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

DONALD HARDCASTLE,	:	CIVIL ACTION
Petitioner	:	
v.	:	**CAPITAL CASE**
MARTIN HORN, et al.,	:	
Respondents	:	NO. 98-CV-3028

MEMORANDUM

Padova, J. **June , 2001**

Before the Court is Donald Hardcastle's Amended Petition for Habeas Corpus pursuant to 28 U.S.C. § 2254 seeking relief on the grounds that his conviction and sentence were obtained in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Hardcastle filed a Petition for Writ of Habeas Corpus on December 30, 1998, containing fifteen claims attacking every stage of his state court proceedings.[1] Following

[1]The various claims in the Petition are as follows. Claim One alleges that trial counsel provided ineffective assistance during the penalty phase by failing to investigate or present evidence of Petitioner's childhood abuse and mental health defects. Claim Two challenges the sufficiency of the evidence for conviction. Claim Three alleges that his trial counsel provided ineffective assistance by failing to adequately investigate the layout of the crime area. Claim Four alleges that the Pennsylvania Supreme Court failed to conduct an independent review of the record when adjudicating his direct appeal.

Claims Five and Six, under the rubric of ineffective assistance of counsel, contest the constitutionality of the sentencing jury's instructions regarding unanimity in finding

extensive briefing on the issue of exhaustion, Petitioner filed an Amended Petition on November 29, 1999, reasserting most of the claims in the original Petition.[2] Oral argument on the Amended Petition was held on February 20 and 21, 2001. For the reasons that follow, the Court concludes that Petitioner is entitled to a writ of habeas corpus based on Claim Seven of the Amended Petition, alleging racially discriminatory exercise of peremptory challenges by the prosecutor during jury selection.[3] The Pennsylvania Supreme

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mitigating circumstances, and the evidence of an aggravating circumstance for imposition of the death penalty, respectively. Claim Seven argues that the prosecutor improperly exercised peremptory challenges on the basis of race during jury selection. Claim Eight asserts that Petitioner's death sentence was a product of racial discrimination and was thus imposed in violation of both the Constitution and international law and treaty. Claim Nine alleges ineffective assistance of trial counsel in eliciting testimony about Petitioner's history of juvenile arrests during the penalty phase.

Claim Ten challenges the appellate process by arguing that the Pennsylvania Supreme Court's proportionality review was arbitrary and utilized flawed data. Claim Eleven asserts that the prosecutor impermissibly commented on Petitioner's failure to testify at trial during her closing argument in the guilt phase. Claim Twelve alleges a claim of ineffective assistance of trial counsel for failing to ask for a penalty phase jury instruction regarding unavailability of parole upon a sentence of life imprisonment. Claims Thirteen and Fourteen assert ineffective assistance of counsel because trial counsel failed to life qualify the jury and failed to object to the prosecutor's improper vouching for the imposition of the death penalty, respectively. Claim Fifteen asserts that Petitioner's jury was improperly death-qualified.

[2]Petitioner withdrew Claim Eight for lack of exhaustion.

[3]Having resolved the Amended Petition on this ground, the Court declines to consider or address Petitioner's other claims and arguments. The remainder of this memorandum is limited to discussion of Claim Seven.

Court's adjudication of this claim resulted in decisions that were contrary to and an unreasonable application of clearly established federal law as determined by the United States Supreme Court, and were based on unreasonable determinations of the facts in light of the evidence available in the state court proceedings. Furthermore, the Court concludes that Petitioner has successfully established intentional discrimination by the prosecutor in selecting a jury in his case based on the state court record.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In the early morning of May 23, 1982, Joseph Gregg and Ernestine Dennis each were stabbed multiple times at Gregg's home at 2122 West Stewart Street in Philadelphia. The house was then set on fire. On May 25, 1982, Petitioner was arrested and charged with two counts of first degree murder, and one count each of arson endangering persons, arson endangering property, and burglary. On December 8, 1982, a jury convicted Petitioner on all counts. Following a penalty hearing, the jury returned death sentences against Petitioner on both of the first degree murder counts on December 10, 1982.

During voir dire, the prosecutor exercised peremptory challenges against twelve African-American prospective jurors. Commw. Pet. to Vacate & Recons. Dec. 1, 1983, Order Granting Def.'s Mot. for New Trial ¶ 5(d); N.T. 4/27/83 at 24. At the conclusion of voir dire, Petitioner filed a motion for a mistrial arguing that

he was denied due process under the state and federal constitutions because the prosecutor exercised the twelve challenges on the basis of race. N.T. 11/29/82 at 5-6; Def.'s Mot. for Mistrial. The trial court denied Petitioner's motion on the ground that neither state nor federal law placed any limitations on the prosecutor's use of peremptory challenges in the absence of proof of systemic racial discrimination. Id. at 8-9.

Following his conviction and sentencing, Petitioner filed a motion for a new trial that again raised the issue of the prosecutor's discriminatory exercise of peremptory challenges.[4] Def.'s Mot. for New Trial ¶ 6. The trial court denied the motion. On December 1, 1983, however, a three-judge panel of the Court of Common Pleas reversed the trial court and granted Petitioner's motion for a new trial. The panel concluded that proof of the exclusion of jurors through peremptory challenges on the basis of race in a single case could establish a constitutional violation and determined that such a violation occurred in Petitioner's case. Commonwealth v. Hardcastle, No. 3288-3293, June Term, 1982, at 5 (Court of Common Pleas (en banc) Dec. 1, 1983). The Pennsylvania Superior Court reversed this grant of a new trial on March 8, 1985. Petitioner initially was permitted to appeal to the Pennsylvania

[4]In his motion, Petitioner urged adoption of a burden-shifting test for intentional discrimination similar to that eventually established in Batson v. Kentucky, 476 U.S. 79 (1986). See Def.'s Brief in Support of Post Trial Mot. at 3-5.

Supreme Court, but his appeal was subsequently dismissed as improvidently granted. Instead, his case was remanded to the Court of Common Pleas for sentencing. On February 18, 1986, Petitioner was formally sentenced to death for each of the murder convictions and a term of years for the related convictions. N.T. 2/18/86 at 29-34.

Petitioner appealed to the Pennsylvania Supreme Court which affirmed his convictions and sentence on August 10, 1988. In his direct appeal, Petitioner reasserted his challenge to the prosecution's use of peremptory challenges in his case, citing Batson v. Kentucky, 476 U.S. 79 (1986). Resp't Ex. A at 10-24; Resp't Ex. B at 5-10. The Pennsylvania Supreme Court addressed and rejected Petitioner's challenge to the prosecutor's exercise of peremptory challenges on the merits under the Batson standard. Commonwealth v. Hardcastle, 546 A.2d 1101, 1103-5 (Pa. 1988). The United States Supreme Court denied Hardcastle's petition for a writ of certiorari on February 20, 1990. Hardcastle v. Pennsylvania, 493 U.S. 1093 (1990).

On September 13, 1990, Petitioner filed a motion for post-conviction relief pursuant to the Pennsylvania Post-Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541, that again raised a Batson claim. The Court of Common Pleas denied the PCRA motion on January 18, 1995. The Pennsylvania Supreme Court subsequently affirmed the denial of the PCRA petition. Commonwealth v.

Hardcastle, 701 A.2d 541, 548 (Pa. 1998).

