Harris, 489 U.S. at 264 (holding that federal courts are required to honor state law grounds providing a sufficient basis for the state court's judgment, even when the state court also relies on federal law). Because the Pennsylvania Supreme Court in Rollins II clearly established that Rollins' trial court error and prosecutorial misconduct claims were procedurally barred by the doctrine of waiver, we do not read the Court's later discussions of these issues in the context of the ineffective assistance of counsel as an indication that it was declining to apply that procedural bar.

As the Pennsylvania Supreme Court's discussion of Petitioner's underlying claims of trial court error and prosecutorial misconduct in the context of his assistance of

counsel claim does not constitute an adjudication "on the merits," we must review these underlying claims de novo, rather than applying AEDPA's deferential standard of review. The ineffective assistance of counsel claims are, however, subject to AEDPA review, as they were clearly adjudicated on the merits in Rollins II.

## III. PETITIONER'S CLAIMS FOR RELIEF

### 1. Ineffective Assistance of Counsel at Penalty Phase

Petitioner first contends that he was denied his constitutionally guaranteed right to the effective assistance of counsel when his attorney failed to investigate or present to the jury significant mitigating evidence regarding Petitioner's physically and psychologically traumatic upbringing.[6]

In Strickland v. Washington, 466 U.S. 668, 687 (1984), clearly established federal precedent at the time of Rollins' state court conviction, the Supreme Court set forth the standard by which courts must evaluate claims alleging unconstitutional ineffectiveness of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the

[6] Petitioner exhausted this claim on post-conviction review before the Pennsylvania Supreme Court. Rollins II, 738 A.2d at 448; See supra, Part I.A. Because the Pennsylvania Supreme Court reached the merits of this claim, we will apply the AEDPA's deferential standard of review. See supra, Part II.

> defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable.

Counsel is deemed to be ineffective if his representation falls "below an objective standard of reasonableness" or outside the "wide range of professionally competent assistance." Strickland, 466 U.S. at 688, 690. However, there is a "strong presumption" that counsel has provided adequate assistance and has made all significant decisions in the exercise of reasonable professional judgment. Id. at 690. In scrutinizing the adequacy of representation, judges must consider the facts of the case at the time of counsel's conduct, and must make every effort to escape what the Supreme Court referred to as the "distorting effects of hindsight." Id. at 689-90.

A defendant is deemed to be prejudiced by counsel's ineffectiveness only if he can show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. The Supreme Court in Strickland defined a reasonable probability as "a probability sufficient to undermine confidence in the outcome." Id. at 694.

Petitioner alleges that trial counsel was deficient in that he failed to conduct any investigation or other preparation for the penalty phase of the trial, and did not attempt to locate or speak to any potential mitigation witnesses until after the jury

rendered its guilty verdict. Petitioner claims he was prejudiced by counsel's ineffectiveness because, had counsel conducted an appropriate investigation, counsel would have discovered that, as a child, Rollins witnessed his father's severe abuse of his mother; that Rollins himself suffered abuse at the hands of his father; that his mother abandoned him and left him and his brother to live with their abusive father; that his two brothers, mother, and father all died within a relatively short period of time; and that Rollins suffered head injuries. Petitioner further claims that reasonable counsel, upon discovering this information, would have sought a mental health evaluation that would have revealed impairment of Rollins' emotional and cognitive functioning, depression, and damage to the frontal lobe of his brain.

***A. Deficiency of Counsel's Performance***

The Supreme Court has long recognized criminal defense counsel's duty to investigate:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, *counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.*

Strickland, 466 U.S. at 690-91 (emphasis added). As explained in United States v. Gray, 878 F.2d 702, 711 (3rd Cir. 1989),

"counsel can hardly be said to have made a strategic choice ... when s/he has not yet obtained the facts on which such a decision could be made." Under such circumstances, counsel's behavior is "not colorably based on tactical considerations but merely upon a lack of diligence." United States v. Gray, 878 F.2d at 712. Thus, under Strickland, where counsel has no strategic or other reason for failing to investigate, the failure is objectively unreasonable.

The duty to investigate set forth in Strickland is particularly significant when applied to mitigating evidence, which the Supreme Court has recognized plays an important role in "ensuring that a capital trial is both humane and sensible to the uniqueness of the individual." Peterkin v. Horn, 176 F. Supp. 2d 342, 378 (E.D. Pa. 2001) (citing Eddings v. Oklahoma, 455 U.S. 104, 110-11 (1982); Lockett v. Ohio, 438 U.S. 586, 604, 605 (1978)). Where a jury in a capital case has been precluded from hearing mitigating evidence concerning the defendant's character or background because counsel has made an objectively unreasonable decision not to look for it, counsel's performance violates the dictates of Strickland. See Rompilla v. Beard, 2005 U.S. LEXIS 4846 at 28-34 (U.S. 2005); Williams, 529 U.S. at 395-96; Jermyn v. Horn, 266 F.3d 257, 306-07 (3rd Cir. 2001); Pursell, 187 F. Supp. 2d at 383-86; Holloway v. Horn, 161 F. Supp. 2d 452, 567-68 (E.D. Pa. 2001).

The Pennsylvania Supreme Court in Rollins II summarily rejected Rollins' claim of ineffectiveness at the penalty phase on the grounds that there was "no indication that counsel had any reason to know that defendant might have a mental problem." Rollins II, 738 A.2d at 448. We find that this was a contrary and unreasonable application of Strickland and its progeny, which impose a duty on counsel to investigate or make an "objectively reasonable decision" not to investigate, and establish that the duty to investigate is not predicated on counsel's pre-existing knowledge of potential mitigating evidence. Strickland, 466 U.S. at 690-91; Williams, 529 U.S. at 396 (trial counsel has an obligation "to conduct a thorough investigation of the defendant's background").

Further, in only addressing counsel's failure to produce mitigating evidence relating to Rollins' "alleged mental infirmity," the Pennsylvania Supreme Court unreasonably overlooked the potentially mitigating value of evidence concerning Rollins' childhood and upbringing. The court's failure to consider counsel's ineffectiveness with respect to these other mitigating factors suggests reasoning directly contrary to federal precedent, which requires that a court consider all mitigating evidence (including "family history" and a "violent background"), not just mitigating evidence which would tend to support a legal excuse from liability. See Rompilla,

2005 U.S. LEXIS 4846 at 31-34; Williams, 529 U.S. at 395 (finding counsel's performance deficient because he failed to conduct an investigation that would have uncovered a "nightmarish childhood"); Eddings, 455 U.S. at 112-15.

Finally, the Pennsylvania Supreme Court's decision regarding counsel's ineffectiveness at the penalty phase directly contradicts Williams, 529 U.S. at 395, in which the Supreme Court found counsel's performance deficient because he did not begin to prepare for the sentencing phase until a week before the trial. See also Jermyn, 266 F.3d at 308 (citing Williams, finding counsel's performance objectively unreasonable because he did not begin to prepare for the penalty phase until the night before it began). Rollins' trial counsel presented four witnesses, including Mr. Rollins himself, during the penalty phase of his trial. Counsel admits that he did not seek out or speak to potential mitigation witnesses until the short recess between the jury verdict and the start of the penalty phase of the trial.[7] Declaration of the Honorable William Austin Meehan, Jr. ("Meehan Decl.") ¶ 12. It is objectively unreasonable for counsel to wait until after the verdict is rendered to investigate potential

[7] Respondent questions the credibility of this statement based on trial counsel's statements following the guilty verdict. When asked by the trial court whether the prosecution or defense had any witnesses for the penalty phase, trial counsel responded, "a number of them just said, hey, I haven't seen him. I don't know anything about him. I can't come." N.T. 1723. However, the time records counsel submitted to the court support counsel's more recent declarations.

mitigating evidence, and the Pennsylvania Supreme Court's failure to recognize this fact is contrary to clearly established federal law.

Had the Pennsylvania Supreme Court reasonably applied the Strickland and Williams standards regarding counsel's duties of preparation and investigation, it would have found that Petitioner's counsel was constitutionally ineffective due to his failure to adequately prepare for the penalty phase of the trial, including his failure to investigate potential mitigating evidence.

Trial counsel admits that he was unaware of the history of abuse in Rollins' family and that he did not ask questions designed to elicit such information from either Rollins or any other witness. Meehan Decl. ¶ 16. Although he was aware that Rollins had a brother who had been murdered, counsel did not investigate the circumstances of the murder or its effect on Rollins. Id. ¶ 11. Not having much knowledge about Rollins' background, counsel never considered having him tested by a psychologist or psychiatrist. Id. ¶ 15. Petitioner's counsel had no objectively reasonable basis for failing to investigate Rollins' background for potential mitigating evidence in preparation for the penalty phase.

The mitigation evidence counsel did present likewise demonstrates his lack of investigation and preparation for the

penalty phase. It appears that trial counsel did not prepare any of the witnesses, including Mr. Rollins, for their testimony in the penalty phase. Declaration of Marie Ballard ("Ballard Decl.") ¶¶ 15-17, Declaration of Yasmin Dawson ("Dawson Decl.") ¶ 26; Meehan Decl. ¶¶ 12-13. Therefore, none of the witnesses were aware of what kind of information would provide mitigating evidence. Two of the witnesses counsel presented in the penalty phase were grandmothers of Rollins' children. One of the grandmothers, Marie Ballard, was present every day at trial, yet counsel never spoke with her about Rollins or asked her to testify on his behalf. Ballard Decl. ¶¶ 15-17. Marie Ballard was completely unaware that she was even going to be called as a mitigation witness until she was called to take the witness stand. Id. The grandmothers testified that Rollins was the father of their grandchildren and that he provided some support for them. They also testified that he had a reputation as a "nice person." When the court *sua sponte* explained to counsel that this would open the door to damaging information about Rollins' prior record, counsel responded that "this is about one of the only things that I have." N.T. 1766-69.

Rollins' sister was also called as a witnesses, but was only asked to testify that she and Rollins were the sole living family members out of four siblings. Trial counsel did not inquire further into the circumstances of their family members' deaths,

nor did he ask questions about her brother's background or upbringing. Counsel admits that he was aware that Rollins had a sister, and though she was present every day at trial, he never spoke with her or questioned her about her brother's background. Meehan Decl. ¶ 11.

Rollins' own testimony demonstrates a lack of preparedness. Trial counsel asked him his age, how many children he had, and whether he supported those children. Then counsel simply asked Rollins: "Do you have anything further that you wish to say to the jury on your behalf at this time?". Notes of Trial (hereafter, "N.T.") 1810. Mr. Rollins' response was in the form of a question to his counsel: "In regards to the incident or my well-being?", to which counsel answered: "With regard to anything, sir." N.T. 1811.

In addition to not interviewing or preparing the mitigation witnesses he did call, counsel also failed to seek out other potential mitigation witnesses. Counsel never attempted to contact Rollins' wife, or any family friends or neighbors who could attest to Rollins' difficult life and the impact it had on him emotionally. See Petitioner's Exs. E-J; Meehan Decl. ¶ 12.

Because counsel failed in his duty to investigate Petitioner's background, and had no objectively reasonable justification for this failure, we find that counsel's representation fell below an objective standard of

reasonableness. The Pennsylvania Supreme Court's decision to the contrary was an unreasonable and contrary application of federal precedent concerning the duty to investigate potentially mitigating evidence and prepare for the penalty phase of trial.

***B. Prejudice***

We further find that Petitioner was prejudiced by his counsel's failure to prepare for the penalty phase of the trial and investigate or present mitigating evidence to the jury.[8]

In any death penalty case in Pennsylvania, the jury's decision on the penalty must be unanimous. Jermyn, 266 F.3d at 308. Accordingly, Petitioner can satisfy the prejudice prong if he can show that the presentation of the available mitigating evidence would have convinced even one juror to find that the mitigating factors outweighed the aggravating factors. Jermyn, 266 F.3d at 308. Therefore, this Court must weigh the totality of mitigating evidence that could have been presented at trial with the aggravating evidence that was presented. Williams, 529 U.S. at 397-98.

The jury at Rollins' trial found two aggravating circumstances: that the killing was committed while in the perpetration of another felony, and the killing created a grave risk of harm to others. Rollins II, 738 A.2d at 440. The jury

[8] The Pennsylvania Supreme Court did not reach the prejudice inquiry, because it dismissed Rollins' ineffective assistance of counsel claim on the grounds that counsel's conduct was objectively reasonable.

also found one mitigating circumstance: that Rollins had no significant history of prior criminal convictions. Rollins II, 738 A.2d at 440. Finally, the jury determined that the aggravating circumstances outweighed the mitigating circumstances and sentenced Rollins to death. Rollins II, 738 A.2d at 440.

Had counsel properly interviewed Rollins, the three other mitigation witnesses, or other family members and friends, he would have discovered powerful mitigating evidence regarding Rollins' background and upbringing. The jury would have learned that Rollins, the son of an African-American serviceman and Japanese mother, moved several times with his family before settling in Philadelphia, Pennsylvania. Rollins lived in a "bad neighborhood" in South Philadelphia where he and his siblings were beaten up because they were interracial. Ballard Decl. ¶ 6; Dawson Decl. ¶ 10. The Rollins children also grew up in an abusive home. Dawson Decl. ¶ 2. Rollins' father, weighing more than 300 pounds, would often physically abuse Rollins' 100 pound mother in front of the children. Id. Rollins' father also beat Rollins and his siblings with his "fist, belts, shoes, or with any item he got his hands on." Id. ¶ 6. Sometimes he beat the children just for crying when their mother was beaten. Id. Eventually, Rollins' mother left her husband because of the abuse, taking her daughter and youngest son, but leaving Rollins and his brother Mioshi with their father. Id. ¶ 4.

The jury also would have learned that Rollins has dealt with the successive deaths of close family members. First, Rollins' youngest brother, Tommy, accidentally drowned. Dawson Decl. ¶ 12. People close to Rollins could see that he held in his emotions regarding Tommy's death. Ballard Decl. ¶ 8; Dawson Decl. ¶ 14. Rollins began to spend more time with his mother after Tommy's death and eventually moved to Reading, Pennsylvania, where his mother then lived. Dawson Decl. ¶ 14. Only a few years after Tommy's death, Rollins' mother died from cancer. Id. ¶ 15. Two years later, Rollins' other brother, Mioshi, was shot, and died a week later in the hospital. Id. ¶¶ 18-19. Rollins was the first person at Mioshi's side when he was shot, and spent hours in the hospital watching over Mioshi before he died. Id. ¶ 20. Mioshi's shooting and death left Rollins an "emotional wreck" and caused him to "completely break down." Id. ¶¶ 20-21. Rollins' father died two years after Mioshi's death. Id. ¶ 24.

Such evidence, Petitioner argues, would likely have caused counsel to seek a mental health evaluation. In the state PCRA proceedings, Rollins presented sworn declarations from two clinical psychologists and a neuropsychologist. After interviewing and performing psychological testing on Rollins, two of the experts concluded that Rollins suffers from organic brain damage, most likely caused by multiple head injuries. First

Decl. of Henry L. Dee, Ph.D. (“Dee Decl.”) ¶ 7; First Decl. of Carol L. Armstrong, Ph.D. (“Armstrong Decl.”) ¶ 11. The experts also concluded that “Mr. Rollins has suffered from extreme mental and emotional disturbance and a substantially impaired capacity to conform his conduct to the requirements of the law during his life and at the time of the offense.” Dee Decl. ¶ 7; Armstrong Decl. ¶ 11.

Respondent argues that because this is not the type of case where counsel overlooked significant medical evidence, these affidavits should be accorded little, if any, weight. Respondent’s Memorandum at 41. To a certain degree, Respondent is correct, as these evaluations were not in existence at the time of Rollins’ conviction. However, that is largely, if not entirely, the result of counsel’s failure to investigate Petitioner’s background and mental health as potential mitigating factors. It is because of counsel’s failure to investigate any potential sources of mitigating evidence until after the verdict that Petitioner must now rely on expert opinions obtained ten years after conviction.