II. EXHAUSTION AND PROCEDURAL DEFAULT

The instant Amended Petition was filed pursuant to 28 U.S.C. § 2254 which allows federal courts to grant habeas corpus relief to prisoners "in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a) (West 2001). Under that section, a writ of habeas corpus may not be granted unless the applicant has exhausted all remedies available in state court. 28 U.S.C.A. § 2254(b)(1)(A) (West 2001). "The exhaustion requirement ensures that state courts have the first opportunity to review federal constitutional challenges to state convictions and preserves the role of state courts in protecting federally guaranteed rights." Caswell v. Ryan, 953 F.2d 853, 857 (3d Cir.), cert. denied, 504 U.S. 944 (1992).

To exhaust the available state court remedies, a petitioner must fairly present all the claims that he will make in his habeas corpus petition in front of the highest available state court, including courts sitting in discretionary appeal. O'Sullivan v. Boerckel, 526 U.S. 838, 847-48 (1999); Henderson v. Frank, 155 F.3d 159, 164 (3d Cir. 1998). To "fairly present" a claim, a petitioner must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted. McCandless v. Vaughn, 172 F.3d 255, 261

(3d Cir. 1999). A petitioner who has raised an issue on direct appeal, however, need not raise it again in state post-conviction proceedings. Evans v. Court of Common Pleas, Delaware County, Pa., 959 F.2d 1227, 1230 (3d Cir. 1992). Nor must the state court discuss or base its decisions upon the presented claims for those claims to be considered exhausted. Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996). The burden of establishing that a habeas claim was fairly presented falls upon the petitioner. Lines v. Larkins, 208 F.3d 153, 159 (3d Cir. 2000).

A habeas corpus petition containing both exhausted and unexhausted claims ordinarily must be dismissed so that the petitioner may present the unexhausted claims to the state courts. Rose v. Lundy, 455 U.S. 509, 510 (1982). A petition containing unexhausted claims, however, is not subject to dismissal when those claims are procedurally barred under state law. Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993) (citations omitted). In the event that a petition contains both exhausted and procedurally defaulted claims, the habeas court may adjudicate the exhausted claims but may not address the defaulted claims on the merits unless the petitioner shows either (a) that there was cause for the procedural default and that it resulted in prejudice; (b) that the failure to entertain the claim would produce a miscarriage of justice; or (c) that the procedural rule was not independent and adequate. Coleman v. Thompson, 501 U.S. 722, 750 (1991); Doctor, 96 F.3d at 683

(citing Harris v. Reed, 489 U.S. 255, 260-61 (1989)).

Respondents assert that Claims One, Four, Five, Seven, Eleven, Twelve, and Fourteen either in whole or part were not exhausted before the state courts and are now procedurally defaulted. With respect to these claims, Petitioner raises several novel exhaustion theories, including implied exhaustion and exhaustion by operation of state law, and alternatively argues that exhaustion is excused because the Pennsylvania procedural bar is not independent and adequate. According to the parties, therefore, all of the claims in the Amended Petition are either defaulted or exhausted. Both parties admit that no avenue presently exists for Petitioner to raise any unexhausted claims before a Pennsylvania state court. The instant Petition, therefore, is not a mixed petition that is subject to dismissal.

Petitioner bases Claim Seven on two different theories. First, Petitioner argues that the record of voir dire proceedings before the state court alone establishes that the prosecutor exercised her peremptory challenges in a racially discriminatory manner in violation of Batson. Alternatively, Petitioner contends that he is able to establish the racially discriminatory exercise of peremptory challenges under the evidentiary burden imposed by Swain v. Alabama, 380 U.S. 202, 203-4 (1965), by adducing evidence of the systemic exclusion of African-Americans from Philadelphia juries by both the individual prosecutor and the Philadelphia District

Attorney's office generally. Respondents concede that a Batson claim that is based solely on the state court record of voir dire was fully exhausted before the state court, but argue that Petitioner's alternative claim is unexhausted since it relies on additional statistical and videotape evidence that was never presented to the state courts.

The Court need not resolve this issue since the Court determines that Petitioner is entitled to relief based on his argument under Batson that references only the state court record.[5] This claim clearly was exhausted before the state courts. Petitioner repeatedly raised the issue of the prosecutor's exercise of peremptory challenges in a racially discriminatory manner based solely on the conduct of his own trial before the state courts. Def.'s Mot. for Mistrial at 1; Def.'s Mot. for New Trial ¶ 6; Resp't Ex. A at 10-24; Resp't Ex. B at 5-10; Resp't Ex. C at 46-50. The Pennsylvania Supreme Court addressed the issue on both direct appeal and post-conviction relief. See Hardcastle, 701 A.2d at 548; Hardcastle, 546 A.2d at 1103-1105. Accordingly, Claim Seven, insofar as it is based on the state court record, was exhausted and is now properly before the Court.

[5]As a result, the Court will not address Petitioner's theories on exhaustion and excuse of default because their resolution is unnecessary for the Court's discussion of the Batson claim.

III. LEGAL STANDARD

Since the Amended Petition was filed after April 24, 1996, it is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-132, 110 Stat. 1214. See Lindh v. Murphy, 521 U.S. 320, 326-27 (1997). AEDPA made numerous changes to Title 28, Chapter 153 of the United States Code, 28 U.S.C. §§ 2241-2255, the chapter governing federal habeas petitions, in order to further the principles of comity, finality and federalism. See Williams v. Taylor, 529 U.S. 420, 436 (2000).

Section 2254(d)(1), as amended by AEDPA, provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d)(1) (West 2001). A habeas claim under Batson involves mixed questions of law and fact. Jones v. Ryan, 987 F.2d 960, 965 (3d Cir. 1993). To apply the AEDPA standards to pure questions of law or mixed questions of law and fact, federal habeas courts must first determine whether the state court decision regarding each claim was "contrary to" clearly established Supreme

Court precedent. Werts v. Vaughn, 228 F.3d 178, 197 (3d Cir. 2000). If relevant United States Supreme Court precedent requires an outcome contrary to that reached by the state court, then the court may grant habeas relief at this juncture. Matteo v. Superintendent S.C.I. Albion, 171 F.3d 877, 890 (3d Cir. 1999). Otherwise, the court must evaluate whether the state court decision was based on an "unreasonable application of" Supreme Court precedent. Id.

A state court decision may be 'contrary to' clearly established federal law as determined by the United States Supreme Court in two ways.[6] See Williams v. Taylor, 429 U.S. 362, 405 (2000). First, a state court decision is contrary to Supreme Court precedent where the court applies a rule that contradicts the governing law set forth in United States Supreme Court cases. Id.

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[6]Neither standard for the 'contrary to' prong requires that the applicable Supreme Court precedent be factually identical to the case arising on habeas review:

> Rather, the critical question is "whether a Supreme Court rule – by virtue of its factual similarity (though not necessarily identicality) or its distillation of general federal law precepts into a channeled mode of analysis specifically intended for application to variant factual situations – can fairly be said to require a particular result in a particular case.

Matteo, 171 F.3d at 888-89 (quoting O'Brien v. Dubois, 145 F.3d 16, 15 (1st Cir. 1998)). Although Batson did not apply its standard to a particular set of facts, it did outline a general principle of law specifically intended for application to variant factual standards. Accordingly, a Batson claim may still be analyzed under the 'contrary to' prong.

Alternatively, a state court decision is contrary where the state court confronts facts that are materially indistinguishable from a relevant United States Supreme Court precedent and arrives at an opposite result. Id. at 406.

On the other hand, a state court decision that applies the correct legal rule from United States Supreme Court precedent to the facts of a petitioner's case is more appropriately considered under the "unreasonable application" clause. Id. A state court decision can involve an "unreasonable application" of Supreme Court precedent if the state court identifies the correct governing legal rule but unreasonably applies it to the facts of the particular state prisoner's case. Id. at 407. A state court determination also may be set aside under this standard if the court unreasonably refuses to extend the governing legal principle to a context in which the principle should control or unreasonably extends the principle to a new context where it should not apply. Ramdass v. Angelone, 530 U.S. 156, 166 (2000); Williams, 529 U.S. at 407. To grant a habeas corpus writ under the unreasonable application prong, the federal court must determine that the state court's application of clearly established federal law was objectively unreasonable. Williams, 529 U.S. at 409; Werts, 228 F.3d at 197. A federal court cannot grant habeas corpus simply by concluding in its independent judgment that the state court applied clearly established federal law erroneously or incorrectly; mere

disagreement with a state court's conclusions is insufficient to justify relief. Williams, 529 U.S. at 411; Matteo, 171 F.3d at 891. In determining whether the state court's application of the Supreme Court precedent is objectively reasonable, habeas courts may consider the decisions of inferior federal courts. Matteo, 171 F.3d at 890.

The habeas statute further creates heightened deference to state court factual determinations by imposing a presumption of correctness. 28 U.S.C.A. § 2254(e)(1) (West 2001). The presumption of correctness is rebuttable only through clear and convincing evidence. Id. Clear and convincing evidence is evidence that is "so clear, direct, weighty and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." United States Fire Ins. Co. v. Royal Ins. Co., 759 F.2d 306, 309 (3d Cir. 1985).

Furthermore, the district court may only grant relief on a habeas claim involving state court factual findings where the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C.A. § 2254 (d)(2)(West 2001); see Weaver v. Bowersox, 241 F.3d 1024, 1030 (8th Cir. 2001); Watson v. Artuz, No. 99Civ.1364(SAS), 1999 WL 1075973, at *3 (S.D. N.Y. Nov. 30, 1999) (listing cases). The district court must conclude that the state court's determination

of the facts was objectively unreasonable in light of the evidence available to the state court. Weaver, 241 F.3d at 1030 (citing Williams, 529 U.S. at 409); Torres v. Prunty, 223 F.3d 1103, 1107-8 (9th Cir. 2000); see also Watson, 1999 WL 1075973, at *3. Mere disagreement with the state court's determination, or even erroneous factfinding, is insufficient to grant relief if the court acted reasonably. Weaver, 241 F.3d at 1030.

IV. DISCUSSION

Under AEDPA, a state court's legal determinations may only be tested against a rule of federal law that was clearly established at the time the state conviction became final. See 28 U.S.C.A. § 2254(d)(1) (West 2001); Williams, 529 U.S. at 380. Accordingly, the Court will first identify the appropriate Supreme Court precedent and determine whether it was clearly established at the time when Petitioner's conviction became final. The Court will then apply the AEDPA standards in § 2254(d) to Claim Seven. Because the Pennsylvania Supreme Court's decision was contrary to and involved unreasonable applications of Batson and was based on unreasonable determinations of the facts in light of the record, the Court will also determine whether Petitioner successfully establishes a Batson violation.

A. Clearly Established Federal Law

State court's determinations may only be tested against "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.A. § 2254(d)(1) (West 2001). This phrase refers to the "holdings, as opposed to the dicta" of the Supreme Court's decisions as of the time of the relevant state-court decision. Williams, 529 U.S. at 412. Courts look to principles outlined in Teague v. Lane, 489 U.S. 288 (1989), to determine whether a rule of law is clearly established for habeas purposes. Williams, 529 U.S. at 379-80, 412. "[W]hatever would qualify as an old rule under [the Court's] Teague jurisprudence will constitute clearly established Federal law," except that the source of that clearly established law is restricted to the United States Supreme Court. Id. at 412. The federal habeas court must independently evaluate whether a rule was clearly established at the time the state court rendered the final judgment of conviction.[7] Id. at 382.

As early as 1965, the United States Supreme Court held as a broad proposition that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." Swain v. Alabama, 380 U.S. 202, 203-4 (1965). The general principle

[7]Respondents do not dispute that Batson constituted clearly established law at the time Petitioner's final judgment of conviction was rendered.

that prosecutors may not engage in intentional discrimination when selecting juries, therefore, was clearly established at the time of Petitioner's trial in 1982 and at the time of the subsequent state court decisions. The quantum of proof necessary to successfully prove purposeful discrimination in the context of jury selection, however, changed over the years. Swain applied a presumption that "in any particular case . . . the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court." Id. at 222. This presumption could not be overcome by showing that the prosecution exercised peremptory challenges against all or some prospective jurors of a particular race on the basis of their race in a single case. Id. Instead, Swain required proof of systemic use of peremptory challenges to remove jurors on the basis of race, such that "the State has not seen fit to leave a single Negro on any jury in a criminal case." Id. at 223-24. Accordingly, only proof of systemic exclusion of jurors of a certain race over a period of time through peremptory challenges would overcome the presumption of fairness and create an inference of intentional discrimination. Id. at 227.

In 1986, the United States Supreme Court revisited the issue of the evidentiary burden borne by criminal defendants in proving purposeful discrimination by the State on the basis of race in jury selection. Batson, 476 U.S. at 90 (1986). The Supreme Court rejected Swain's requirement of proof of systemic discriminatory

use of peremptory challenges over a span of cases, and instead held that a defendant may make a prima facie showing of intentional discrimination in the selection of his or her jury by relying on the prosecutor's exercise of peremptory challenges at the defendant's own trial. Id. at 96. Thus, the United States Supreme Court's holding in Batson consisted of two parts. First, the Supreme Court reaffirmed the principle that the use of peremptory challenges on the basis of race violates the Equal Protection Clause of the United States Constitution. Most importantly, however, the Supreme Court established a different standard for courts to use in evaluating such claims.

Batson's standard for evaluating claims of racially discriminatory exercise of peremptory challenges was clearly established at the time of Petitioner's final judgment of conviction. The opinion in Batson was issued on April 30, 1986. On January 13, 1997, the Supreme Court provided for the retroactive application of Batson to all cases pending on direct appeal at the time Batson was decided. Griffith v. Kentucky, 479 U.S. 314, 328 (1987). The Pennsylvania Supreme Court handed down Petitioner's final judgment of conviction on August 10, 1988, over two years after Batson was decided and over one year after it had been made retroactive. Hardcastle, 546 A.2d at 1101, 1104; see Nevius v. McDaniel, 218 F.3d 940, 947 (9th Cir. 2000) (holding conviction finalized following exhaustion of direct appeal before state

supreme court). Because Batson was decided well before Petitioner's conviction became final, it was not a new rule under Teague. See Wright v. West, 505 U.S. 277, 291 (1992) ("Teague defined a "new" rule as one that was "not dictated by precedent existing at the time the defendant's conviction became final."). Accordingly, the Batson principle and standard were clearly established federal law at the time of Petitioner's final conviction.