Respondent also argues that a pre-sentence mental health evaluation of Rollins demonstrates that at the relevant time, there was nothing to indicate that Rollins suffered from any mental infirmity. The pre-sentence evaluation was performed by Dr. Edward Camiel, M.D., one day after the penalty phase. After

a thirty-minute interview with Rollins, Dr. Camiel concluded that Rollins showed "no evidence of a psychosis or primary affective disorder or any other major mental illness." Respondent's Ex. A. However, Dr. Camiel also noted that he reached this conclusion based on an incomplete interview. Id. The interview had been interrupted when a sergeant of the sheriff's department informed Dr. Camiel that the bus Rollins was scheduled to go back on was getting ready to leave. Dr. Camiel further concluded that a personality disorder of an anti-social type was suspected, but that he did not have enough information to make a definitive diagnosis.

It is clear from Dr. Camiel's report that he spent very little time with Rollins and had minimal information about his background. The report indicates that Dr. Camiel only learned of Rollins' "recent life situation," a period of only five years preceding the evaluation which was summed up in one short paragraph. Therefore, we do not believe that this pre-sentence mental health evaluation settles the issue of Rollins' mental state.[9] Taking all of the above into consideration, we think it is proper to consider the affidavits of the mental health experts

[9] Respondent also argues that the mental health evaluation demonstrates that counsel's decision not to pursue mental health evidence as possible mitigation was reasonable. This argument relates to counsel's ineffectiveness. As we concluded above, counsel's failure to prepare for and investigate any possible sources of mitigating evidence renders him constitutionally ineffective. Mental health evidence is an avenue counsel may have pursued had he performed the required investigations.

in weighing the mitigating evidence.

Had the jury heard the evidence regarding Petitioner's life history and the conclusions reached by mental health experts based on this life history, we find there to be a reasonable probability that at least one juror would have found the mitigating circumstances to outweigh the aggravating circumstances, and voted against the death sentence. We are satisfied that counsel's unprofessional errors have undermined confidence in the outcome of the sentencing verdict. On this basis, we grant Petitioner's writ of habeas corpus and direct that Petitioner either be given a new sentencing hearing or sentenced to life imprisonment.

**2. Improper Jury Instructions and Verdict Sheet**

Petitioner next avers that the jury instructions and verdict slip violated the Eighth and Fourteenth Amendments because they misinstructed the jury that it must unanimously agree on mitigating circumstances before giving effect to those circumstances at sentencing.[10]

In advancing this argument, Petitioner relies upon Mills v.

[10] Petitioner exhausted this substantive Mills claim, as well as a claim that prior counsel was ineffective for failing to raise the Mills claim, on post-conviction review before the Pennsylvania Supreme Court. Rollins II, 738 A.2d at 450; See supra, Part I.A. However, as the Pennsylvania Supreme Court reached the merits of the ineffective assistance of counsel claim only, we will review the substantive Mills claim of trial court error under a de novo standard. See supra, Part II.

Maryland, 486 U.S. 367 (1988), in which the Supreme Court held that a state may not require jurors to unanimously agree that a particular mitigating circumstance exists before they may be permitted to consider that circumstance in their sentencing determination. Because the sentencer in a capital case may not be precluded from considering any mitigating evidence of the defendant's character or record, it is unconstitutional to impose a "barrier" of unanimity with respect to mitigating factors, whether that barrier is established by statute, by the trial court, or by an evidentiary ruling. Mills, 486 U.S. at 375. Where a petitioner alleges that ambiguous jury instructions set forth the requirement of unanimity, the critical question is whether "there is a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of constitutionally relevant evidence." Boyde v. California, 494 U.S. 370, 380 (1990)[11]; see also Banks, 271 F.3d at 544-45 (adopting this Court's conclusion that a Mills problem arises from the "danger of jury misinterpretation," rather than a court's interpretation of a statutory scheme).

At Rollins' sentencing, the trial court instructed the jury as follows:

> Members of the jury, you must now decide whether the defendant is to be sentenced to death or life imprisonment.

[11] In Mills, 486 U.S. at 384, decided two years before Boyde, the Supreme Court applied a "substantial probability" standard to juror interpretation of ambiguous jury instructions.

> The sentence will depend on your findings concerning aggravating and mitigating circumstances.
>
> The sentencing statute provides that the 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.
>
> ... Remember that your verdict must be a sentence of death if you unanimously find at least one aggravating and no mitigating circumstance, 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. 1852-53, 1855. Rollins' jury was also instructed that the Commonwealth's burden of proving aggravating circumstances beyond a reasonable doubt is a higher standard than the defendant's burden of proving mitigating circumstances by a preponderance of evidence. The jury was not, however, instructed as to whether unanimity was required for both aggravating and mitigating circumstances. Petitioner contends that the verdict sheet and accompanying instructions likewise suggested a requirement of unanimity for mitigating circumstances.

The Third Circuit has consistently held that jury instructions and burden of proof instructions which do not specify the differing unanimity requirements for aggravating and mitigating circumstances run afoul of Mills and Boyde. Frey v. Fulcomer, 132 F.3d 916, 924 (3rd Cir. 1997); Banks, 271 F.3d at 548; Laird, 159 F. Supp. 2d at 106-07. In Frey, for example,

upon considering jury instructions virtually identical to those in Rollins, the Third Circuit found it reasonably likely that these instructions caused the jury to believe that it was required to find the existence of mitigating circumstances unanimously. Frey, 132 F.3d at 924. The court found that this problem was further compounded by burden of proof instructions which informed the jury of the differing burdens of proof for aggravating and mitigating circumstances without specifying the differing unanimity requirements. Frey, 132 F.3d at 923-24; see also Banks, 271 F.3d at 548; Laird, 159 F. Supp. 2d at 107. "It is what is not said here that is significant." Frey, 132 F.3d at 923 (emphasis in original).

Respondents deny that Mills or its progeny require a mandatory instruction that unanimity is not required in the case of mitigating circumstances, citing the Supreme Court's holding in Buchanan v. Angelone, 522 U.S. 267, 275 (1998) that "we have never ... held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence." However, that same case confirmed the Boyde standard for determining whether jury instructions are ambiguous or subject to erroneous interpretation, which this Court is obligated to apply. Buchanan, 522 U.S. at 275.

We find it reasonably likely that the jury in Rollins applied the jury instructions described above in a way that

prevented the consideration of constitutionally relevant mitigating factors. Given the jury instructions' emphasis on unanimity in finding "at least one aggravating circumstance and no mitigating circumstance," a reasonable juror could believe that mitigating circumstances had to be found unanimously, thus depriving Petitioner of his constitutional right to have all mitigating evidence considered and given full effect. The likelihood of confusion is further compounded by the fact that the jury instructions specifically highlighted other distinctions between the standards for mitigating and aggravating circumstances, such as the differing burdens of proof. A juror could reasonably assume that the jury instructions were complete and exhaustive in setting forth the differences between mitigating and aggravating circumstances, and, as a result, come to the erroneous conclusion that both types of circumstances must be found unanimously. While we make this finding under a de novo standard of review, we emphasize that Petitioner's allegations likewise satisfy the higher AEDPA standard that would be applied had the Pennsylvania Supreme Court's decision on this issue been truly on the merits.

The Pennsylvania Supreme Court, in discussing Rollins' ineffective assistance of counsel claim with respect to the Mills issue, found no merit in Rollins' allegations that the jury instructions violated Mills, on the grounds that the instructions

mirrored the language of the sentencing statute, 42 Pa. Cons. Stat. § 9711(c)(1)(iv). Rollins II, 738 A.2d 450. "We have previously stated that where a charge tracks this statutory language, it 'does not state or infer a requirement that any given mitigating circumstance must be unanimously recognized before it can be weighed against aggravating circumstances in reaching a verdict.'" Rollins II, 738 A.2d at 450 (quoting Commonwealth v. Travaglia, 661 A.2d 352, 366 (Pa. 1995)). However, where a court decides that there is no Mills violation solely on the grounds that a jury instruction tracks statutory language, and does not perform a Boyde analysis of whether there is a reasonable likelihood of jury confusion, that court's decision is a contrary and unreasonable application of clearly established Federal law for the purposes of AEDPA. See Banks, 271 F.3d at 545, Laird, 159 F. Supp. 2d at 104.

Because the Pennsylvania Supreme Court in Rollins failed to perform an analysis of likelihood of jury confusion as required by Boyde, which was clearly established law at the time of the 1990 state court decision, we must grant Petitioner's writ of habeas corpus. We direct that the Petitioner either be given a new sentencing hearing or be sentenced to life imprisonment.

**3. Prosecutorial Misconduct in Opening and Closing Statements**

Petitioner further seeks relief on the grounds of prosecutorial misconduct during opening and closing arguments in both the guilt and penalty phases of his case. Petitioner alleges that the prosecutor engaged in misconduct by: (A) impermissibly vouching for the Commonwealth's case; (B) impermissibly vouching for the truth of the Commonwealth's witnesses; (C) urging the jury to ignore inconsistencies in the case; (D) asking the jury to speculate on the existence of facts outside the record to support a theory regarding the shooter's hat and blood type; and (E) offering improper personal opinions at closing arguments in the penalty phase, and encouraging the jury to impose the death penalty for impermissible reasons.[12]

A criminal prosecutor has a special obligation to avoid "improper suggestions, insinuations, and ... assertions of personal knowledge" which may induce the jury to trust the Government's judgment rather than the jury's own view of the evidence. Berger v. Unites States, 295 U.S. 78, 88 (1935), overruled on other grounds by Stirone v. United States, 361 U.S. 212 (1960); see also United States v. Young, 470 U.S. 1, 18-19 (1985). Such comments can convey the impression that evidence

[12] Petitioner exhausted these substantive claims of prosecutorial misconduct, as well as a related ineffective assistance of counsel claim, on post-conviction review before the Pennsylvania Supreme Court. Rollins II, 738 A.2d at 444-45, 448-50; See supra, Part I.A. However, as the Pennsylvania Supreme Court reached the merits of the ineffective assistance of counsel claim only, we will review the substantive claims of prosecutorial misconduct under a de novo standard. See supra, Part II.

not presented to the jury, but known to the prosecutor, supports the charges against the defendant, thus jeopardizing the defendant's right to be tried solely on the basis of the evidence presented to the jury. Young, 470 U.S. at 18. Vouching, expression of the prosecutor's personal belief regarding the credibility of the witnesses, is likewise impermissible. United States v. Walker, 155 F.3d 180, 184 (3rd Cir. 1998) (citing Lawn v. United States, 355 U.S. 339, 359 n. 15 (1958)). "Although counsel may state his views of what the evidence shows and the inferences and conclusions that the evidence supports, it is clearly improper to introduce information based on personal belief or knowledge." United States v. Zehrbach, 47 F.3d 1252, 1266-67 (3rd Cir. 1995)

Improper statements by a prosecutor do not in and of themselves require reversal, but must be analyzed on a case-by-case basis pursuant to the harmless error doctrine. Zehrbach, 47 F.3d at 1267. While few trials are perfect, a court cannot grant reversal on the grounds of a prosecutor's allegedly improper comments unless the 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, 180-81 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637 at 643 (1974)). In making this determination, a court must examine the prosecutor's statements in context to determine their probable

effect on the jury's ability to judge the evidence fairly. Young, 470 U.S. at 11-14. For example, a conviction will not be overturned on the grounds of prosecutorial statements where the prosecutor's comments were "invited" by defense counsel's improper statements, and went no further than necessary to "right the scale" of justice or to "neutralize" the defense's remarks. Young, 470 U.S. at 12-13 (citing Lawn, 355 U.S. 339); United States v. Pungitore, 910 F.2d 1084, 1126 (3rd Cir. 1990); see also Werts v. Vaughn, 228 F.3d 178, 199 (3rd Cir. 2000).

We find that the prosecutorial statements highlighted by Petitioner as objectionable in this case did not "infect[] the trial with unfairness" to such an extent that Rollins' conviction denied him due process of law. Darden, 477 U.S. at 180-81. Taken in context and viewed as a whole, the prosecutor's remarks did not likely impede the jury's ability to view the evidence before them fairly.

***A. Improper Vouching for the Commonwealth's Case***

Petitioner contends that the prosecutor improperly vouched for the Commonwealth's case by assuring the jury that he had sworn an oath to "seek justice in every case," and that, unlike a bounty hunter, he did not "get paid for the convictions." N.T. 29. The Pennsylvania Supreme Court found that these statements were a proper means of "informing the jury of the role of a prosecutor," and we agree. Rollins II, 738 A. 2d at 444. The

full text of the prosecutor's comment was as follows:

> Many people have the mistaken notion that an assistant DA or a prosecutor is like a bounty hunter, that we get paid for the convictions. That's not true. Just as you swore an oath this morning, I too when I entered the office swore an oath. And the oath that I swore as an attorney and as a person was to seek justice in every case. Sometimes that means not guilty on certain cases and sometimes that means standing before a jury such as yourself and seeking to persuade you through evidence and under the law that an individual who is charged, as Saharris Rollins is charged, did in fact commit the crimes and should be found guilty.

N.T. 29. Reading the prosecutor's full statement in context, it is clear that there was no impropriety in the prosecutor's explanation of his role.

Petitioner also contends that the prosecutor improperly vouched for the Commonwealth's case when he remarked that he had "reviewed this case very carefully." However, it is unlikely that the jury took this comment to mean that the prosecutor had personal knowledge of facts not known to the jury, as the comment directly followed an explanation of the jury's unique role in evaluating the evidence presented to them:

> ... [W]hat is ultimately proven in this case is not what I think is proven. It's what you collectively and individually think is proven. So I'm not going to invade your jury box. I'm not going to step into your sacred province. But I am permitted to tell you what I expect to prove, and I can tell you that because I've spoken to the witnesses and I've reviewed this case very carefully.

N.T. 36-37. The Pennsylvania Supreme Court correctly found no merit to Rollins' allegations of impropriety with respect to this

statement. Rollins II, 738 A. 2d at 444.

Finally, petitioner contends that the prosecutor improperly vouched for the Commonwealth's case by stating that Rollins had "evil in his head, evil in his heart."[13] However, it is unlikely that the jury would consider this statement, taken in context, to express the prosecutor's personal knowledge or belief about Rollins himself. Rather, the statement was a valid summary of witness testimony regarding Rollins' identification, and seemed to express the witnesses' perception that the man who killed their brother, whoever he might have been, acted with malice.

***B. Improper Vouching for Witnesses***

Petitioner next contends that the prosecutor improperly vouched for the Commonwealth's witnesses by telling the jury that, in his opinion, the testimony of Violeta Cintron had the "ring of truth," that other Commonwealth witnesses "testified with conviction," that the witnesses' "visual imprint clicked" when they saw Mr. Rollins in a line-up, that the witnesses' identifications were "believable," and that the witnesses' testimony constituted "true facts." Taken in context, however, these statements were not improper, as many of them were appropriate summaries of witness testimony, and others were

[13] "At the lineup, the Cintrons and Angel were confronted with the height, the weight, the color, the three dimensions, the actual physical presence of the man that came on Orkney Street that night with evil in his head, evil in his heart, and a handgun on his belt. And at that time, when they saw that man face to face, that visual imprint clicked. Number five, number five, number five, number five." N.T. 1605.

invited responses going no further than necessary to neutralize the defense counsel's own remarks. Furthermore, taken in context, the prosecutor's statements do not suggest personal knowledge of the witnesses' credibility, but rather appeals to the jury's own opinion.