B. Application of the AEDPA Standard to the Pennsylvania Supreme Court's Decision on Direct Appeal, As Revised by the PCRA Appeal Decision

The Government exercised peremptory challenges against the following jurors: Aileen Conway, juror no. 91; Lisa Stewart, juror no. 456; William Preston, juror no. 367; Adrienne Marsh, juror no. 293; Catherine Taylor, juror no. 483; Marian Johnson, juror no. 178; Shirley Davis, juror no. 81; Kim Richards, juror no. 322; Iris Garayua, juror no. 119; Gladys Workman, juror no. 461; Lorraine Fox, juror no. 128; James Richardson, juror no. 339; Mary Henry, juror no. 103; Janice Ferrell, juror no. 70; and Anthony Aiello, juror no. 2.[8] See N.T. 11/15/82 at 1.22, 1.30, 1.114, 1.116; N.T. 11/16/82 at 2.3, 2.8, 2.14, 2.22, 2.28; N.T. 11/17/82 at 8, 14, 46, 50, 92, 96, 121, 128; N.T. 11/18/82 at 4.40, 4.46, 4.57, 4.60, 4.65; N.T. 11/19/82 at 5.40, 5.44, 5.62, 5.64, 5.95, 5.99. In pressing his claim of racially discriminatory peremptory challenges

[8]The record reveals that the Government exercised fifteen peremptory challenges, not fourteen as the court stated. See Hardcastle, 546 A.2d at 1104.

before the state courts, Petitioner identified twelve of those challenged jurors as African-American: Lisa Stewart; William Preston; Adrienne Marsh; Catherine Taylor;[9] Marian Johnson; Shirley Davis; Kim Richards; Gladys Workman; Lorraine Fox; James Richardson; Mary Henry; and Janice Ferrell. Def.'s Mot. for Mistrial ¶ 2; Def.'s Mot. for New Trial ¶6(b); see also Resp't Ex. A at 25 & Ex. C; Resp't Ex. B at 7; Resp't Ex. C at 46. The Pennsylvania Supreme Court presumed the accuracy of Petitioner's identification of the challenged African-American jurors since it made no contrary finding. Furthermore, the state court record reveals no instance where the Government contested the accuracy of Petitioner's identifications. Compare Commw. Pet. to Vacate and Recons. Dec. 1, 1983 Order, Granting Def.'s Mot. for New Trial and Granting Reargument Thereon ¶ 5(d).

The Pennsylvania Supreme Court addressed Petitioner's claim on both direct appeal and PCRA review. Acknowledging that the United States Supreme Court had held Batson retroactive to cases pending on direct appeal when the case was decided and finding that Petitioner had adequately preserved the issue, the court addressed Petitioner's challenge to the prosecutor's exercise of peremptory challenges on the merits under the Batson standard. Hardcastle, 546

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[9]Petitioner identified Taylor as "Kathryn Taylor." (See Mot. for Mistrial.) The trial transcripts spell the name as "Catherine Taylor." (See N.T. 11/16/82 at 2.22.) There is only one juror with a surname of Taylor whom the Government peremptorily challenged during voir dire at Petitioner's trial.

A.2d at 1103-5.

Because trial counsel failed to object at the time of each peremptory challenge, the trial court provided no opportunity for the prosecutor to place her reasons for striking the African-American jurors on the record. Id. at 1104. Since the record lacked the prosecutor's reasons for her strikes, the Pennsylvania Supreme Court canvassed the voir dire transcript to determine whether any of the twelve jurors stricken by the prosecution had provided information that could conceivably constitute a race-neutral reason for striking that juror. Id. at 1104-5. The court first found that the voir dire transcript contained potential race-neutral reasons to justify the prosecutor's exercise of peremptory challenges with respect to ten of the excluded jurors. Id. The Pennsylvania Supreme Court discussed these ten jurors in the order of their challenge rather than by name or juror number. See id. at 1104-5. To facilitate review, this Court matched the Pennsylvania court's description of each challenged juror's voir dire testimony with the trial record.[10]

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[10]The Pennsylvania Supreme Court discussed the first juror as follows: "The first challenged juror, when questioned by the Commonwealth, indicated that a member of his family had been the victim of violent crime. His sister had been raped approximately six or seven years prior to appellant's trial." Hardcastle, 546 A.2d at 1104. This description matches the testimony of William Preston, juror no. 467, who was the third juror of any race and the second African-American juror to be peremptorily challenged by the Commonwealth. Id.; N.T. 11/16/82 at 2.3-2.8; see also N.T. 11/15/82 at 1.22, 1.30, 1.114, 1.116. The court's description of the "second challenged juror" matches the testimony of Adrienne

Outside of the ten jurors whose testimony was specifically described, the Pennsylvania Supreme Court determined that the remaining two African-American jurors whom the prosecutor excluded could have been challenged based on the Commonwealth's observations of their demeanor:

> In the other two instances, the Commonwealth had the opportunity to observe the witnesses and their response to questioning prior to exercising the peremptory challenge.

Hardcastle, 546 A.2d at 1105. The court again failed to identify the jurors by name or number. The only African-American jurors whose testimony did not match any of the ten specific descriptions supplied by the Pennsylvania Supreme Court, however, were Lisa

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Marsh, juror no. 293, the third African-American challenged juror. Hardcastle, 546 A.2d at 1104; N.T. 11/16/82 at 2.8-2.14. The description of the "third challenged juror" matches the testimony of Catherine Taylor, juror no. 483, the fourth African-American challenged juror. Hardcastle, 546 A.2d at 1105; N.T. 11/16/82 at 2.22-2.28. The description of the "fourth challenged juror" matches the testimony of Marian Johnson, juror no. 178, the fifth African-American challenged juror. Hardcastle, 546 A.2d at 1105; N.T. 11/17/82 at 8-14. The court's description of the "sixth challenged juror" matches the testimony of Lorraine Fox, juror no. 128, the ninth challenged African-American juror. Hardcastle, 546 A.2d at 1105; N.T. 11/18/82 at 4.57-4.60. The description of the "seventh challenged juror" matches the testimony of James Richardson, juror no. 339, the tenth excluded African-American juror. Hardcastle, 546 A.2d at 1105; N.T. 11/18/82 at 4.60-4.65. The description of the "eighth challenged juror" matches the testimony of Mary Henry, juror no. 103, the eleventh excluded African-American juror. Hardcastle, 546 A.2d at 1105; N.T. 11/19/82 at 5.40- 5.44. The description given for the "ninth challenged juror" matches the testimony of Janice Ferrell, juror no. 70, the twelfth excluded African-American juror. Hardcastle, 546 A.2d at 1105; N.T. 11/19/82 at 5.62-5.64. The Court will discuss in detail the court's description of the fifth and tenth challenged jurors later in this memorandum.

Stewart, juror no. 456, and Kim Richards, juror no. 322. See Hardcastle, 546 A.2d at 1104-5; N.T. 11/15/82 at 1.114-1.116; N.T. 11/17/82 at 92-96.

After making these determinations, the court held that Petitioner failed to establish a prima facie case of purposeful discrimination under Batson:

> A review of this record indicates that an identifiable reasonable basis for a challenge was available in at least ten of the Commonwealth's twelve peremptory challenges. In the other two instances the Commonwealth had the opportunity to observe the witnesses and their response to questioning prior to exercising the peremptory challenge. In addition, although the Commonwealth had ample challenges remaining, there were no challenges offered to two black jurors, one of whom ironically was challenged by the defendant. On this record we find that appellant has not made out a prima facie case of the Commonwealth's improper use of peremptory challenges.