For example, the prosecutor's statement regarding Violeta Cintron's testimony ("... I submit, it does have the ring of truth") was offered in direct response to the defense's suggestion that Cintron was "starting to distort the facts," and was tempered by appeals to the jury's own perspective on the matter: "Look at the trouble she's gotten into as a result of telling the truth. She's got current charges concerning the cocaine ... Now why would a person lie to get themselves in so much trouble?" N.T. 1601.

Similarly, the prosecutor's comment that the witnesses "testified with conviction" regarding the trauma of their brother's death was both a valid summary of their testimony and an appropriate response to defense counsel's allegation that one witness engaged in a "screaming match" on cross-examination.[14] Taken in context, we likewise see no impropriety in the

[14] "And of course they testified with conviction. When I say conviction, I mean to say that they were sure that this was the defendant. They vented their hostility toward him. You know you killed my brother. I saw it with my own bleep-bleep eyes. You recall how they yelled from that stand and pointed to this defendant. Does defense counsel really anticipate that they were going to come in and keep their voice real nice and low and testify so matter of fact about the man that had a forty-five caliber revolver, excuse me, automatic pistol and shot and killed Jungo, their own flesh and blood?" N.T. 1604.

prosecutor's statements regarding the "click" of the witnesses' "visual imprint," the witnesses' "believable" identifications,"[15] the "true facts" of the case,[16] or the prosecutor's statement that Dalia Cintron's testimony, if believed, would be sufficient to prove Rollins' guilt.[17]

Even if the jury had viewed these remarks as statements of the prosecutor's personal knowledge or belief, the judge's curative instructions at the beginning and the end of arguments that the jury must base its verdict solely upon the evidence before it, and not the arguments of counsel, helped to ensure that the jury would not be improperly swayed. N.T. 25-26, 1640; See Darden, 477 U.S. at 182.

***C. Comments Regarding Inconsistent Testimony***

We likewise find no impropriety in the prosecutor's

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[15] "[T]here was no doubt in their mind. There was no hesitation. There was no conspiracy to identify number five. There was an independent and believable identification from every one of the four people from Orkney Street[.]" N.T. 1628.

[16] "Now, if that's the evidence in the case and they were there and they have no doubt about this man being the shooter and killer of Raymond Cintron, then I submit to you you should have no doubt either. And if you have no doubt, no reasonable doubt, and if you view that evidence and find those true facts, then there's only one verdict proper under the law[.]" N.T. 1628-29.

[17] "I did not need Angel Rivera to prove this case. I did not need Nilda Cintron to prove this case. And in point of fact, I did not need Violeta to prove this case. I did not need three people from North 21st Street. I did not need the positive ballistics matchup, matching the weapon three days apart. I did not need any of that. All I needed was the testimony of Dalia Cintron that Saharris Rollins here on trial was the man that came strolling out of Violeta's house with that handgun in his hand and turned around and pointed it at her and then turned and walked down the street. That's all I needed to prove this case." N.T. 1607.

statements regarding the witnesses' inconsistent testimony. Far from encouraging the jury to disregard the inconsistencies, as Respondent suggests, the prosecutor noted that mistakes are "natural" and that the jury should view corroborated testimony as truthful:

> ... There are mistakes made in these cases because the witnesses aren't perfect and if they did testify perfectly, Mr. Meehan would have argued, hey, these aren't human witnesses. These are robots that the DA sent up here. But I submit to you they testified with all human frailty, but they only want to remember one thing. The thing they want to remember is that Raymond Cintron was loved by them and a guy came and killed him one night and this is the guy. The kind of shoes he had on, that doesn't matter much. Whether a sweater had buttons or a turtleneck, who cares? This is the guy, right here, Saharris Rollins. And with regard to the inconsistencies, they're natural. They are normal in a criminal case. But where there is corroboration, then you can take the witnesses' testimony as truthful. Where you have outside proof that the witness is telling you something, then you can take that as the truth.

N.T. 1625-26. Viewed in context, the prosecutor's statements did not improperly suggest to the jury that they should ignore any inconsistencies in the testimony of the Commonwealth's witnesses.

***D. Speculating on Evidence not Before the Jury***

Petitioner next contends that the prosecutor, at closing, presented a scenario regarding the shooter's hat and blood type that was supported only by speculation, rather than by evidence of record. In addressing "this glitch in the case about blood types," the prosecutor suggested that the jeff cap (exhibiting Type A blood) which fell off Rollins' head at the scene of the crime did so because "maybe it was a little too large, like it

belonged to someone else[.]" N.T. 1614. The prosecutor further suggested that this "glitch" could be explained if Rollins (Type O) borrowed the hat from the accomplice (Type A) who was present at the murder, and if Rollins either was a non-secretor or only wore the hat for a short period of time. N.T. 1620-22.

We find it unlikely that a jury considering this scenario would get the impression that the prosecutor, in presenting it, relied on existing outside evidence. Violeta Cintron testified that the jeff cap fell off Rollins' head during a struggle. The Commonwealth's expert witness, serologist Mrs. Burke, testified that three of every four people are blood type secretors, that a hat worn by both a Type A secretor and a Type O non-secretor would reveal only Type A blood, and that it was difficult to say how long a secretor would have to wear a jeff hat for his secretion element to absorb into the band of the hat. N.T. 1547-49. The theory presented by the prosecutor at closing was a valid explanation of inferences and conclusions supported by the above evidence. See United States v. Zehrbach, 47 F.3d at 1266-67. The Pennsylvania Supreme Court correctly found that the prosecutor's statement was "merely a permissible inference based upon the evidence." Rollins II, 738 A.2d. 445.

***E. Prosecutorial Statements at the Penalty Phase***

A sentence of death cannot stand where a prosecutor's statements may have misled the jury into imposing the sentence

for irrelevant or impermissible reasons. See Caldwell v. Mississippi, 472 U.S. 320, 335-36 (1985).

Petitioner objects, first, to the prosecutor's comparison of jurors to soldiers at war who have a "duty to kill." See Petition, ¶ 197. In fact, the prosecutor's remarks were as follows:

> Service on a capital case is one of the greatest and heaviest responsibilities of citizenship. I would like you to compare it to something else. There are men old enough to have served in the World War, in Korea and in Vietnam. It is an obligation of citizenship when the country is at war to serve in the armed forces and, if called upon, to take human life of the enemy. It is with a heavy heart that men and women who go to war do that. It's not something that they want to do, but for the good of the country and under the system of freedom and law that we have, it is necessary and it is just.

N.T. 1830-31. The Pennsylvania Supreme Court found that the prosecutor did not commit misconduct by likening the jury's responsibility in a capital case, "surely one of the more weighty responsibilities a citizen could have in this society," to the burden placed on soldiers at war. Rollins II, 738 A.2d at 449. We agree. Taken in context, the prosecutor's statement was a reflection on the somberness of the occasion, rather than an impermissible exhortation to "kill the enemy," as Petitioner contends. Petitioner also contends that the prosecutor "argued that the jurors had to sentence Mr. Rollins to death in order to live up to their oaths." See Petitioner's Memorandum, p. 55. In fact, the prosecutor made no such argument. He merely said, "I'm

asking you to live up to your promise under oath that you follow the law that you'll get from Judge Sabo," without suggesting in any way that the jury's oath required them to impose the death penalty. N.T. 1849.

Next, Petitioner contends that the prosecutor's mention of deterrence of others at closing impermissibly encouraged the sentencing jury to consider deterrence as a non-statutory aggravating factor. We agree with the Pennsylvania Supreme Court's finding that "fleeting references" to deterrence of others, such as those made to explain the rationale behind the death penalty, are unlikely to bias or prejudice a jury. Rollins II, 738 A.2d at 449; see also Lesko v. Lehman, 925 F.2d 1527, 1545 (3rd Cir. 1991). The prosecutor mentioned deterrence twice in this case, both times in the context of discussing justifications for the death penalty generally, rather than justifications for Rollins' sentence in particular. In his first reference, the prosecutor explained that deterrence is one of the many reasons why American law views the death sentence to be a justifiable penalty:

> Consequently, where there is a murder of the first degree and where the aggravation outweighs the mitigation, that being our valid and Constitutional law, the death penalty is appropriate. It's never easy. It's never easy to kill. But you heard His Honor talk about the various forms of homicide and you heard His Honor talk about justifiable homicide. The death penalty as written in Pennsylvania, if imposed, is justifiable. There is nothing wrong with it. And it arises, this great responsibility, it arises out of

> the very sanctity of life.
>
> It is important and it is essential that people who would kill be deterred from killing, that when they take that weapon in their hand, they think twice. I could be put to death for extinguishing this human life. Under our system of law, we must have the ultimate deterrent for what is the ultimate crime, murder of the first degree with aggravating circumstances outweighing any mitigation.

N.T. 1832-33. The prosecutor's second comment was made in a similar context:

> It is with a heaviest heart that I make this argument to you. I would prefer that we lived in a better world. I would prefer that we did not have murders occurring on our streets and in our homes. I would prefer that we didn't have aggravating circumstances in what murders did occur. But we don't live in a pretty world and because of how ugly it has become, we have the death penalty and it serves as a lesson and a deterrent. Let those who take loaded guns into other people's homes, let them think twice about the consequences. I don't mean the consequences necessarily of the people inside the home, but let them think twice about the consequences to their own life if they should brandish that loaded and deadly weapon around ...

N.T. 1848. Furthermore, the prosecutor never suggested that deterrence be considered as an aggravating factor to increase Rollins' sentence.

Petitioner next claims that the prosecutor improperly offered his personal opinion that the facts of the cases established the "grave risk of death" aggravating factor when he argued as follows:

> I can't chart for you where those bullets went but they certainly were flying at great, great speed in a very small and confined space with other human beings there.

> And the presence of those human beings was well known to the defendant because he cased that room before he went out and got his semi-automatic handgun.
>
> So if you're asking me did the defendant in the commission of this murder knowingly create a grave risk of death to another person, either Violeta or little Jose, in addition to the victim Raymond, my answer would be yes. But you are the finder of fact. And if I have proven that, that knowing assumption of the grave risk of death to the two remaining, surviving individuals, then that too is an aggravating circumstance if you find it beyond a reasonable doubt.

N.T. 1840-41. However, this Court finds that the prosecutor's comments, taken in context and tempered by appeals to the jury's authority, were not statements of personal belief or knowledge, but rather statements of "what the evidence shows and the inferences and conclusions that the evidence supports." Zehrbach, 47 F.3d at 1266-67.

Petitioner next contends that the prosecutor's comments regarding Petitioner's lack of remorse were improper because lack of remorse is not a statutory aggravating factor, and because the comments violated Petitioner's right to remain silent. The prosecutor made the following remarks:

> Well, the defendant wants you to believe that he's innocent. Did he at any point express any sorrow about the death of Raymond Cintron? I mean, whether or not he killed the man, you know. In his mind he says no. You have said yes. Well, regardless, did he express any remorse or sorrow over Raymond Cintron's untimely death at the age of twenty-seven? No. .... The only human emotion that came from that witness stand was anger, no remorse, no sorrow. With the overwhelming quality of the Commonwealth's evidence during the case in chief on the guilt stage, he still is going to take the stand in front of you and say, I'm innocent.

N.T. 1842-43.

Initially, we find that the comments regarding Rollins' lack of remorse did not violate his privilege against self-incrimination, as his testimony at the penalty phase touched on some of the facts of the case against him, his innocence, and biographical information about his family and children. A defendant who provides testimony of a biographical nature at the penalty phase cannot claim a Fifth Amendment privilege against prosecutorial comment on matters reasonably related to his credibility or the subject matter of his testimony. Lesko, 925 F.2d at 1542.

We further find that the prosecutor's comments regarding lack of remorse, taken in context, would not have been viewed by the jury as an invitation to consider this factor as an aggravating factor in sentencing. These comments were made as the prosecutor began his discussion of potential mitigating factors: "And there's a list of [mitigating factors] too, because you're entitled to consider things that would make the murder of Raymond Cintron not so bad. And to that end, the defendant and Mr. Meehan had people take the witness stand at the penalty phase." N.T. 1842. The prosecutor then noted that Rollins' testimony, while presumably intended to convince the jury that Raymond Cintron's murder was "not so bad," was presented without remorse or sorrow, and indeed without any acceptance of personal

responsibility. Reading these comments in context, it appears that the prosecutor intended only to clarify that Rollins' present attitude towards the crime of which he was convicted was not sufficiently remorseful to serve as a mitigating factor. It is highly unlikely that the jury was led to believe that lack of remorse is an appropriate aggravating factor.

Finally, Petitioner alleges that the prosecutor denigrated the mitigating evidence regarding Petitioner's obligations to his children and family by pointing out that such evidence was not on the list of statutory mitigating circumstances. While a prosecutor is entitled to argue that the mitigating evidence presented by the defendant is not compelling, a jury cannot be precluded from considering any relevant mitigating evidence. Hitchcock v. Dugger, 481 U.S. 393, 394 (1987). As Pennsylvania's sentencing statute expressly includes a "catch-all" mitigation provision for "any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense," Petitioner contends that it was improper for the prosecutor to suggest that the jury could not consider Rollins' testimony regarding his family responsibilities. See 42 Pa. Cons. Stat. § 9711(e)(8). Specifically, Petitioner highlights the following statement:

> And curiously enough, nowhere on this sheet of mitigating circumstances does it appear that the defendant had children at the time of his offense. That's not even a truly mitigating circumstance. It's

> a bold faced ploy for sympathy. And I think you know that bias and sympathy is not to control your decision...

N.T. 1846. However, the record as a whole does not support Petitioner's reading of this comment. The prosecutor began his discussion of mitigating factors by recognizing that the defense was relying on two potentially mitigating factors – Petitioner's lack of significant criminal history, and his support for two of his four children. N.T. 1843. The prosecutor then argued to the jury that Petitioner's role as a father should not be viewed as a particularly compelling mitigating factor in light of the nature of the crime he had committed:

> But it seems curious indeed that now, with the defendant truly on trial for his life, where the personality is in fact the issue before a jury, all of a sudden four children ... all of the sudden they're real important to him and he wants you to know all about them. I wish that he had as much consideration for the child of Violeta Cintron as he purports to have for his own four children, because if he really loved children and if they were really special the way they all are ... he wouldn't have went out and gotten that gun and come back in and put it right in the face of this woman with the baby next to him ... That's awfully thin, awfully thin to come to court and ask a jury to spare your life because you have children when you have so wantonly disregarded the child of another.

N.T. 1845. The prosecutor's statement about the "sheet of mitigating circumstances" was made only after a thorough discussion of the merits of Petitioner's claim regarding the mitigating effects of his role as a father.

Given that the prosecutor directly challenged the merits of Petitioner's claim, and given that the jury was later instructed

to consider "any other evidence of mitigation concerning the character and record of the defendant," this Court finds it unlikely that the jury would have been misled by the prosecutor's statement regarding non-statutory mitigating factors.

### 4. Ineffective Assistance of Counsel and Trial Court Error at the Guilt Phase

Petitioner next contends that he is entitled to relief from his conviction because of attorney ineffectiveness and trial court error at the guilt phase of his trial. Petitioner alleges that trial counsel was ineffective for failing to investigate and present potentially exculpatory evidence regarding Rollins' blood type, the possibility that the shooting occurred during a struggle, and concerns about the witnesses' potentially inaccurate identifications of Rollins. Petitioner further alleges that the trial court prevented counsel from properly cross-examining Dalia Cintron and improperly instructed the jury regarding the implications of Dalia Cintron's testimony.

#### *A. Counsel's Failure to Investigate and Present Evidence of Petitioner's Blood Type*

Petitioner asserts that he was denied his right to the effective assistance of counsel because his attorney failed to independently discover Rollins' blood type, and failed to investigate and present evidence exploiting the discrepancy

between Rollins' blood type and the blood type found at the scene of the crime.[18] In fact, counsel first learned that Rollins' blood was type O from the prosecution shortly before the defense rested in its case. Until that time, counsel had thought his client's blood was type A, the type found at the crime scenes, because he had failed to subpoena easily available hospital records of Rollins' treatment for shotgun pellet wounds. See N.T. 1481-88.

The Pennsylvania Supreme Court found this ineffective assistance of counsel claim to be without merit, because the prosecutor and defense counsel ultimately stipulated at trial that Rollins had type O blood, and counsel "fully exploited this evidence" by addressing the blood type discrepancy before the jury in his closing statement. Rollins II, 738 A.2d 445. We find that the Pennsylvania Supreme Court's judgment was neither a contrary nor unreasonable application of the Strickland standard for ineffective assistance of counsel claims. Strickland requires that a petitioner show both that his counsel's performance was deficient and that the petitioner suffered prejudice as a result. Strickland, 466 U.S. at 687. While not explicitly phrasing its decision in these terms, the Pennsylvania Supreme Court effectively held that Rollins failed to demonstrate

[18] Petitioner exhausted this claim on post-conviction review before the Pennsylvania Supreme Court. Rollins II, 738 A.2d at 445; See supra, Part I.A. Because the Pennsylvania Supreme Court reached the merits of this claim, we will apply the AEDPA's deferential standard of review. See supra, Part II.

prejudice sufficient to support a Strickland claim. Before retiring to make its decision, the jury was informed that Rollins' blood was type O, and heard defense counsel argue that Rollins could not have been the murderer because of this blood type discrepancy. To demonstrate prejudice, Petitioner would have to show a reasonable probability that the result of the jury's deliberations would have been different had defense counsel's arguments concerning Rollins' blood type been made earlier in the case. While counsel's failure to discover Rollins' blood type until the end of trial indicates a significant defect in professional judgment, we find that it was reasonable under Strickland for the Pennsylvania Supreme Court to hold that Rollins had not met the burden of showing he was prejudiced by counsel's actions.

***B. Trial Court Error and Ineffective Assistance of Counsel Regarding Dalia Cintron's Identification Testimony***

Petitioner contends that the trial court erred in refusing to expedite transcription of Dalia Cintron's pretrial testimony, and refusing, at trial, to allow counsel to question the witness based on his own recollection of her earlier testimony. Petitioner further objects to the trial court's jury instructions concerning the implications of Dalia Cintron's trial testimony. Finally, Petitioner brings ineffective assistance of counsel

claims with respect to both these issues.[19]

At a pre-trial motion to suppress, Dalia Cintron testified that she observed, from her own window, Rollins and a few other men arrive at Violeta Cintron's house before the crime occurred. Dalia testified that later, when she left her own home and approached Violeta's house, she saw Rollins coming out the door, and had approximately a second or two to view his face before he turned his back to her. N.P.T. Vol. II at 137-41. Upon being questioned by defense counsel at trial on this issue, however, Dalia testified that she had the opportunity to observe Rollins for "about ten or fifteen minutes." N.T. at 1339. Counsel attempted to challenge the witness' testimony on the basis of his own recollection, stating, "And I asked you the very same question [in a hearing before the trial started], how much time did you have to view the defendant. And you responded to me, 'One to two seconds. After that, all I could see was his back.'" N.T. at 1342. Upon objection and a brief conference with the court, counsel re-phrased the question, but the witness did not admit to making the earlier statement. N.T. at 1344-45. On cross-examination, the prosecutor used a stopwatch to help Dalia

[19] Petitioner exhausted these claims on post-conviction review before the Pennsylvania Supreme Court, where he raised an ineffective assistance of counsel claim relating to counsel's failure to pursue claims of trial court error surrounding Dalia Cintron's testimony. Rollins II, 738 A.2d at 447-48; See supra, Part I.A. As the Pennsylvania Supreme Court reached the merits of the ineffective assistance of counsel claim only, we will review the substantive claims of trial court error under a de novo standard, and the ineffective assistance of counsel claims under the more deferential AEDPA standard. See supra, Part II.

Cintron indicate the amount of time she was face-to-face with Rollins, which amounted to no more than four seconds. N.T. at 1350-53.

The Pennsylvania Supreme Court rejected Rollins' claim that counsel was ineffective for "failing to pursue the claim that the trial court erred when it precluded certain cross-examination of Dalia," on the grounds that the underlying claim of trial court error was meritless. Rollins II, 738 A.2d at 447. The Court found it "very clear" that the time in which Dalia Cintron viewed Rollins face-to-face was "far more limited" than the ten or fifteen minute period during which she observed Rollins' activities from afar. Id. The court also found no material inconsistency between the witness' testimony on cross-examination that she saw Rollins' face for four seconds and her pre-trial statement that she had seen his face for one to two seconds. Id at 448.

Petitioner contends that the trial court's refusal to expedite transcription of Dalia Cintron's pre-trial testimony, and its later refusal to allow counsel to question the witness using his own notes and recollection of her earlier testimony, violated Petitioner's rights under the Confrontation Clause of the Sixth Amendment. Confrontation Clause errors, including denial of a defendant's opportunity to impeach a witness for bias, are subject to harmless error analysis. Delaware v. Van

Arsdall, 475 U.S. 673, 684 (1986). We find that the trial court's judgment in this regard was harmless error, because the witness ultimately admitted, upon cross-examination by the prosecutor, that she stood face-to-face with Rollins for only a matter of seconds. In contrast, the fact trial counsel was attempting to elicit from Dalia Cintron by questioning her as to her prior testimony was that she saw Rollins' face for one or two seconds. We find that this two-second difference between Dalia Cintron's pre-trial and trial testimony is not material, and likely did not affect the outcome of the case.

Petitioner further contends that the trial court erred when it "essentially directed the jury to accept the accuracy of Dalia's testimony." Petitioner's Memo, p. 63. After instructing the jury that the identification testimony of Violeta Cintron, Angel Rivera, and Nilda Cintron should be treated with caution because these witnesses were initially unable to identify Rollins from a series of photographs, the court gave the following instruction:

> The aforesaid cautionary identification of Saharris Rollins by Violeta Cintron, Angel Rivera and Nilda Cintron does not apply to the identification of Saharris Rollins by Dalia Cintron. There is evidence in this case that Dalia Cintron did pick out the photo of Saharris Rollins on January the 23rd, 1996 when presented with eight photos by Detective Ballantine. In addition, Dalia Cintron did on February 18, 1986, at a live lineup of six persons, positively identify the defendant Saharris Rollins as the one who committed the alleged crime at 2859 North Orkney Street. Where the opportunity for positive identification is good and the

> witness is positive in her identification and her identification is not weakened by prior failure to identify but remains even after cross-examination positive and unqualified, such testimony as to identification need not be received with caution. Indeed, the law says that her positive testimony as to identity may be treated as a statement of fact.

N.T. 1650. The Pennsylvania Supreme Court held that this jury instruction was a proper statement of the law under Commonwealth v. Kloiber, 106 A.2d 820, 826 (Pa. 1954), and in no way directed the jury to accept Dalia Cintron's testimony without question. Rollins II, 738 A.2d at 448. We agree. The trial court's instruction, which was taken virtually verbatim from Kloiber, uses the pronoun "her" to refer to any witness who satisfies the Kloiber requirements, not to Dalia Cintron specifically. Furthermore, the instruction indicates only that the jury "may" treat such a witness' positive identification as fact, and by no means reduces the Commonwealth's burden of proof as to identity. There was no error in the trial court's jury instruction with respect to the implications of Dalia Cintron's testimony.

Finally, Petitioner argues that these alleged trial court errors violated his right to effective assistance of counsel. We find, however, that the Pennsylvania Supreme Court reasonably applied the Strickland standard when it rejected Petitioner's ineffective assistance of counsel claim on the grounds that Dalia Cintron's testimony at trial was consistent with her pre-trial statements. See Rollins II, 738 A.2d at 448. Since any

deficiencies in trial counsel's examination of Dalia Cintron were cured when she admitted upon cross examination that she stood face-to-face with Rollins for only four seconds, Petitioner cannot show that he suffered prejudice as a result of his attorney's ineffectiveness. Likewise, the Pennsylvania Supreme Court reasonably applied the Strickland standard to Petitioner's claim regarding the Kloiber jury instruction, as counsel committed no fault in failing to question a perfectly proper jury instruction.

### *C. Counsel's Failure to Investigate and Respond to Identification Testimony*

Petitioner contends that his trial counsel was ineffective in failing to explore potentially exculpatory evidence regarding whether the shooter was right- or left-handed, and in failing to object to the introduction of evidence concerning the shooter's identity and motive (including evidence of Petitioner's prior drug-related transactions) and expert testimony concerning the blood type on the cap found at the scene.[20] We find these arguments to be without merit.

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[20] The portions of this claim relating to evidence of Petitioner's dominant hand and counsel's failure to object to expert testimony were exhausted on post-conviction review before the Pennsylvania Supreme Court. Rollins II, 738 A.2d at 446-47; See supra, Part I.A. The portion of this claim relating to counsel's failure to object to testimony regarding Petitioner's prior drug transactions was exhausted on direct appeal. Rollins I, 580 A.2d at 748-49; Rollins II, 738 A.2d at 447. Because the Pennsylvania Supreme Court reached the merits of this claim, we will apply the AEDPA's deferential standard of review. See supra, Part II.

Testimony indicates that Raymond Cintron's shooter may have used his left hand to fire the gun, but that the shooter at the Campbell residence, where Rollins was later arrested, was right-handed. N.T. 405; 820-23. Petitioner, who is right-handed, now faults counsel for failing to sufficiently exploit this fact at trial. In his closing argument, however, trial counsel specifically called on the inconsistencies surrounding the shooter's dominant hand as an issue of reasonable doubt for the jury:

> Now, you have the incident in North 21st Street and an incident on Orkney Street. Now, anybody that testifies regarding the holding of the gun on Orkney Street testified, and Violeta said that he held it with his left hand, held it with his left hand. Now, the guy that was doing the job at 21st Street held it with his right hand. Now, is this the man that did the homicide on Orkney Street? The same blood type at both places. The guy holds the gun in different hand at both places. Although he's identified as being the person that may have held that gun at 21st Street, is he the same person that held the gun on Orkney Street?"

N.T. 1567.

The Pennsylvania Supreme Court rejected Petitioner's argument of trial counsel ineffectiveness on the grounds that counsel cross-examined Violeta Cintron regarding her statement that Raymond's murderer was left-handed, and further called the jury's attention to this issue at closing. Rollins II, 738 A.2d at 447. In doing so, the Pennsylvania Supreme Court reasonably applied the Strickland standard for ineffective assistance of counsel. While counsel may not have explored the issue of the

shooter's dominant hand to the fullest extent possible, counsel's decision to proceed in this manner was objectively reasonable, particularly given the fact that Violeta Cintron, whose earlier statement indicated that Raymond's shooter used his left hand, was unable or unwilling to confirm this fact at trial. Furthermore, evidence suggests that the same gun was used at both the Cintron and Campbell residences, so any attempt by counsel to emphasize the fact that Rollins was right-handed could have ultimately backfired. It is not for this Court to second-guess counsel's trial strategy, where that strategy was reasonably selected in light of facts available at the time of trial.

Petitioner further claims that counsel was ineffective in failing to object to testimony regarding Rollins' involvement in drug-related transactions with members of the Cintron household. Petitioner contends that such testimony is inadmissible because it is far more prejudicial than probative of identity. On direct appeal, the Pennsylvania Supreme Court found that the trial court should have given a cautionary instruction noting that the testimony of drug transactions should be considered only for the limited purpose of showing identity and motive. Rollins I, 580 A.2d at 748. However, the court held that no prejudice resulted from counsel's failure to object to the testimony or request a limiting instruction, because "the record is replete with evidence" of drug transactions by Rollins and members of the

Cintron household. Id. at 748-49. We agree. Counsel is deemed ineffective under the standards of Strickland only where the attorney's deficient performance actually prejudices the defense. Strickland, 466 U.S. at 687. Where there is ample evidence of record that the defendant and witnesses to a shooting were involved in prior criminal drug activity, counsel's failure to object to one witness' testimony about defendant's drug transactions is not prejudicial to the defense as a whole.

Finally, Petitioner contends that counsel was ineffective in failing to object to the expert testimony of crime lab technician Roberta Burke. At trial, Ms. Burke explained to the jury the significance of blood type identification through secretion of non-blood bodily fluids such as sweat, tears, and mucus. N.T. 1544-49. She testified that seventy-five percent of humans secrete blood type indicators through non-blood fluids, and that non-blood secretions of blood type A were found on the sweatband of the jeff cap which Rollins wore at the scene of the crime. N.T. 1547-48. When asked by the prosecutor what would happen if a hat was worn first by a type A secretor and later by a non-secretor of a different blood type, Ms. Burke responded that testing would reveal only type A secretions. N.T. 1548-49. Petitioner claims that the hypothetical question posed by the prosecutor was improper because it was based on assumptions and facts not reflected in the record: namely, that an unknown type A

secretor had worn the cap found at the scene of the crime, that Rollins obtained the cap from this unknown individual, and that Rollins is a non-secretor.

An expert's conclusory opinion testimony is generally proper only if the facts upon which it is based are reflected in the record. Commonwealth v. Rounds, 542 A.2d. 997, 999 (Pa. 1988). However, an expert may testify in response to a hypothetical question based on assumed facts as long as the hypothetical is supported by "competent evidence and reasonable inferences derived therefrom." Commonwealth v. Petrovich, 648 A.2d 771, 772 (Pa. 1994).

The Pennsylvania Supreme Court, in reviewing Petitioner's claims regarding Ms. Burke's testimony, found that the hypothetical posed to Ms. Burke assumed the following facts: that Rollins had worn the jeff cap at the scene of the murder; that the jeff cap, which is normally worn tight, was easily knocked off of Rollins' head during the murder; that sweat found in the cap had been secreted by a person with type A blood, and that Rollins had type O blood. Rollins II, 738 A.2d 446. The court held that the hypothetical was proper because these assumed facts were all established by competent evidence. Id. We agree, and further find that the inferences concerning the unknown type A secretor and Rollins' possible non-secretor status were reasonable in light of the evidence of record. Numerous

witnesses identified Rollins as the murderer and noted that he was wearing a brown jeff cap when he arrived at the Cintron house but not when he departed. The cap was later recovered from the scene of the crime. While it was stipulated at trial that Rollins had type O blood, the cap tested positive only for traces of type A non-blood fluids. Based on these facts, it would be reasonable for the prosecutor to infer that the cap had previously been worn by an unidentified Type A secretor, and that Rollins was either a non-secretor or did not wear the cap for long enough to leave traces of his blood type on the cap. See also supra, Part III.3.D. In finding that there was no deficiency on counsel's part for failing to object to this legitimate hypothetical, the Pennsylvania Supreme Court reasonably applied the Strickland standard for ineffective assistance of counsel claims.