Hardcastle, 546 A.2d at 1105. On PCRA review, however, the Pennsylvania Supreme Court revised its earlier opinion made on direct review to presume the existence of a prima facie case:

> Notwithstanding the language in our opinion [on direct appeal] to the effect that the Appellant had not made out a prima facie case, the extensive analysis of the record for race-neutral reasons indicates that our post hoc analysis actually presumed the existence of a prima facie case, evaluated the evidence and all the relevant circumstances as the trial court would ordinarily do pursuant to Batson, and resolved the ultimate issue by deciding that the Commonwealth had not used its peremptory challenges improperly.

Hardcastle, 701 A.2d at 548. All of the discussion in this memorandum that follows refers to the Pennsylvania Supreme Court's direct appeal decision as revised by its PCRA decision.

Petitioner challenges the Pennsylvania Supreme Court's analysis of his claim as contrary to, and an unreasonable application of, Batson on several grounds. First, Petitioner contends that the court's post hoc reconstruction analysis used with respect to all twelve jurors is contrary to Batson because it provides no basis for determining the prosecutor's subjective intent. Second, Petitioner argues that the court's decision was contrary to Batson because the court failed to uncover any race-neutral reason for the prosecutor's challenge of two jurors and failed to remand for a new trial. Lastly, Petitioner challenges the reasonability of the state court's factual findings of no intentional discrimination with respect to several jurors.

1. The Pennsylvania Supreme Court's Contrary Application of Batson

The Pennsylvania Supreme Court's decision was contrary to Batson because the court confronted a situation that is factually indistinguishable from Batson but yet reached an opposite result. In Batson, the trial court rejected the defendant's timely objection without determining if the facts established a prima facie case of purposeful discrimination. Batson, 476 U.S. at 100. The Supreme Court remanded the case for such a determination. Id. The trial court in Petitioner's case engaged in the same course of

conduct, but the Pennsylvania Supreme Court failed to remand the case.

Batson further provides that if the facts establish a prima facie case and the prosecutor fails to come forward with a neutral explanation, the conviction must be reversed. Id. The Pennsylvania Supreme Court determined that Petitioner had established a prima facie case, but the prosecutor in Petitioner's case never advanced any neutral reasons for her challenges. Hardcastle, 701 A.2d at 548; Hardcastle, 546 A.2d at 1104. The only statements by the prosecutor in the record of her reasons for exercising the relevant challenges are general denials of racial bias or statements of her inability to remember the reasons for the challenges. N.T. 4/27/83 at 49 ("How can I possibly now tell you why I challenged anybody? I don't think that now, some six months after, I can tell you why I challenged somebody then."); N.T. 4/27/83 at 80 ("I'm not saying that the race of the venireman was the reason for those challenges."). Statements such as these were explicitly rejected by Batson as being insufficient to sustain the prosecutor's burden of production. See Batson, 476 U.S. at 98 ("Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.'") (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)). Since the Batson court held these reasons to be insufficient as a matter of law and no other valid neutral reasons

proffered by the prosecutor appear in the record, Batson required reversal of Petitioner's conviction. The Pennsylvania Supreme Court failed to do so and thus reached a result directly contrary to Batson.

2. The Pennsylvania Supreme Court's Use of Potential Justifications for the Prosecutor's Exercise of Peremptory Challenges

Since the prosecutor in Petitioner's case was never required to offer any justification for her exercise of peremptory challenges, the Pennsylvania Supreme Court independently searched the voir dire transcript for race-neutral information on each challenged juror that could potentially have been raised to justify that juror's challenge. See Hardcastle, 546 A.2d at 1104. Thus the court implicitly determined as a matter of law that such apparent or potential justifications could substitute for the actual reasons that should have been proffered by the prosecutor. The Court concludes that the Pennsylvania Supreme Court's legal conclusion that judicially-inferred justifications for the prosecutor's challenges are sufficient to satisfy Batson's requirement that the prosecutor advance a justification for the challenges is contrary to or, alternatively, an unreasonable application of Batson.

Longstanding United States Supreme Court precedent clearly states that a party asserting a violation of the Equal Protection Clause must prove that the opposing party acted with discriminatory intent or purpose. See Batson, 476 U.S. at 93; Arlington Heights

v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977); Washington v. Davis, 426 U.S. 229, 239-40 (1976) (citing Atkins v. Texas, 325 U.S. 398, 403-4 (1945)). In accordance with this principle, Batson proscribes only intentional or purposeful discrimination in exercising peremptory challenges. Batson, 476 U.S. at 98. To enable this inquiry into intent and purpose, Batson places on the prosecutor the burden of producing a neutral explanation for the peremptory challenge, the credibility of which the court then weighs. Id. at 97. Hence, Batson clearly focuses the court's inquiry on the prosecutor's state of mind, namely the presence or absence of an intent to discriminate on the basis of race. Here, the justifications for the prosecutor's challenges were proffered by the court, not the prosecutor. The method of analysis employed by the Pennsylvania Supreme Court is contrary to Batson because it exempts the prosecutor from satisfying the burden of production imposed by Batson. Thus, the state court, by sua sponte generating justifications for the prosecutor's challenges, applied a rule of law that is contrary to that established by Batson.

Even if the state court's method is not contrary to Batson, it at least constitutes an unreasonable application of Batson because the fact that certain information known about a juror could have supported a non-discriminatory challenge does not support any reasonable inference that the prosecutor actually relied on any of that information. See United States v. Page, No.97C2115, 1999 WL

652035, at *7 (N.D. Ill. Aug. 20, 1999). Because apparent reasons do not reflect the prosecutor's actual motivation, they "cannot be mistaken for the actual reasons for a [peremptory] challenge." Mahaffrey v. Page, 162 F.3d 481, 483-84 n.1 (7th Cir. 1999). Given Batson's emphasis on the prosecutor's intent, reliance on apparent or potential reasons is objectively unreasonable because they do not shed any light on the prosecutor's intent or state of mind when making the challenge. See Mahaffrey, 162 F.3d at 484 n.1; Johnson v. Love, 40 F.3d 658, 667 (3d Cir. 1994) (requiring the state to produce evidence of the prosecutor's state of mind in addition to proffering justifications for the challenges when addressing Batson in a post-trial context).

As a corollary, the court's factual determination that the potential reasons generated with respect to ten of the African-American jurors successfully rebutted the inference of discrimination raised by Petitioner's prima facie case is unreasonable in light of the available record evidence. The court combed the record for facts about the jurors that could potentially support a race-neutral justification for the peremptory challenge of ten of the jurors, see Hardcastle, 546 A.2d at 1105, but identified no evidence in the record that purported to show the prosecutor's actual reasons for exercising the peremptory challenges. While the apparent reasons gleaned from the record could have been the prosecutor's operative reasons that she might

have offered in response to a Batson objection, no reviewing court could reasonably say that they probably were the prosecutor's reasons without engaging in sheer and unsupported speculation. Page, 1999 WL 652035, at *8. It is objectively unreasonable to conclude that the inference of purposeful discrimination created by the prima facie case is rebutted in the absence of any actual reasons that reflected the prosecutor's subjective intent.

The only explanations in the record that arguably reflect the prosecutor's state of mind are statements that the prosecutor could not remember the reasons for the challenge and other general denials of any racial bias. N.T. 4/27/83 at 49; N.T. 4/27/83 at 80. Batson discredits such general denials of discrimination. See Batson, 476 U.S. at 98. As such, the prosecutor's statements are not neutral explanations under Batson, and any determination that the prima facie inference of discrimination was rebutted by these statements is objectively unreasonable.