***D. Counsel's Failure to Investigate and Present Evidence of a Continued Struggle***

Petitioner further contends that trial counsel was ineffective for failing to investigate and present evidence that could have been used to show that the murder of Raymond Cintron occurred during a struggle.[21] Specifically, Petitioner faults

[21] Petitioner exhausted this claim on post-conviction review before the Pennsylvania Supreme Court. Rollins II, 738 A.2d at 446; See supra, Part I.A. Because the Pennsylvania Supreme Court reached the merits of this claim, we will apply the AEDPA's deferential standard of review. See supra, Part II.

counsel for failing to impeach Violeta Cintron on the grounds of inconsistencies between her pre-trial statement and trial testimony regarding the nature of the struggle and the timing of the shots. Petitioner also contends that, in light of the testimony and forensic evidence suggesting the possibility of a struggle, reasonable trial counsel should have requested expert examination of the crime scene. Petitioner asserts that the issue of whether the victim was killed during the course of a struggle is relevant both to the degree of homicide of which Rollins was convicted, and the appropriateness of the "grave risk of death" aggravating factor at sentencing.[22]

In her pretrial statement, Violeta Cintron said that the first two or three shots were fired during the course of a struggle between Rollins and Raymond Cintron. One of these shots apparently hit Raymond in the arm, and the remaining shots struck a lamp and some speakers. Violeta stated that after Raymond fell

[22] While Petitioner argues that additional evidence of a struggle "would have resulted in the jury not finding the 'grave risk of death' aggravating factor," this Court finds that argument to be completely without merit. In sentencing, the jury found that Petitioner had "knowingly created a grave risk of death to another person in addition to the victim of the offense." In what was apparently a failed attempt at robbery, Petitioner intentionally pulled a loaded gun in a ten- by eleven-foot room where at least two individuals besides the victim, including a one-year old infant, were present. The available evidence clearly indicates that at least some shots were fired during a struggle between Petitioner and the victim, Raymond Cintron. Given these circumstances, it is extremely unlikely that any juror would reverse his position as to the "grave risk of death" aggravating factor when faced with additional evidence suggesting that all the gunshots were fired during the course of the struggle. On the contrary, a juror might view the risk of death to third parties as even greater where a gun was repeatedly discharged wildly during a struggle, rather than fired intentionally and directly at the intended victim.

to the ground, Rollins grabbed him by the lapels and fired a direct shot. See N.T. 820-21. At trial, however, Violeta's testimony as to the course of events was somewhat different. Violeta testified that two shots were fired during the struggle, and that, once Raymond fell to the ground, Rollins first walked a few steps to the open front door and briefly looked outside before returning to the spot where Raymond lay. Violeta testified that Rollins then pulled Raymond up from the ground by his lapels and fired a direct shot. Either while he was holding Raymond or after he had dropped him back onto the floor, Rollins fired approximately two more shots. One of these later shots struck Raymond in the shoulder. See N.T. 649-51, 822-24, 852, 856-57, 1745-47.

Dalia Cintron, who observed the scene from afar, testified that, after Violeta let him in, Rollins spent approximately five minutes in the Cintron house. He then came outside, obtained a gun from one of his associates standing outside, concealed the gun in his jacket, and re-entered the house. N.T. 140-41. After he re-entered the house, Dalia testified that "a shot came real fast." N.T. 141. She then heard approximately six more gunshots, and initially described the shots, in response to prompting by the prosecution, as being one right after the other. N.T. 142, 145. Dalia later testified that she heard the first shot as she was coming down the stairs, heard two more just after

she left her house, and heard the remaining shots while running to Violeta's house. N.T. 205, 206. Angel Rivera similarly testified that he initially heard two shots, and then three more shots a second or two later. N.T. 250-51.

Six spent casings were found at the scene, but only four projectiles were recovered. Of the three gunshot wounds to Raymond Cintron's body, the shot to the arm was identified by the medical examiner as a possible defense wound and was apparently fired from a distance of between two and six inches. N.T. 463, 1097. The medical examiner testified that, of the three gunshot wounds, the wound to the shoulder, which was "devastatingly fatal" because it pierced his lung, heart, and bowels, was least likely to have occurred during a struggle. N.T. 463, 477.

The Pennsylvania Supreme Court held that counsel was not ineffective for failing to further investigate evidence suggesting that Raymond Cintron was killed during a struggle, because such a defense would have "run directly counter to Appellant's defense that he was an innocent man who had been misidentified." Rollins II, 738 A.2d 446. Citing a dissenting opinion in Commonwealth v. Legg, 711 A.2d 430, 436 (Pa. 1988), the court found that it is objectively reasonable for counsel to fail to present two inconsistent defenses, especially when one defense would undermine the other. Id.

We find that the Pennsylvania Supreme Court's decision

regarding counsel's failure to investigate evidence of a struggle was a reasonable application of Strickland. Strickland requires that a court judge the reasonableness of counsel's challenged conduct on the facts of the particular case, rather than applying "mechanical rules." Strickland, 466 U.S. at 690, 696. In reviewing Rollins' claim, the Pennsylvania Supreme Court did not apply a bright-line rule which would excuse all attorneys failing to set forth inconsistent claims. Rather, the court considered the particulars of Petitioner's case, and determined that it was objectively reasonable for counsel to proceed with the primary defense of misidentification while abandoning the alternative defense of struggle, because presenting both might appear inconsistent to a jury. Rollins II, 738 A.2d 446. Petitioner's arguments to the contrary are presented from hindsight, and do not establish that the Pennsylvania Supreme Court acted "unreasonably" in applying federal law. See, e.g., Florida v. Nixon, 125 S. Ct. 551, 563 (2004) (it is reasonable for defense counsel to strive to avoid the counterproductive course which might result from presenting inconsistent defenses); Jacobs v. Horn, 395 F.3d 92, 107-08 (3rd Cir. 2005) (counsel's failure to assert a diminished capacity defense was not reasonable where such a defense would have undermined counsel's strategy to seek acquittal based upon Petitioner's innocence); Porter v. Horn, 276 F. Supp. 2d 278, 315-16 (E.D. Pa. 2003) (same).

Furthermore, even if counsel's performance in failing to present additional evidence of a struggle was below the minimal standard of professionally competent assistance, Petitioner's claim nonetheless fails because he cannot show prejudice. A petitioner alleging unconstitutional ineffectiveness of counsel will succeed only if he can demonstrate a "reasonable probability" that the result of the proceedings would had been different had Counsel taken a different course. Strickland, 466 U.S. at 694. The available evidence clearly establishes that Raymond Cintron was initially shot in the arm during the course of a struggle. However, the testimony of Violeta Cintron also indicates that the killer then grabbed Raymond, who lay injured on the floor, by the lapels of his jacket and took at least one direct shot, if not more. The forensic evidence suggests that at least one of these direct shots struck Raymond in the shoulder and led directly to his death. While there are some differences between Violeta's pre-trial and at-trial statements, these differences are irrelevant given that Violeta consistently maintained that the killer took at least one direct shot at Raymond after Raymond fell, injured, to the floor.

Petitioner now presents the affidavit of a new expert, H. Dale Nute, who believes that the physical evidence, including the position of all three gunshot wounds suffered by Raymond Cintron, is consistent with the shots having been fired by a

left-handed shooter during a struggle. Mr. Nute also opines that the rapid succession of shots described by Dalia and Angel is inconsistent with Violeta's description of the course of events, although this Court's reading of the trial testimony does not indicate any such inconsistency. Even if Petitioner's counsel had investigated the possibility that all shots were fired during a struggle, and presented testimony similar to Mr. Nute's, such testimony would have conflicted both with the testimony of the medical examiner and the crime scene investigator, and with the credible testimony of Violeta Cintron, a witness to the crime. It is not reasonably probable that testimony of the flavor presented by Mr. Nute would cause a jury to disregard the consistent testimony of Violeta and various witnesses, as well as the testimony of two forensic experts, all indicating that the killer left the Cintron house to obtain a gun, returned with a loaded weapon, and fired at least one direct shot into the upper torso of an already-injured victim who was lying, incapacitated, on the floor. Petitioner has not succeeded in showing a reasonable probability that the jury's finding of intentional homicide would have been different had additional evidence of continued struggle been presented.

**5. Trial Court Error, Prosecutorial Misconduct, and Ineffective Assistance of Counsel at Jury Selection**

### *A. Substantive and Derivative Batson Challenges*

Petitioner first brings claims of trial court error, prosecutorial misconduct, and ineffective assistance of counsel relating to the prosecutor's allegedly discriminatory use of peremptory strikes.[23] Petitioner contends that the prosecutor struck potential jurors based on their race, in violation of Batson v. Kentucky, 476 U.S. 79 (1986), and that the trial court erred in allowing the prosecution to exercise these strikes without first holding a Batson hearing. For the reasons which follow, we find Petitioner's arguments to be without merit.

To make out a prima facie Batson claim, a defendant must establish that he is a member of a cognizable racial group. Batson, 476 U.S. at 96. Furthermore, the facts and circumstances of the case must raise an inference that the prosecutor used his challenges in a racially discriminatory manner. Id. In evaluating whether a defendant has made the requisite prima facie showing, the following factors are properly considered: (1) the number of racial group members in the panel; (2) the nature of the crime; (3) the race of the defendant and the victim; (4) a

[23] Petitioner exhausted these claims on post-conviction review before the Pennsylvania Supreme Court. Rollins II, 738 A.2d at 442-43; See supra, Part I.A. While the Pennsylvania Supreme Court did not adjudicate these claims on their merits, Petitioner's substantive Batson claim was addressed on its merits by the PCRA trial court. Thus, we will review the PCRA trial court's decision using the AEDPA's deferential standard of review. See supra, Part II; see generally, Brinson v. Vaughn, 398 F.3d 225, 232 (3rd Cir. 2005); Hardcastle v. Horn, 368 F.3d 246, 254-55 (3rd Cir. 2004).

pattern of strikes against racial group members, and (5) the prosecution's questions and statements during voir dire. United States v. Clemons, 843 F.2d 741, 748 (3rd Cir. 1988) (citing Batson, 476 U.S. at 97). The defendant is also entitled to rely on the fact that the practice of peremptory challenges "permits 'those to discriminate who are of a mind to discriminate.'" Batson, 476 U.S. at 96. However, these factors are merely illustrative, and courts may properly consider "all relevant circumstances" that might give rise to an inference of purposeful discrimination. Batson, 476 U.S. at 96-97; Clemons, 843 F.2d at 748.

If a defendant is able to make out a prima facie Batson claim, the burden then shifts to the prosecution to articulate race-neutral explanations for striking specific venirepersons. Batson, 476 U.S. at 98. Finally, the trial court must determine whether the defendant has established purposeful discrimination. Id.

**i. Factual History**

The relevant facts concerning jury selection at Rollins' trial are as follows: At voir dire, the prosecutor exercised all or almost all of his first seven peremptory strikes against

African-American venirepersons.[24] Upon the prosecutor's third peremptory strike, Petitioner's counsel raised the following objection:

> Your Honor, I wish to note my objection on the record as that juror was qualified among any other juror as indicating that it was, that the person could impose the death penalty, that the juror, the juror's race was in fact black. And I want to note my objection to the exclusion of the black from the jury panel, and I believe that it's going to be a methodical thing of excluding all blacks from this panel.

Notes of Voir Dire (hereafter, "N.V.D.") 243-44. The trial judge responded, "I think you're wrong there," noting that one of the four jurors who had already been empaneled was African-American. The prosecution indicated that he was keeping "a very, very careful record indeed," and that he would be willing, at the conclusion of voir dire, to explain for the record how he had exercised his peremptory strikes. After two more prospective jurors had been interviewed, the prosecution raised its fourth peremptory strike. Petitioner's counsel then requested that the court note for the record the race of the stricken venireperson. The court responded, "Well, we could do that later. Come on. I'll make a record of it too and we could do something." However, Petitioner's counsel did not renew this request prior to the start of trial, and there is no indication in the trial

[24] Petitioner contends that the prosecution exercised all seven initial strikes against African-American jurors. Respondent contends that only six of the first seven strikes were used against African-American jurors.

record of the racial makeup of the stricken venirepersons. Furthermore, the trial court never called upon the prosecution to provide explanations for his use of peremptory strikes.

After the verdict was rendered, Petitioner's counsel renewed his Batson challenge. At a post-verdict hearing, the prosecutor summarized the following facts, which were not objected to by Petitioner's counsel: At the completion of jury selection, the jury included five African-American members, and one of the alternate jurors was African-American. On the first day of trial, juror number six, an African-American woman, failed to appear, and was replaced by the first alternate juror, a white male. The prosecution had used a total of eleven peremptory strikes, striking six African-American and five white venirepersons. The defense had exercised twenty-one peremptory challenges, striking twenty white and one Hispanic venirepersons. The trial court denied Petitioner's post-verdict Batson motion, and Petitioner abandoned this claim on direct appeal.

Petitioner renewed the Batson challenge in his 1996 PCRA petition, which was denied without a hearing by Judge Sabo, who had presided over Petitioner's criminal trial.[25] In reviewing the PCRA petition, the trial and post-trial record, and his own recollection of the trial proceedings, Judge Sabo found that

[25] In addition to denying the substantive basis of the PCRA petition, Judge Sabo also denied Petitioner's request for discovery or a hearing on the Batson claim.

Rollins had failed to make out a prima facie claim under Batson. Judge Sabo first found that there was no clear pattern of discrimination because the prosecutor had not exercised "a substantial number" of strikes against African-American venirepersons. Commonwealth v. Rollins Opinion, Sept. 4, 1997, at 11-12 (Pa. Ct. Comm. Pl.). Upon consideration of the fact that the prosecutor's demeanor with respect to minority venirepersons did not differ "in any respect" from his demeanor towards white venirepersons, the court further found that there was no evidence to support an "inference of discrimination." Id. at 11-13. The court also noted that Petitioner's Batson claim was "predicated entirely upon the number of strikes against individuals of African-American ancestry," and that Petitioner had failed to take into consideration the race of the other stricken jurors, the ultimate composition of the jury, and whether there were any other indicia of discrimination. Id. at 10. Finding that there was no pattern of racially-motivated strikes nor any inference of discriminatory intent, Judge Sabo did not proceed to the second step of the Batson analysis. On appeal, the Pennsylvania Supreme Court denied Petitioner's Batson-based ineffective assistance of counsel claim on procedural grounds, as Petitioner he had not established a sufficient record to support his allegations. Rollins II, 738

A.2d at 442-43.[26]

**ii. Review of PCRA Court's Decision**

Upon careful review, this Court finds that the PCRA trial court reasonably applied Batson in determining that Petitioner failed to make out a prima facie claim of discriminatory jury selection. Because Petitioner cannot establish a prima facie claim under Batson, his derivative claims of trial court error and ineffective assistance of counsel must also fail.

It is well-recognized that reviewing courts in AEDPA proceedings must defer to state courts' factual findings inasmuch as those findings are fairly supported by the record. 28 U.S.C. § 2254(d); Scarbrough v. Johnson, 300 F.3d 302, 305 (3rd Cir. 2002). The need for deference has been highlighted as particularly critical in reviewing Batson claims, because state trial courts play a pivotal role in evaluating demeanor and credibility when determining whether a prima facie claim has been made. See Batson, 476 U.S. at 98, n. 21; Riley v. Taylor, 277 F.3d 261, 27 (3rd Cir. 2001); Clemons, 843 F.2d at 746. Petitioner urges this Court to reject the PCRA court's factual

[26] In making this determination, the Pennsylvania Supreme Court relied upon the rule first set forth in Commonwealth v. Spence, 627 A.2d 1176, 1182-83 (Pa. 1993), requiring that a petitioner bringing a Batson claim first make out a record "specifically identifying the race of all the veniremen who had been removed by the prosecution, the race of the jurors who served, or the race of jurors acceptable to the Commonwealth who had been stricken by the defense. The Third Circuit has recently held, however, that the imposition of a strict Spence record requirement is inconsistent with the teachings of Batson. Holloway v. Horn, 355 F.3d 707, 725-28 (3rd Cir. 2004).

findings as per se unreasonable, because they were made without a hearing and without granting Petitioner the opportunity to further develop the record through discovery. However, Petitioner has cited no authority suggesting that a Batson hearing is required where, as here, the court finds the Petitioner has failed to even make out a prima facie claim. This Court finds nothing inherently improper in the PCRA court's evaluation of the first prong of Petitioner's Batson claim on the basis of the trial and post-trial record, Petitioner's PCRA petition and supporting evidence, and the court's own recollection of the trial court proceedings. Thus, we will grant full deference to the PCRA court's findings of fact.

Judged by the standard of "reasonableness" set forth in Williams, 529 U.S. at 410, this Court cannot find that the PCRA court unreasonably applied the teachings of Batson to the facts of Petitioner's case. In holding that Petitioner could not demonstrate a "pattern" of discriminatory strikes, the PCRA court relied on the fact that the prosecutor used only six or seven peremptory strikes against African-American venirepersons. In total, the prosecutor exercised eleven strikes, out of twenty he was allotted. The Petitioner refers this Court to Holloway v. Horn, 355 F.3d 707, 723 (3rd Cir. 2004), in which the Third Circuit held that the exercise of eleven out of twelve peremptory strikes established a prima facie pattern of discrimination, and

noted that a prosecutor "cannot undermine a pattern of strikes that appears racially motivated by merely pointing to a lone juror of a different race whom he also found objectionable." Holloway, 355 F.3d at 723; see also Brinson v. Vaughn, 398 F.3d 225, 233 (3rd Cir. 2005) (finding pattern of discrimination where prosecutor used 13 of 14 strikes against African-Americans). However, the Supreme Court in Batson, while recognizing that a "pattern" of strikes against minority venirepersons could give rise to an inference of discrimination, has declined to adopt a particular mathematical or procedural formula for determining whether a pattern has been established. Batson 476 U.S. at 96-97, 99. Given the open-endedness of the Batson directive with respect to pattern establishment, this Court cannot say that it was manifestly unreasonable for the PCRA court to find that seven strikes out of a possible twenty did not constitute a pattern. See Williams, 529 U.S. at 410 (an "unreasonable" application of federal law is different from an "incorrect" application of federal law).[27]

The PCRA court further found that there were no other

[27] The PCRA court further suggested that even if there had been a "pattern" of discrimination, the number of strikes against minorities alone could never be sufficient to establish or negate a prima facie Batson case. Commonwealth v. Rollins Opinion, Sept. 4, 1997, at p. 10 (Pa. Ct. Comm. Pl.) (citing United States v. Esparsen, 930 F.2d 1461, 1467 (10th Cir. 1991)); compare with Brinson v. Vaughn, 398 F.3d 225, 235 (3rd Cir. 2005) (in some cases, a prima facie case may be made out based on a single factor, even where there are no other indicia of discrimination). However, as the PCRA court did not rely on this line of reasoning when making its determination regarding the merits of Petitioner's claim, this Court need not consider whether it is a contrary or unreasonable application of Batson.

indicia of discrimination which would serve to support a prima facie Batson claim. The court identified three factors supporting its determination: the prosecutor's neutral demeanor towards both minority and white venirepersons, facially apparent race-neutral reasons for the prosecutor's strikes, and the inclusion of five African-Americans in the twelve-person jury.

Petitioner first contends that the PCRA court erred in considering the composition of the jury as a factor relevant to the first step of a Batson analysis. Indeed, this Court recognizes that the strike of a single minority venireperson may be sufficient for a prima facie Batson claim, even where minorities are fairly represented in the final jury pool. See Clemons, 843 F.2d at 747; Deputy v. Taylor, 19 F.3d 1485, 1492 (3rd Cir. 1994). However, while the racial composition of the jury is by no means determinative, it is certainly one of the "relevant circumstances" that might give rise to an inference of purposeful discrimination. Given Batson's understanding of peremptory challenges as a practice that permits discrimination by those who are "of a mind to discriminate," the prosecutor's acceptance of five African-American jurors and one African-American alternate tends to rebut Petitioner's suggestion of discriminatory intent. See Batson, 476 U.S. at 96.

Petitioner further faults the PCRA court for failing to consider a variety of other factors tending to support a finding

of discrimination, including the prosecutor's alleged attempt to "mask" his discriminatory strikes, his note-taking during voir dire, and his allegedly inadequate responses to defense counsel's Batson objection. However, it is clear from review of the PCRA petition that Petitioner did not raise these arguments before the PCRA court; thus, we cannot consider them here. See Holloway, 355 F.3d at 723, n. 11.

Aside from the alleged "pattern" of discrimination, the only additional factor identified by Petitioner in support of his Batson claim before the PCRA court was the general prosecutorial attitude in Philadelphia at the time of Petitioner's trial. Petitioner argues that discriminatory intent for the purposes of Batson could be inferred from the existence of a Philadelphia District Attorney's Office jury selection training videotape featuring Attorney Jack McMahon, which was made at approximately the same time as Petitioner's trial. The Pennsylvania Supreme Court has noted that many of the practices advocated in this training video, including exclusion of African American venirepersons on the basis of race alone, "flaunt constitutional principles in a highly flagrant manner." Commonwealth v. Basemore, 560 Pa. 258, 283, n. 12 (Pa. 2000). While this Court likewise condemns the discriminatory practices advocated in the video, Petitioner has presented no evidence to suggest that the prosecutor in his trial was aware of the video or adhered to

these practices in striking particular jurors. See Holloway v. Horn, 161 F. Supp. 2d 452 at 520 (E.D. Pa. 2001) (video had no bearing on petitioner's case where there was no evidence that the prosecutor had seen the video or adhered to its recommendations); Peterkin v. Horn, 988 F. Supp. 534, 540-41 (E.D. Pa. 1997) (same); compare with Basemore, 744 A.2d at 731 (video may establish an inference of discrimination under Batson only where petitioner was prosecuted by Attorney McMahon himself). Absent some showing of a causal link between the training video and the particular strikes at issue in Petitioner's criminal trial, the mere existence of the video will not form an independent basis for a prima facie Batson claim. Thus, the PCRA court's failure to reference this video as a factor in its analysis of Petitioner's claim was not an unreasonable application of Batson.

***B. Counsel's Ineffectiveness in Failing to Life-Qualify Jurors***

Petitioner next contends that he was denied effective assistance of counsel because his attorney failed to adequately question at least four jurors as to whether they would be willing to impose a life sentence, rather than the death penalty, upon a murder conviction.[28] The Pennsylvania Supreme Court found that

[28] Petitioner exhausted this claim on post-conviction review before the Pennsylvania Supreme Court. Rollins II, 738 A.2d at 441; See supra, Part I.A. Because the Pennsylvania Supreme Court reached the merits of this claim, we will apply the AEDPA's deferential standard of review. See supra, Part II.

defense counsel at Rollins' trial was not ineffective for failing to "life-qualify" the jurors. Rollins II, 738 A.2d at 441. The court noted that, while counsel is permitted to inquire as to each juror's willingness to impose a life sentence, such questioning is not required. Id. Thus, counsel could not be faulted for failing to engage in such questioning, particularly where all the jurors assured the court that they would be able to follow the dictates of the law. Id.

A prospective juror in a capital case may be excluded for cause where his views regarding capital punishment "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Tex., 448 U.S. 38, 45 (1980)). For example, a juror who in no case could vote for capital punishment is not an impartial juror and must be removed for cause. See Witherspoon v. Illinois, 391 U.S. 510, 523 n. 21 (1968). Similarly, the Supreme Court has held that a juror who will automatically impose the death penalty upon conviction is necessarily unable to deliberate impartially in accordance with the law and his oath. Morgan v. Illinois, 504 U.S. 719, 729, 735 (1992).

While the Pennsylvania Supreme Court's judgment may be contrary to Morgan, the principles set forth in that case were not "clearly established Federal law" at the time Petitioner's

conviction became final in 1991. See Morgan, 504 U.S. 725, n. 4 (describing significant disagreement among state courts as of 1992); Jermyn v. Horn, 1998 U.S. Dist. LEXIS 16939 (M.D. Pa. 1998) (under a Teague analysis, Morgan established a new rule and cannot be applied retroactively). Reviewing the Pennsylvania Supreme Court decision in light of federal precedent as of 1987, we cannot find that the court unreasonably applied existing federal law. Only two years before Petitioner's conviction, the Supreme Court in Wainwright v. Witt affirmed that the proper standard for juror exclusion was the Adams standard: whether the juror's views would substantially impair the impartial performance of his duties. Wainwright, 469 U.S. at 424. While recognizing that dicta in Witherspoon left open the possibility of excluding jurors who would "automatically" vote against the death penalty, the Supreme Court expressly held that Witherspoon "is not a ground for challenging any prospective juror." Wainwright, 469 U.S. at 423 (citing Adams v. Texas, 448 U.S. at 47-48). It was not until 1992 that the Supreme Court recognized the value of specific inquiry into a juror's ability to return a life sentence where the juror had already affirmed that he would be able to follow the law as given. Morgan, 504 U.S. 735-36. Thus, at the time of Petitioner's conviction, federal precedent denied the necessity of life-qualification, but recognized that attorneys were obligated to inquire as to each juror's ability to

follow the oath.

The Pennsylvania Supreme Court's determination in Rollins II was fully consistent with this precedent. At Petitioner's trial, each of the four jurors in question was asked whether he would be able to abide by the oath and follow the law as given by the trial judge, and each affirmed that he could. In light of the law established in Wainwright, trial counsel was not ineffective for failing to make further inquiry.

***C. Counsel's Ineffective Use of Peremptory Challenges***

Petitioner further contends that trial counsel was ineffective for exercising peremptory strikes, rather than challenges for cause, against certain venirepersons "who would likely have been removable for cause if they had been effectively life-qualified." As a result, insufficient peremptory strikes were available to remove at least four "demonstrably biased" empaneled jurors.[29]

The loss of a peremptory challenge alone does not violate a defendant's constitutional rights, unless he can demonstrate that the failure to remove a biased juror for cause ultimately compromised the impartiality of the jury. Ross v. Okla., 487 U.S. 81, 88 (1988). The Pennsylvania Supreme Court rejected

[29] Petitioner exhausted this claim on post-conviction review before the Pennsylvania Supreme Court. Rollins II, 738 A.2d at 442; See supra, Part I.A. Because the Pennsylvania Supreme Court reached the merits of this claim, we will apply the AEDPA's deferential standard of review. See supra, Part II.

Petitioner's ineffective assistance of counsel claim because the record did not suggest that the stricken venirepersons identified by Petitioner as potentially biased would have been removable for cause. Rollins II, 738 A.2d at 442. We agree. Petitioner's argument is grounded not in fact, but rather in speculation that further questioning of certain allegedly biased venirepersons would have revealed their inability to impartially follow the law.

By way of example, one of the venirepersons cited by Petitioner as biased and potentially strikeable for cause was Joanne Marks, who admitted upon questioning that drug use was a "sore spot" with her. When asked whether the involvement of drugs in the homicide might "color [her] view in that it would make [her] snap to a judgment without fairly weighing all of the evidence," Mrs. Marks answered, "It might, yes." N.V.D. 482. However, Mrs. Marks also indicated that she could follow the law, would follow the law, and four times asserted that she thought she could render an impartial verdict despite the fact that drugs were involved in the case. N.V.D. 476-83. Defense counsel questioned Mrs. Marks extensively, and exercised a peremptory challenge against her only after his motion to strike for cause was denied by the court.

Indeed, all the allegedly biased venirepersons identified by Petitioner ultimately agreed, after questioning by defense

counsel regarding their inclinations, that they would be able to render an impartial verdict. Petitioner in this action cannot overcome the presumption of trial counsel effectiveness based on sheer speculation that additional questioning would have caused these venirepersons to give a different response. See Strickland, 466 U.S. at 690. The Pennsylvania Supreme Court did not unreasonably apply the Strickland standard for effective assistance of counsel when it came to the same conclusion.

***D. Trial Court Error and Counsel's Ineffectiveness in Excluding Venirepersons Without Sufficient Opportunity for Rehabilitation***

Petitioner next maintains that the trial court improperly excluded, in violation of Witherspoon, ten venirepersons who indicated some objection to the death penalty but who Petitioner claims could have been death-qualified through further questioning. The Pennsylvania Supreme Court found that the Witherspoon claim of trial court error was waived because it had not been raised on direct appeal. Rollins II, 738 A.2d at 441.

As explained in Part I.B., above, the relaxed waiver doctrine does not serve as an adequate procedural bar to review of Petitioner's waived claims generally. However, this Court is barred from reviewing Petitioner's Witherspoon claim because there is an independent and adequate state bar to review of such

claims. At the time of Petitioner's direct appeal, the Pennsylvania Supreme Court consistently held that the relaxed waiver doctrine did not apply to Witherspoon violations. Thus, if a petitioner failed to raise a Witherspoon objection upon direct review, collateral review of the claim would be procedurally barred. See Commonwealth v. Jasper, 610 A.2d 949, 953 (Pa. 1992); Commonwealth v. Lewis, 567 A.2d 1376, 1381 (Pa. 1989); Commonwealth v. Szuchon, 506 Pa. 228, 255 (Pa. 1984).

Petitioner further raises claims of trial counsel ineffectiveness relating to the exclusion of these venirepersons.[30] Five venirepersons were excluded on the basis of their inability to follow the statutory scheme (though each admitted that he could impose the death penalty in certain situations), and five were excluded on the basis of their unwillingness to impose the death penalty at all. Petitioner contends that all ten could have been rehabilitated had defense counsel questioned them further or instructed them more thoroughly as to the legal standard for weighing aggravating and mitigating factors.

The Pennsylvania Supreme Court rejected Petitioner's Strickland claim, noting that a trial judge is under no duty to

[30] Petitioner exhausted this claim on post-conviction review before the Pennsylvania Supreme Court. Rollins II, 738 A.2d at 442; See supra, Part I.A. Because the Pennsylvania Supreme Court reached the merits of this claim, we will apply the AEDPA's deferential standard of review. See supra, Part II.

permit rehabilitation of venirepersons who clearly indicate an inability to follow the law. The court further held that defense counsel was not ineffective for neglecting to attempt rehabilitation of jurors who expressed an inability to render an impartial sentencing decision. Rollins II, 738 A.2d at 442. We agree. As explained above, Petitioner's mere speculation that further questioning would have effectively rehabilitated these venirepersons is insufficient to overcome the presumption of competent assistance of counsel. See Strickland, 466 U.S. at 690.

***F. Counsel's Ineffectiveness in Questioning Regarding Biases***

Finally, Petitioner faults trial counsel for failing to question jurors specifically as to whether their individual biases might impact their impartiality at sentencing.[31] The Pennsylvania Supreme Court found this claim to be without merit, and, in doing so, reasonably applied the dictates of Strickland. Rollins II, 738 A.2d at 443.

Trial counsel asked each venireperson questions designed to elicit his biases with respect to race, drug use, and other issues. Counsel then asked whether these biases would affect the venireperson's judgment regarding the defendant's guilt or

[31] Petitioner exhausted this claim on post-conviction review before the Pennsylvania Supreme Court. Rollins II, 738 A.2d at 443; See supra, Part I.A. Because the Pennsylvania Supreme Court reached the merits of this claim, we will apply the AEDPA's deferential standard of review. See supra, Part II.

innocence. While he did not specifically inquire as to whether these biases would affect the venireperson's judgment with respect to sentencing, each venireperson was asked whether he could impartially follow the law (relating both to guilt and sentencing) as dictated by the trial judge. Such an approach was objectively reasonable under the dictates of Strickland. Furthermore, Petitioner has offered no evidence beyond sheer speculation that counsel's failure to explicitly link bias and sentencing led the venirepersons to believe that it was permissible to take biases into account at the penalty phase. Thus, Petitioner cannot show that he was prejudiced in any way by counsel's approach to voir dire.