Even if the Pennsylvania Supreme Court's use of the potential justifications it created from the record was proper, the court's opinion was still contrary to Batson. Batson provides that once a justification for the peremptory challenge is offered, the court must determine if the defendant established intentional discrimination. Id. at 98. In making this ultimate determination, Batson anticipates that the court will weigh the credibility of the proffered reasons and the relevant circumstances that raised the

inference of discrimination to reach its conclusion as to the existence of intentional discrimination. Id. at 93, 98 n.21 ("In deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'") (quoting Arlington Heights, 429 U.S. at 266). The Pennsylvania Supreme Court's decision does not indicate that the court engaged in any analysis or consideration of the credibility of the potential justifications that it had proffered. Rather, the court's decision reads as if the court accepted the justifications at face value. If the court failed to engage in substantive analysis of the potential reasons it found in the record, then the court's decision was contrary to Batson.

3. The Prosecutor's Opportunity to Observe the Demeanor of Two of the Challenged Jurors

After uncovering potential neutral reasons for ten of the strikes, the court found that the remaining two African-American jurors could have been excluded because:

> the Commonwealth had the opportunity to observe the witnesses and their response to questioning prior to exercising the peremptory challenge.

Hardcastle, 546 A.2d at 1105. The Court determines that the state court's conclusion that this explanation is sufficient to satisfy

Batson is an objectively unreasonable application of Batson.[11]

Batson requires that the prosecution's proffered race-neutral reason be both "clear and reasonably specific" and "related to the particular case to be tried." Batson, 476 U.S. at 98 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)). When assessing whether a prosecutor has properly advanced an explanation for a peremptory challenge based on demeanor, courts require that the prosecutor provide some detail about her concerns or impressions of the stricken juror's demeanor or attitude. See, e.g., Burks v. Borg, 27 F.3d 1424, 1429-30 (9th Cir. 1994); United States v. Johnson, 4 F.3d 904, 913 (10th Cir. 1993); Brown v. Kelly, 973 F.2d 116, 120 (2d Cir. 1992); United States v. Sherrills, 929 F.2d 393, 394-95 (8th Cir. 1991); United States v. Horsley, 864 F.2d 1543, 1546 (11th Cir. 1989).

A blanket statement that the prosecutor had the opportunity to observe the jurors' demeanor is not reasonably specific or related to Petitioner's particular case. The court's explanation does not contain or reference any information about either the jurors' demeanor or the prosecutor's impressions thereof. Because it is phrased as "the opportunity to observe" the jurors' demeanor, the explanation is not even specifically connected to the particular

[11]Batson neither prohibits peremptory challenges from being exercised on the basis of a juror's demeanor, nor discredits justifications based on demeanor as per se racially discriminatory. Accordingly, the state court's reliance on that justification cannot be contrary to Batson.

prosecutor exercising the challenge, the particular case being tried, or the juror who was struck. The court's supposition regarding demeanor is indistinguishable from the general denials of a discriminatory motive or affirmation of good faith that Batson squarely determined to be insufficient as a matter of law. See Batson, 476 U.S. at 97. Accordingly, the court's conclusion that having the 'opportunity' to observe the jurors' demeanor constituted a reasonably specific explanation that was related to the particular case that was being tried was objectively unreasonable. Since this is the only potential justification that the court found for striking two of the African-American jurors and the explanation is inadequate as a matter of law, Batson required the court to vacate Petitioner's conviction. See Johnson, 40 F.3d at 668 ("Batson inquiry ends and the conviction must be vacated at the second stage of the analysis if the state's explanation is such that, taken at face value, it . . . would otherwise be inadequate as a matter of law.")

In determining that no purposeful discrimination occurred, the state court found that the prosecutor's opportunity to observe the jurors' demeanor rebutted the inference of discrimination created by Petitioner's prima facie case. This factual determination also constitutes an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. The Pennsylvania Supreme Court was not present during the actual voir

dire and thus relied solely on the record transcripts in reaching its conclusion. The record contains no evidence whatsoever about any juror's demeanor or the prosecutor's observations or impressions thereof. See also Sherrills, 929 F.2d at 395 (noting that observations of demeanor are generally not reflected in the written record). In the absence of any evidence relevant to demeanor, it is objectively unreasonable to derive any inference, positive or negative, about the challenged jurors' demeanor or the prosecutor's impressions of the jurors' attitude. To permit such blatant speculation to rebut the inference of purposeful discrimination created by defendant's prima facie case would transform the Equal Protection Clause into "a vain and illusory requirement." See Batson, 476 U.S. at 97. Accordingly, the Pennsylvania Supreme Court's findings that a neutral explanation existed and that Petitioner's prima facie case was rebutted with respect to those jurors is based on an unreasonable determination of the facts.

4. The Pennsylvania Supreme Court's Factual Finding with Respect to the "Tenth Challenged Juror"

As previously explained, the Pennsylvania Supreme Court reviewed Petitioner's claim by canvassing the record to uncover potential race-neutral reasons for challenging the African-American jurors. Hardcastle, 546 A.2d at 1104. Based in part on a finding that race-neutral reasons existed in the record to justify the

exclusion of ten of the African-American jurors, the court found as fact that Petitioner failed to ultimately establish purposeful discrimination. Hardcastle, 546 A.2d at 1105; see Batson, 476 U.S. at 98 n.21 (commenting that a finding of intentional discrimination is a finding of fact). To determine the reasonability of Pennsylvania Supreme Court's findings, this Court has reviewed the record of voir dire. Based on this review, the Court concludes that the court's finding of the existence of a race-neutral justification for challenging one of the African-American jurors was an objectively unreasonable determination of fact because it was based on the testimony of a juror who was not identified as African-American and whose exclusion Petitioner did not contest before the state court.

The last juror whose testimony was specifically described by the Pennsylvania Supreme Court does not match any of the jurors who Petitioner identified to the court as being African-American and whose challenge Petitioner contested before the state courts. The court stated:

> The tenth challenged juror testified that he was a thirty-five year old single bartender living in south Philadelphia. When asked if there was a reason whether he could not return a verdict of death, even in a proper case, the juror stated "No ..., I wouldn't go against my word, you know, whatever I thought was right." He then changed his testimony indicating that he would follow the law as defined by the judge.

Hardcastle, 546 A.2d at 1105. The only juror whose voir dire

testimony matches this information is Anthony Aiello ("Aiello"), juror number 2. See N.T. 11/19/82 at 5.95-5.99. Although the record reveals that he was peremptorily challenged by the prosecution, the record is completely devoid of any evidence that Aiello was African-American. See N.T. 11/19/82 at 5.95-5.99. Aiello has never been identified by Petitioner or the Commonwealth as being African-American. See Def.'s Mot. for Mistrial ¶ 2; Def.'s Mot. for New Trial ¶ 6(b); see also Resp't Ex. A at 25, Ex. C. Petitioner has never challenged Aiello's exclusion. Furthermore, the Government never disputed Petitioner's identification of the African-American jurors. The Pennsylvania Supreme Court never determined that Petitioner's identifications were erroneous, and the record contains no basis for doing so. Since the state court specifically discussed the challenges of twelve jurors, the court obviously substituted Aiello for one of the African-American jurors and used his testimony to justify the peremptory challenge of that juror. In light of these circumstances, the court's substitution of Aiello was not merely erroneous, but also was objectively unreasonable because it is completely unsupported by the record. See Watson, 1999 WL 1075973 at *3 (indicating that an unreasonable determination occurs where the finding is "'so devoid of record support' as to indicate that it is outside the universe of plausible, credible outcomes").

In replacing one of the African-American jurors whose exclusion Petitioner challenges with Aiello, a juror who has never been identified as African-American and whose exclusion Petitioner has never challenged, the court failed to specifically address the merits of the Batson claim with respect to one of the twelve African-American jurors.[12] Since the court found no facts to rebut the inference of intentional discrimination created by Petitioner's prima facie case with respect to that juror, the court's ultimate finding that Petitioner failed to prove intentional discrimination with respect to that omitted juror is objectively unreasonable. Such a result directly contradicts Batson's requirement that the conviction be vacated where there is no justification proffered. Id. at 100.

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[12]The Court notes that the Pennsylvania Supreme Court's description of the "fifth challenged juror" potentially matches the testimony of two African-American jurors whom Petitioner alleges were discriminatorily excluded, Gladys Workman or Shirley Davis. See Hardcastle, 546 A.2d at 1105; N.T. 11/17/82 at 49; N.T. 11/18/82 at 4.43-4.44. Respondents would likely argue that the Pennsylvania Supreme Court must have substituted Aiello for either Workman or Davis, and that the court's unreasonable determination of fact caused by Aiello's substitution is essentially rendered harmless because the court's finding of a neutral explanation would have applied to both of those jurors. The Court, however, will not speculate about what the Pennsylvania Supreme Court might have done had it attempted to correct its determinations. Such conjecture is exactly the type of improper review that the Court has rejected throughout this memorandum.

C. Plenary Review of Petitioner's Batson Claim

Having concluded that the Pennsylvania Supreme Court's decision was contrary to and an unreasonable application of clearly established federal law as determined by the United States Supreme Court in Batson and was based on unreasonable determinations of the facts in light of the record, the Court may grant habeas corpus relief pursuant to 28 U.S.C. § 2254(d). The question now becomes whether the Court should grant habeas relief based on the merits of Petitioner's Batson claim. The Court is obliged to conduct an independent de novo review of Petitioner's Batson claim to determine if issuance of a writ is warranted.[13] Rose v. Lee, No. 00-12, 00-11, 2001 WL 558079, at * 9-10 (4th Cir. May 24, 2001) (citing Williams, 529 U.S. at 395-399, 415, 418-19). State court factual findings, however, are still subject to the deferential standards in 28 U.S.C. § 2254(e)(1). Appel, 250 F.3d at 210; see also Rose, 2001 WL 558079, at 10-11 (using state court's factual findings to determine de novo merits of ineffective assistance of

[13]The Third Circuit Court of Appeals has not specifically addressed the question of the applicable standard of review in cases where the state court decision is contrary to or an unreasonable application of federal law. The Third Circuit has held, however, that where the state court fails to adjudicate or address the merits of a claim raised by the petitioner, the reviewing court does not apply AEDPA's deferential standards, but rather "exercise[s] plenary review over state court conclusions on mixed questions of law and fact and pure issues of law." Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001). The Court determines that this plenary review also applies where a state court decision addresses the merits of a particular claim but is deficient under the § 2254(d) standards.

counsel claim). Accordingly, the Court will continue to apply the statutory deference to the state court's factual findings except with respect to those findings that the Court has already determined were unreasonable in light of the evidence available to the state court.

A Batson analysis proceeds in three steps: (1) the defendant must make a prima facie showing of a violation; (2) if the defendant succeeds, the prosecution must articulate a race-neutral explanation; and (3) the court must then determine whether the defendant has proven purposeful discrimination. Simmons v. Beyer, 44 F.3d 1160, 1167 (3d Cir. 1995). At the threshold, the Court defers to the Pennsylvania Supreme Court's determination that Petitioner established a prima facie case under Batson, and thus successfully raised an inference of racial discrimination by the prosecutor. See Hardcastle, 701 A.2d at 548. Even if deference is unnecessary, the Court agrees that the relevant circumstances of Petitioner's case clearly establish a prima facie case of discrimination.

Batson states that to establish a prima facie case of discriminatory jury selection the defendant must show that he is a member of a cognizable racial group, the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race, and sufficient facts exist to raise an inference that "the prosecutor used that practice [of peremptory challenges]

to exclude the veniremen from the petit jury on account of their race." Batson, 486 U.S. at 96. In connection with the prima facie case, Batson permits the defendant "to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate." Id. Courts examine several factors when determining whether a prima facie case has been established: (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 pattern of strikes against racial group members; and (5) the prosecution's questions and statements during the voir dire. United States v. Clemons, 843 F.2d 741, 748 (3d Cir. 1987); see also Batson, 486 U.S. at 97.

Neither party disputes that Petitioner is African-American and thus is a member of a cognizable racial group, and that the prosecutor exercised peremptory challenges of jurors of Petitioner's race. See Commw. Pet. to Vacate and Recons. Dec. 1, 1983 Order, Granting Def.'s Mot. for New Trial and Granting Reargument Thereon ¶ 5(d). Although Petitioner and the victims are of the same race and the crime contains no apparent racial overtones, the relevant circumstances support a finding that Petitioner successfully established a prima facie case. The prosecutor exercised a very large proportion of her peremptory challenges against African-American jurors, twelve out of fifteen.

Given that only fourteen African-Americans sat on the venire,[14] this pattern of strikes is highly suspicious. Furthermore, the prosecutor made a revealing statement during voir dire questioning that supports an inference of discrimination. Juror number 35, Gisela Broughton, expressed uneasiness about Petitioner's race during her voir dire questioning. N.T. 11/16/82 at 2.71-2.72. Ms. Broughton had previously been victimized twice, both times by African-Americans. Id. at 2.70-2.71. She recognized that Petitioner is African-American and admitted that she felt prejudiced against him on the basis of his race. Id. at 2.71 ("I think I am a little prejudiced right at this point because both times that this has happened, it has been a black person, and I just feel a little bit uneasy about that."); Id. at 2.72 ("I was always open minded and all, but since two things happened to me, both times it was black people, I feel a little bit on the prejudiced side.") When Petitioner challenged her for cause, the prosecutor objected. (Id.) The prosecutor's support for the retention of a juror who admitted to being racially-biased against African-Americans is probative of the prosecutor's state of mind during voir dire. The fact that one African-American juror sat on the jury in Petitioner's case does not preclude a finding of a prima facie case with respect to the

[14]The Pennsylvania Supreme Court indicates, and the record supports, that the prosecutor excluded twelve of the African-American jurors, Petitioner challenged one juror, and one ultimately sat on the jury. Hardcastle, 546 A.2d at 1104-5.

jurors who were excluded. Simmons, 44 F.3d at 1167-68. The number of African-American veniremen peremptorily challenged by Petitioner is irrelevant to the issue of whether the prosecutor employed her strikes for discriminatory reasons. Based on all of these circumstances, the Court finds that Petitioner established a prima facie case of discrimination.