**6. Prosecutorial Misconduct, Trial Court Error, and Ineffective Assistance of Counsel in Instructing Jurors With Respect to Mitigating and Aggravating Factors**

Petitioner also raises claims of prosecutorial misconduct, trial court error, and ineffective assistance of counsel with respect to the jury instructions concerning mitigating and aggravating factors.[32] We find these arguments to be without

[32] Petitioner exhausted these claims on post-conviction review before the Pennsylvania Supreme Court, where he raised ineffective assistance of counsel claims relating to counsel's failure to object to the court's instructions and the prosecutor's remarks, as well as substantive claims of trial court error and prosecutorial misconduct. Rollins II, 738 A.2d at 450; See supra, Part I.A. However, as the Pennsylvania Supreme Court reached the merits of the ineffective assistance of counsel claim only, we will review the

merit. While a sentencer must be free to give independent weight to mitigating aspects of the defendant's character, record, and offense, Petitioner has not established that any act or omission of the prosecutor, judge, or defense counsel at his trial barred the jury from such consideration. See Eddings v. Okla., 455 U.S. 104, 110 (1982) (citing Lockett v. Ohio, 438 U.S. 586 (1978)).

Petitioner contends that the jury which sentenced him to death may have been misled with as to the sentencing standard by the prosecutor's closing remarks. Petitioner first alleges that the prosecutor "advised" the jury that it could consider as an aggravating factor the fact that the crime was committed during the course of a drug transaction. However, there is no evidentiary basis for Petitioner's contention that the prosecutor's brief references to cocaine were anything but incidental. Rather, the prosecutor cited the fact that defendant "extinguished a human life while committing an armed robbery for cocaine" as evidence of a statutory aggravating factor: commission of a homicide while in the perpetration of a felony. N.T. 1836, 1847, 1853.

Petitioner also contends that the prosecutor misled the jurors by suggesting that they were not permitted to consider non-statutory mitigating factors, such as the fact that

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substantive claims of trial court error and prosecutorial misconduct under a de novo standard. See supra, Part II.

Petitioner had children and may have contributed to their support. However, this Court has already found that no prejudice arose from the prosecutor's statements regarding this issue. See supra, Part II.3.E.

Petitioner next claims that the trial court erred in providing only general instructions regarding mitigation and aggravation, and failing to "correct" the allegedly improper prosecutorial statements. We find this argument to be without merit. The trial judge properly instructed the jury that the defendant had raised two mitigating circumstances from the statutory list: his lack of a significant criminal history, as well as "any other evidence of mitigation concerning the character and record of the defendant and the circumstances of the offense." The judge then instructed the jury that it "is important and proper" for them to consider "[a]ll the evidence from both sides, including the evidence you heard earlier during the trial in chief as to aggravating or mitigating circumstances." N.T. 1854. These instructions were proper because they clearly directed the jury to give independent weight to any and all mitigating aspects of the defendant's character, record, and offense. See Rollins II, 738 A.2d at 450.

Finally, Petitioner faults defense counsel for failing to request a jury instruction regarding the defendant's capacity to conform his conduct to the requirements of the law and the

mitigating aspects thereof. As the jury had not been presented with any evidence tending to suggest that Petitioner was unable to conform his conduct to the requirements of the law, defense counsel cannot be faulted for failing to request such an instruction. See Werts v. Vaughn, 228 F.3d 178, 203 (3rd Cir. 2000).

**7. Trial Court Error and Ineffective Assistance of Counsel With Respect to Jury Instructions on Eligibility for Parole**

A defendant convicted of first degree murder in Pennsylvania must be sentenced either to death, or to life imprisonment without the possibility of parole. See 18 Pa. Cons. Stat. § 1102(a)(1); 42 Pa. Cons. Stat. § 9711; 42 Pa. Cons. Stat. § 9756(c) (1999); Commonwealth v. Yount, 615 A.2d 1316, 1320 (Pa. Super. 1992). At Petitioner's trial, the jury was instructed to decide whether Petitioner should be sentenced to "death or life imprisonment," but was not informed by the trial judge that life imprisonment offers no possibility of parole. N.T. 1852. Petitioner contends that the trial court's failure to instruct the jury that "life means life" violated his constitutional rights under the 6th, 8th, and 14th Amendments, and that he was denied effective assistance of counsel because his attorney

failed to object to these instructions.[33]

The Pennsylvania Supreme Court held that Petitioner's ineffective assistance of counsel claim lacked merit, because existing federal law at the time of Petitioner's conviction in 1987 did not mandate a "life means life" instruction. Rollins II, 738 A.2d 435, 450-51. Although Simmons v. South Carolina, 512 U.S. 154 (1994), mandated such a jury instruction in limited situations, that decision could not be given retroactive effect. Id. at 450. Furthermore, Pennsylvania law at the time of Petitioner's trial expressly prohibited an instruction informing the jury that life imprisonment offers no possibility for parole. Id. at 450-51. We find that the Pennsylvania Supreme Court's decision was neither an unreasonable nor a contrary application of the Strickland standard for ineffective assistance of counsel. Where Pennsylvania law prohibited a "life means life" instruction, and the Supreme Court had yet to speak on this issue, Counsel cannot be faulted for failing to anticipate a change in the law.[34]

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[33] Petitioner exhausted these claims on post-conviction review before the Pennsylvania Supreme Court, where he raised an ineffective assistance of counsel claims relating to counsel's failure to object to the court's instructions, as well as a substantive claim of trial court error. Rollins II, 738 A.2d at 450-51; See supra, Part I.A. However, as the Pennsylvania Supreme Court reached the merits of the ineffective assistance of counsel claim only, we will review the substantive claim or trial court error under a de novo standard. See supra, Part II.

[34] Petitioner also supports his claim by reference to Supreme Court precedent reversing sentencing decisions that are based on "misinformation of constitutional magnitude." See United States v. Tucker, 404 U.S. 443, 447 (1972); Townsend v. Burke, 334 U.S. 736, 740 (1948). However, the trial

We must also reject Petitioner's substantive claims of trial court error with respect to this jury instruction. As the Pennsylvania Supreme Court correctly noted in the proceedings below, the "life means life" instruction mandated by Simmons under some circumstances cannot be given retroactive effect. O'Dell v. Netherland, 521 U.S. 151, 166 (1997); see also Peterkin v. Horn, 176 F. Supp. 2d 342, 384 (E.D. Pa. 2001); Laird v. Horn, 159 F. Supp. 2d 58, 122 (E.D. Pa. 2001). Furthermore, even if Simmons were retroactively applicable, the dictates of Simmons do not govern the instant case. The Supreme Court in Simmons held that, where the state's case for the death penalty rests in part on the defendant's continued dangerousness, the jury must be permitted to consider the defendant's ineligibility for parole as a mitigating factor at sentencing. Simmons, 512 U.S. at 168-69. Thus, Simmons mandated a "life means life" instruction only where the defendant's future dangerousness is placed at issue; in all other situations, the Supreme Court held that states "reasonably may conclude that truthful information regarding the availability of commutation, pardon and the like should be kept from the jury." Simmons, 512 U.S. at 168. Simmons is inapplicable to

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court's instruction that the jury must sentence Petitioner to either "death" or "life imprisonment" was factually and legally accurate, and so cannot be described as "misinformation." While an instruction specifying that "life means life" might be more accurate or informative in terms of clarifying juror confusion as to the meaning of "life imprisonment," even Simmons recognized a state's right to withhold from a jury truthful information regarding the availability of parole in some situations. Simmons, 512 U.S. at 168-71.

Petitioner's case because the prosecutor, in support of the death penalty, did not introduce evidence "with a tendency to prove [the defendant's] dangerousness in the future." See Kelly v. South Carolina, 534 U.S. 246, 254 (2002). In Kelly, the Supreme Court found that the defendant's dangerousness had been placed at issue when the prosecutor highlighted his propensity for violent behavior in prison, referred to him as a "butcher ... more frightening as a serial killer," and noted that "murderers will be murderers." Kelly, 534 U.S. at 255-56. At Petitioner's trial, however, the prosecutor made no such invective remarks about Rollins' character or propensity for violence. The prosecutor's closing argument, for example, focused exclusively on the details and aggravating characteristics of the crime actually committed and made no reference whatsoever to the likelihood of Petitioner committing crimes in the future. As Petitioner's future dangerousness was not placed at issue, the trial court was not obligated under Simmons to instruct the jury with respect to Petitioner's ineligibility for parole.

In addition to his Simmons claim, grounded in the 14th Amendment's Due Process Clause, Petitioner contends that the trial court's failure to instruct the jury that "life means life" violated his rights under the 6th and 8th Amendments. In particular, Petitioner contends that Pennsylvania's practice of withholding truthful information about the possibility of parole

offends evolving standards of decency. We cannot find this to be the case. Only a decade ago, the Supreme Court in Simmons held that states may, without offending constitutional mandates, withhold truthful information about parole eligibility in death penalty cases where dangerousness is not at issue. Three years later, applying a Teague analysis, the Court further found that Simmons' "life means life" requirement has not "'altered our understanding of the bedrock procedural elements' essential to the fairness of a proceeding," and so does not qualify as a "watershed rule of criminal procedure" implicating fundamental fairness and accuracy of criminal proceedings. O'Dell v. Netherland, 521 U.S. 151, 167 (1997). Given these recent directives by the Supreme Court, this Court cannot find that Pennsylvania's refusal to require a "life means life" instruction in all death penalty cases is unconstitutional.

**8. Application of Pa. Cons. Stat. § 9711(d)(6)**

Petitioner contends that Pa. Cons. Stat. § 9711(d)(6), which establishes as an aggravating factor "a killing committed while in the perpetration of a felony," is arbitrary and capricious because it fails to "genuinely narrow the class of persons eligible for the death penalty" and does not "reasonably justify the imposition of a more severe sentence." See Zant v. Stephens,

462 U.S. 862, 877 (1983).[35] We find this argument to be without merit. Petitioner, in arguing that his was a "murder in the course of a robbery gone awry" and somehow less blameworthy than a "planned murder," fails to recognize that a penalty phase is convened only where it has already been established beyond a reasonable doubt that a killing was committed with specific intent. See Rollins II, 738 A.2d at 451. There is absolutely no support for Petitioner's claim that the § 9711(d)(6) aggravating circumstance is unconstitutional or that the trial court erred in its application.

**9. Inadequate Proportionality Review Under Pa. Cons. Stat. § 9711(h)(3)(iii)**

At the time of Petitioner's trial and direct appeal, the Pennsylvania Supreme Court was required by statute to determine whether the sentence of death imposed in his case was "excessive or disproportionate to the penalty imposed in similar cases." 42 Pa. Cons. Stat. 9711(h)(3)(iii) (1997). Petitioner contends that he was denied meaningful and rational proportionality review because the statistical method by which the Pennsylvania Supreme

[35] Petitioner exhausted this claim, as well as a derivative claim of ineffective assistance of counsel, on post-conviction review before the Pennsylvania Supreme Court. Rollins II, 738 A.2d at 451; See supra, Part I.A. The Pennsylvania Supreme Court reached the merits of the ineffective assistance of counsel claim only. Thus, we will review Petitioner's substantive claim under a de novo standard. See supra, Part II.

Court conducted such review was inadequate.[36]

There is no constitutional requirement that a defendant be granted comparative proportionality review of his sentence. Pulley v. Harris, 465 U.S. 37, 50-51 (1984). However, where a state creates a right to proportionality review, defendants are constitutionally entitled to procedures which ensure that the right is not "arbitrarily denied." Foster v. Delo, 39 F.3d 873, 882 (8th Cir. 1994). If the state has conducted such a review and concluded that a defendant's punishment is proportionate to that imposed for similar crimes, there is no basis for constitutional relief. Id. Indeed, a federal court may not issue a writ of habeas corpus on the basis of a perceived error in application of state law. Pulley, 465 U.S. 37, 41 (1984).

Petitioner does not deny that the Pennsylvania Supreme Court granted him proportionality review; he objects only to the procedure by which that review was conducted. The Pennsylvania Supreme Court, however, has examined the procedures in place at the time of Petitioner's appeal and found "nothing arbitrary or capricious" about them. Commonwealth v. Gribble, 703 A.2d 426, 440-41 (1997). As Petitioner does not contend that his statutory right to proportionality review was arbitrarily denied, there is

[36] Petitioner exhausted this claim, as well as a derivative claim of ineffective assistance of counsel, on post-conviction review before the Pennsylvania Supreme Court. Rollins II, 738 A.2d at 451-52; See supra, Part I.A. The Pennsylvania Supreme Court reached the merits of the ineffective assistance of counsel claim only. Thus, we will review Petitioner's substantive claim under a de novo standard. See supra, Part II.

no basis for federal review of this claim.

**10. Trial Court Error in Admitting Suggestive Out-of-Court Identification Evidence**

Petitioner next contends that the trial court violated his due process rights when it admitted evidence of out-of-court identifications obtained using "impermissibly suggestive" procedures.[37] Three witnesses to the shooting at the Campbell residence were brought to the hospital where Petitioner had been admitted with gunshot wounds, observed Petitioner, and identified him as the shooter, either at the hospital or at the police station directly thereafter.

Although suggestive confrontations are disapproved because they increase the likelihood of misidentification, admission of identification evidence originating from such confrontations does not without more violate due process. Neil v. Biggers, 409 U.S. 188, 198 (1972). Rather, a court evaluating the admissibility of such evidence must determine whether, under the "totality of the circumstances," the identification was reliable even though the confrontation procedure was suggestive. Id. at 199. The factors to be considered in evaluating the likelihood of

[37] Petitioner exhausted this claim, as well as a derivative claim of ineffective assistance of counsel, on post-conviction review before the Pennsylvania Supreme Court. Rollins II, 738 A.2d at 443-44; See supra, Part I.A. The Pennsylvania Supreme Court reached the merits of the ineffective assistance of counsel claim only. Thus, we will review Petitioner's substantive claim under a de novo standard. See supra, Part II.

misidentification include: the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Id. at 199-200.

Considering these factors, this Court finds that the likelihood of misidentification by the three witnesses to the Campbell shooting was low, even if the procedure by which they were asked to identify the shooter may have been suggestive. The record in this action supports the Pennsylvania Supreme Court's finding that the witnesses "all had ample opportunity to observe [Petitioner] in a well-lit location and identified him at the hospital only a couple of hours after the shooting." Rollins II, 738 A.2d at 443-44. At pre-trial motions, the witnesses affirmed that they were positive, upon viewing Petitioner at the hospital, that he was the shooter. Furthermore, there is nothing in the record to indicate "that the witnesses' identifications were anything but certain." Id. Thus, the trial court did not err in admitting evidence of the witnesses' out-of-court identifications.

**11. Prosecutor's Brady Violation Regarding Petitioner's Blood Type**

Petitioner contends that the prosecutor violated Brady by waiting until near the end of trial to disclose Petitioner's blood type, a potentially exculpatory item of evidence.[38]

Under Brady v. Maryland, 373 U.S. 83, 87 (1963), a defendant's due process rights are violated where the prosecution suppresses material evidence favorable to the defendant or breaches its duty to disclose such evidence. A due process violation may also occur where the defendant is prejudiced by the prosecutor's delay in disclosing exculpatory evidence. See United States v. Higgs, 713 F.2d 39, 44 (3rd Cir. 1983); United States v. Darwin, 757 F.2d 1193, 1201 (11th Cir. 1985). However, a prosecutor is not obligated under Brady to disclose evidence which is already available to the defendant, or which is obtainable by the defendant through exercise of reasonable diligence. See United States v. Pelullo, 399 F.3d 197, 213 (3rd Cir, 2005); United States v. Starusko, 729 F.2d 256, 262 (3rd Cir. 1984).