The next stage of the inquiry, therefore, is whether the prosecutor advanced a race-neutral reason for each of the strikes. The Court recognizes that at this stage the prosecutor's proffered reasons need not be plausible or credible, but just facially race-neutral. Hernandez v. New York, 500 U.S. 352, 360 (1991). The Court has already determined that the Pennsylvania Supreme Court's findings with respect to the existence of a race-neutral reason with respect to any of the twelve African-American jurors were unreasonable in light of the available record. As such, no deference to the state court's findings is necessary. The only statements by the prosecutor about the reasons for her strikes in the record are her professed inability to recall the specific reasons for the strikes and a general denial that the strikes were based on race. N.T. 4/27/83 at 49, 80. These statements are insufficient as a matter of law under Batson to constitute a race-neutral justification. See Batson, 476 U.S. at 98. Respondent offers neither explanations for the prosecutor's strikes nor evidence of the prosecutor's state of mind. Accordingly, the Court

determines that no race-neutral reasons are present to rebut Petitioner's prima facie case. Under this circumstance, Batson requires that Petitioner's conviction be vacated. Id. at 100.

Even if the state court's findings of the existence of potential race-neutral reasons for challenging the ten jurors based on their voir dire testimony are accepted and the use of such potential reasons is reasonable under Batson, the Court determines that the prosecutor engaged in intentional discrimination with respect to the exclusion of William Preston (Preston"), James Richardson ("Richardson"), Adrienne Marsh ("Marsh"), and Janice Ferrell ("Ferrell").

The state court surmised that the prosecutor excluded Preston and Richardson, both identified as African-American jurors, based on their testimony that family members had been victims of violent crime. Hardcastle, 546 A.2d at 1104-1105. Preston and Richardson, however, both testified that they would not be influenced by their prior experiences. N.T. 11/16/81 at 2.6, 2.7; N.T. 11/18/82 at 4.62. Five white jurors also testified that either they or close family members had been victimized by violent crime, but the prosecutor explicitly voiced her approval of them as jurors. See Def.'s Mot. for Mistrial ¶ 2; N.T. 11/15/82 at 1.94, 1.96-1.97; N.T. 11/16/82 at 2.3, 2.6, 2.79, 2.81; N.T. 11/17/82 at 32, 34; N.T. 11/18/82 at 4.28, 4.32, 4.60, 4.62, 4.72, 4.74. While recognizing that Batson does not compel a finding of intentional

discrimination merely because veniremen of different races give similar responses and only one is excluded, see, e.g., Howard v. Moore, 131 F.3d 399, 409 (4th Cir. 1997); Burks, 27 F.3d at 1427, the Court sees no credible reason why the prosecutor would find Preston and Richardson distinguishable from the five non-African-American jurors. Casting further doubt on the credibility of such a justification, one of the white jurors accepted by the prosecutor had himself been convicted of a crime of violence. N.T. 11/18/82 at 4.32. Furthermore, both Preston and Richardson were otherwise indistinguishable from another white juror who was accepted by the prosecutor. See N.T. 11/16/81 at 2.4-2.8; N.T. 11/18/82 at 4.22-4.27, 4.60-4.65.

The state court justified the exclusion of Marsh, another African-American juror, because she had heard about the case through the media. Hardcastle, 546 A.2d at 1104. The Court rejects this justification. Marsh stated that she would reach a verdict based on the evidence presented at trial and would not be influenced by any prior knowledge of the case. N.T. 11/16/82 at 2.10. The prosecutor explicitly accepted a white juror who also testified to have read media reports about the crime. See Def.'s Mot. for Mistrial ¶ 2; N.T. 11/16/82 at 2.8, 2.9-2.10; N.T. 11/17/82 at 77-78. Similar to a juror who sat on the petit jury in Petitioner's case, Marsh lived in Mount Airy and was married with adult and teenage children. N.T. 11/15/82 at 1.95, 1.100; N.T.

11/16/82 at 2.9, 2.12. Marsh also stated clearly that she had no beliefs that would prevent her from imposing the death penalty in an appropriate case and that she would follow the law as explained by the judge. Id. at 2.8, 2.13-2.14.

The Pennsylvania Supreme Court justified Ferrell's exclusion on the grounds that she was a twenty years old, unemployed high school graduate, who lived with her mother and had never before served on a jury. Hardcastle, 546 A.2d at 1105. These reasons taken individually or collectively are also insufficient to rebut the inference of discrimination. The prosecutor, however, accepted several young single women who lived at home with their parents. See N.T. 11/17/82 at 53-55; N.T. 11/19/82 at 5.84-5.86. Furthermore, the prosecutor accepted an unemployed juror who lived with his family, had been convicted of a violent crime, and had a family member who had been a victim of violent crime. N.T. 11/18/82 at 4.28-4.33. For these reasons, the Court rejects the state court's proffered justifications and finds that Petitioner has established intentional discrimination with respect to Preston, Richardson, Marsh, and Ferrell.

The Court also finds as fact based on the record that the prosecutor engaged in intentional discrimination with respect to the two jurors for whom no record-based potential reasons were found, Kim Richards and Lisa Stewart. Lisa Stewart testified that she was a housewife with one child living in west Philadelphia, and

that she would follow the law and weigh the evidence fairly. N.T. 11/15/82 at 1.114-1.116. Several white female jurors who the prosecutor explicitly found acceptable also testified to being homemakers with children and living in Philadelphia. Id. at 1.94-1.95, 1.100; N.T. 11/18/82 at 4.65-4.67, 4.71; N.T. 11/19/82 at 5.99-5.101, 5.106. Kim Richards testified that she was a single, 26-year-old college graduate who lived in Overbrook and worked as a secretary for an extermination business. N.T. 11/17/82 at 93, 96. The prosecutor struck Richards while retaining a single 25-year-old white female juror who had attended two years of college and worked as an accountant for an insurance company. Id. at 96; N.T. 11/19/82 at 5.84-5.87. The record reveals no credible basis other than race for distinguishing between Stewart or Richards and their respective white counterparts.

Accordingly, the Court concludes that Petitioner has established that intentional discrimination occurred with respect to six prospective jurors. Since Batson requires reversal of a conviction where even a single juror was excluded for an impermissible reason, the Court determines that the habeas writ must be granted. See Batson, 476 U.S. at 100; see also J.E.B. v. Alabama, 511 U.S. 127, 142 n.13 (1994).

V. CONCLUSION

In summary, the Court determines that the Pennsylvania Supreme Court's adjudication of Petitioner's case resulted in a decision that was contrary to, and involved an unreasonable application of, clearly established federal law as defined by the United States Supreme Court in Batson, and was based on unreasonable determinations of the facts in light of the evidence presented in the state court proceeding. Upon a plenary review of the record, the Court further concludes that Petitioner is entitled to relief because he established a prima facie case of discrimination and the prosecutor failed to proffer any race-neutral reasons for her peremptory challenges. If the state court's findings of the existence of race-neutral reasons are accepted, the Court alternatively concludes that Petitioner has successfully established that the prosecutor engaged in intentional discrimination with respect to six prospective African-American jurors. The Court, therefore, grants Petitioner a writ of habeas corpus.

The proper relief in this case is a new trial with the opportunity to retry the petitioner before a properly selected jury. See Simmons, 44 F.3d at 1171. A new trial is especially appropriate where as here, the passage of time makes a new evidentiary hearing on the petition impossible. See Bryant v. Spectacle, 131 F.3d 1076, 1077-78 (2d Cir. 1999). Nearly twenty

years have passed since Petitioner's trial, such a length of time that even Respondents admit that an evidentiary hearing on Petitioner's Batson claim is unlikely to be helpful. See Commw. Mem. at 126. Accordingly, the Commonwealth may retry Petitioner before a properly selected jury within 180 days of the date of this memorandum. If a date for a new trial is not scheduled within 180 days, Petitioner must be unconditionally released on the charges at that time. An appropriate Order follows.