We find that there was no Brady violation where the prosecutor waited until shortly before the defense rested to inform defense counsel that Petitioner's blood type was type O, rather than type A, the type that had been found at the crime

[38] Petitioner exhausted this claim, as well as a derivative ineffective assistance of counsel claim, on post-conviction review before the Pennsylvania Supreme Court. Rollins II, 738 A.2d at 445, n. 13; See supra, Part I.A. The Pennsylvania Supreme Court found that this claim was procedurally defaulted, and addressed it only in the context of the related ineffective assistance of counsel claim. Thus, we will apply de novo review. See supra, Part II.

scenes. The prosecutor, who discovered Petitioner's blood type by subpoenaing medical records that were readily available to the defense, made this disclosure near the end of trial specifically to preclude a Brady claim. N.T. 1483, 1486-87. The prosecutor noted that he had "presumed all along" that defense counsel knew his client's own blood type and was intending to use it to assist in Petitioner's defense. N.T. 1481, 1485. Only after the defense was close to resting its case did the prosecutor realize that his presumption was incorrect and that defense counsel was not, in fact, aware of Petitioner's blood type.

Petitioner's Brady claim must fail because the medical records establishing his blood type were easily obtainable by the defense through exercise of reasonable diligence. See supra, Part III.4.A. Furthermore, a defendant's own blood type is exactly the type of evidence which, because it is either known or readily available to the defendant, cannot form the basis of a Brady violation.

**12. Prosecutorial Misconduct and Ineffective Assistance of Counsel Regarding Victim Impact Testimony**

Petitioner maintains that the prosecutor impermissibly introduced testimony describing the impact of the crime on Violeta Cintron's young son, and that Petitioner was prejudiced

by his counsel's failure to object to this testimony.[39]

On direct examination, Violeta Cintron was asked numerous questions regarding the circumstances of the shootout during which her brother, Raymond Cintron, was killed. When asked whether she was injured during the shooting, Violeta indicated that she was not. N.T. 675. The prosecutor then asked, "Was your little son Jose hurt in any way?" Violeta responded, "He's just like, you know, when somebody pointing a play gun. He screams but, you know, they forget that." N.T. 675. Petitioner maintains that the purpose and effect of this testimony was to encourage the jury to vote for death penalty by considering victim impact as a non-statutory aggravating factor.

At the time of Petitioner's trial, Pennsylvania's sentencing statute did not permit introduction of victim impact testimony. 42 Pa. C. S. 9711 (1987); Commonwealth v. Fisher, 681 A.2d 130, 145, 147 (Pa. 1996); see also Payne v. Tennessee, 501 U.S. 808, (1991) (overruling earlier cases establishing a per se bar to admission of victim impact testimony at sentencing). On post-conviction review, the Pennsylvania Supreme Court held that Violeta's comment, even if it did constitute victim impact testimony, was so "fleeting" that it could not have affected the

[39] Petitioner exhausted these claims on post-conviction review before the Pennsylvania Supreme Court. Rollins II, 738 A.2d at 447; See supra, Part I.A. The Pennsylvania Supreme Court reached the merits of the ineffective assistance of counsel claim only. Thus, we will review Petitioner's substantive claim under a de novo standard. See supra, Part II.

outcome of the case. Rollins II, 738 A.2d at 447. We agree. In asking Violeta whether she or her son were injured during the shooting, the prosecutor was soliciting relevant and undisputed facts about the circumstances of the crime. The fact that Violeta, without prompting, offered testimony of the psychological impact on her young son does not suggest that the prosecutor impermissibly solicited inadmissible testimony. Furthermore, the Pennsylvania Supreme Court reasonably applied Strickland in finding that Petitioner could not show prejudice in sentencing resulting from Violeta's brief comment during the guilt phase of his trial.

**13. Prosecutor's Introduction of Allegedly False Testimony**

Petitioner maintains that his due process rights were violated by admission of the testimony of Ramon Negron, witness for the prosecution, because Negron was coerced into testifying against Rollins by the threat of prosecution for perjury.[40] The Pennsylvania Supreme Court found that this claim was "belied by the record," and denied it on its merits. Rollins II, 738 A.2d at 445-46. Upon full review of the trial record, this Court must agree.

[40] Petitioner exhausted this claim, as well as a derivative claim of ineffective assistance of counsel, on post-conviction review before the Pennsylvania Supreme Court. Rollins II, 738 A.2d at 445-46; See supra, Part I.A. As the Pennsylvania Supreme Court reached the merits of the ineffective assistance of counsel claim only, we will apply a de novo standard of review. See supra, Part II.

In a signed statement taken by a homicide detective during Ramon Negron's arrest on a related matter, Negron affirmed that he had had a conversation with Rollins while they were both in prison. Negron indicated that Rollins had told him, "I'm here for killing [Raymond Cintron] ... I had to kill him cause he had me in a bearhug with a baby so I just loaded up." See N.T. 1033. At a preliminary hearing, Negron confirmed this earlier statement.

At trial, Negron testified upon direct examination that Rollins had told him that he was in prison for homicide, and that he had been accused of killing Raymond Cintron. N.T. 990-91, 995. However, Negron denied having heard any admission of guilt or involvement on Rollins' part. N.T. 995. When presented with his earlier signed statement, Negron falsely claimed that he could not read English. N.T. 999-1000. When the prosecutor attempted to read aloud the portion of the statement relating to Rollins' admission, Negron interrupted, "Stop. He never told me nothing." N.T. 1005.

At a side conference, Negron's attorney expressed shock at the way Negron's testimony was proceeding, and described his client's testimony as "throw[ing] his own life down the toilet in a vain attempt to assist Mr. Rollins." N.T. 1021. Negron's attorney explained that the motivation for Negron's contradictory testimony was fear of reprisal, and that Negron had received

threats in prison before his involvement in the proceedings. N.T. 1021-23. Upon hearing that Negron was "fearful for his life," Judge Sabo offered to order him transferred to another prison if it would prevent him from perjuring himself. N.T. 1023-24. The prosecution also noted that, although Negron had already admitted to a perjury, "if he recants and testifies in substantial conformity to his testimony [at the preliminary hearing] he's not going to get arrested for perjury. I can tell you that. That's not a deal. That's a fact." N.T. 1023. After consulting with his client, Negron's attorney informed counsel and Judge Sabo that Negron "would just as soon stay where he is," but that he was willing to continue testifying. Before returning to direct examination, the prosecutor clarified, "Okay. My position is this, just so that the record is clear. The only thing that he's being offered at any point, and that is from day one on his own arrest all the way through to today, is a transfer out of custody in Philadelphia County for custody in another county." N.T. 1028-29.

When his testimony resumed, Negron admitted that he was able to read English, and confirmed that his signed statement accurately reflected his prison conversation with Rollins. N.T. 1033, 1075, 1077. Negron testified that, while Rollins never explicitly said, "I killed [Raymond Cintron]," Rollins did say that he "had to kill" Raymond Cintron and that the death occurred

while Rollins was “ripping them off for their drugs and [Raymond] freaked out and grabbed” Rollins. N.T. 1033, 1038, 1079. Negron also admitted that he had not been threatened or offered any benefit, except for a possible prison transfer, in exchange for his testimony. N.T. 1044-46.

Viewing this record as a whole, this Court cannot find that Negron was coerced into testifying against Rollins by the threat of prosecution for perjury. The only significant difference between Negron’s trial testimony before and after the conference concerned Rollins’ admission that he “had to kill” Raymond Cintron and his description of the circumstances of the crime. However, Negron’s later testimony, to which Petitioner now objects, was entirely consistent with his two pre-trial sworn statements. Indeed, both Negron’s ultimate testimony and his attorney’s statements at conference suggest that the pre-trial statements concerning Rollins’ admission were truthful, and that Negron’s initial inconsistent testimony at trial was driven by fear of retaliation by Rollins and other prison inmates. Furthermore, contrary to Petitioner’s assertions, the prosecutor never “threatened” Negron with prosecution if he did not testify against Rollins. Rather, the prosecutor merely stated that there would be no reason to prosecute Negron for perjury if he publicly testified in conformity with his two earlier sworn statements. Finally, Petitioner has presented no evidence beyond mere

supposition that Negron's pre-trial sworn statements were false, or that he would recant his final testimony if offered another opportunity to do so. Thus, Petitioner's claim regarding the introduction of Ramon Negron's testimony offers no basis for relief.

**14. Ineffective Assistance of Trial and Appellate Counsel Generally**

Plaintiff further contends that he was denied ineffective assistance of counsel to the extent that defense counsel and appellate counsel failed to argue and preserve the claims raised in this petition.[41] We find this argument to be without merit.

Counsel cannot be found to be ineffective for failing to raise a meritless claim. United States v. Sanders, 165 F.3d 248, 253 (3rd Cir. 1999). As the bulk of the habeas claims addressed above have been rejected on their merits, this Court cannot find counsel ineffective for failing to raise them. Furthermore, as attorneys are not obligated to raise every colorable claim on behalf of their clients, this Court is not in a position to second-guess the reasonable professional judgments of Petitioner's trial and appellate counsel. See Jones v. Barnes,

[41] Petitioner exhausted this claim on post-conviction review before the Pennsylvania Supreme Court. See supra, Part I.A. As the Pennsylvania Supreme Court did not reach the merits of this claim, we will apply a de novo standard of review. See supra, Part II.

463 U.S. 745, 751, 754 (1983).

**15. Pennsylvania Supreme Court Justice Castille's Failure to Recuse Himself**

Plaintiff next contends that his right to due process was violated as a result of Pennsylvania Supreme Court Justice Ronald D. Castille's failure to recuse himself from Petitioner's PCRA proceedings before the Pennsylvania Supreme Court.[42] At the time of Petitioner's trial and direct appeal, Justice Castille was the District Attorney of Philadelphia County. Petitioner maintains that Justice Castille, by virtue of his earlier position as District Attorney, had "personal knowledge of disputed evidentiary facts," and "personally approved" the decision to seek the death penalty in Petitioner's case. Petitioner's allegations are apparently based on the fact that District Attorney Castille's signature appeared on some of the filings in Petitioner's criminal case.

A party challenging a judge's failure to recuse himself on due process grounds will prevail upon demonstrating that the judge before whom the party is proceeding has a "direct, personal, substantial, pecuniary interest in reaching a

[42] Petitioner exhausted this claim when he moved the Pennsylvania Supreme Court for Justice Castille's recusal on October 13, 1998 and December 11, 1998. See supra, Part I.A. As both motions were denied on their merits, we will apply the AEDPA's deferential standard of review. See supra, Part II.

conclusion against him." Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821-22 (1986). Petitioner in this action has not alleged, however, that Judge Castille had any substantial pecuniary interest in reaching a conclusion in favor of the Commonwealth. Petitioner merely alleges that Judge Castille's involvement violates the Pennsylvania Code of Judicial Conduct, which permits recusal of a judge with "personal knowledge of disputed evidentiary facts" or who previously served as (or was affiliated with) a lawyer in the matter in controversy. Pennsylvania Code of Judicial Conduct, Canon 3(C)(1). Such allegations, however, cannot form a basis for a due process claim. See generally Commonwealth v. Jones, 541 Pa. 351, 357 (Pa. 1995) (denial of a petition to recuse Justice Castille on the basis of former role as District Attorney where petitioner failed to identify a "direct, personal, substantial, pecuniary interest" in the outcome of the case). Thus, the Pennsylvania Supreme Court's denial of Petitioner's motion to recuse was neither an unreasonable nor contrary application of federal law.

Furthermore, even if it was error for the Pennsylvania Supreme Court to deny Petitioner's motions for recusal of Judge Castille, Petitioner has failed to show that he was prejudiced in any way by this decision. The seven justices of the Pennsylvania Supreme Court were unanimous in their denial of Petitioner's PCRA petition. Because Justice Castille's vote was not decisive, the

interests of justice would not be served by vacating the Pennsylvania Supreme Court's decision. Compare with Aetna Life Ins. Co., 475 U.S. at 827-28 (vacating Alabama Supreme Court's decision where disqualified judge cast the deciding vote).

**16. Cumulative Prejudicial Effect**

Plaintiff contends that, even if he is not entitled to relief on any particular claim, the cumulative effect of all the errors alleged in his Petition denied him a fair trial.[43] Above, this Court has found that Petitioner is entitled to relief from sentencing on the basis of two improprieties during the sentencing phase of his proceedings. Thus, this Court need only review Petitioner's claim of cumulative error with respect to Petitioner's conviction itself.

The Third Circuit has established that certain errors, harmless when viewed individually, may be so prejudicial when taken cumulatively as to warrant a new trial. Marshall v. Hendricks, 307 F.3d 36, 94 (3rd Cir. 2002) (citing United States ex rel. Sullivan v. Cuyler, 631 F.2d 14, 17 (3rd Cir. 1980)). For example, in determining whether a prosecutor has violated Brady by failing to disclose material evidence favorable to the

[43] Petitioner exhausted this claim on post-conviction review before the Pennsylvania Supreme Court. Rollins II, 738 A.2d at 452; See supra, Part I.A. As the Pennsylvania Supreme Court denied this claim on its merits, we will apply the deferential AEDPA standard of review. See supra, Part II.

defendant, the court must look to the cumulative impact of all the evidence withheld, rather than the materiality of any single piece. Kyles v. Whitley, 514 U.S. 419, 437-38 (1995).

In this action, however, Petitioner has failed to demonstrate any such cumulative prejudicial effect. This Court found the bulk of Petitioner's claims concerning his conviction to be meritless, because Petitioner was unable to identify any actual errors or improprieties, harmless or otherwise. However, even considering cumulatively the few instances of harmless error identified by Petitioner and recognized by this Court, their overall effect is not so prejudicial to the fairness of the proceedings as to warrant a new trial. See generally Marshall, 307 F.3d at 94. The Pennsylvania Supreme Court did not err in finding accordingly.

## Conclusion

For the reasons described above, this Court must deny Saharris Rollins' request for relief from his conviction of murder in the first degree.

However, This Court will grant habeas corpus relief with respect to Petitioner's death sentence because of two significant errors during the sentencing phase of Petitioner's criminal trial. First, Petitioner's counsel was ineffective in failing to prepare for the penalty phase of the trial until after the jury

rendered its verdict, and in particular, failing to investigate potentially mitigating evidence concerning the psychological impact of Petitioner's abusive childhood. Furthermore, the jury instructions presented by the trial court were ambiguous with respect to whether aggravating and mitigating circumstances must be found unanimously, in violation of Mills and Boyde. For these reasons, Petitioner must either be given a new sentencing hearing or be sentenced to life imprisonment.

An appropriate Order follows.

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

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| SAHARRIS ROLLINS, | : | CIVIL ACTION |
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| Petitioner, | : | 00-1288 |
| | : | |
| v. | : | |
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| | : | |
| MARTIN HORN, Commissioner, Pennsylvania Department of Corrections, et al. | : | |
| | : | |
| | : | |
| Respondents. | : | |

**ORDER**

AND NOW, this 26th day of July, 2005, upon consideration of Saharris Rollins' Petition for Writ of Habeas Corpus (Docs. No. 1, 10) and all responses and replies thereto (Docs. No. 19, 30, 33) it is hereby ORDERED that the Petition is GRANTED on the following grounds:

1. That Petitioner's counsel was ineffective in failing to adequately prepare for the penalty phase of the trial, and failing to investigate potentially mitigating evidence concerning Petitioner's abusive upbringing;

2. That the Pennsylvania Supreme Court unreasonably applied federal law established in Boyde in reviewing a potentially ambiguous jury instruction regarding mitigating and aggravating factors at sentencing;

IT IS FURTHER ORDERED THAT the execution of the writ of habeas corpus is STAYED for 180 days from the date of this Order,

during which time the Commonwealth of Pennsylvania may conduct a new sentencing hearing in a manner consistent with this Memorandum Opinion. If, after 180 days, the Commonwealth of Pennsylvania shall not have conducted a new sentencing hearing, the writ shall issue and the Commonwealth shall sentence Petitioner to life imprisonment.

No certificate of appealability shall issue. See generally 28 U.S.C. §2253.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.