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This formulation establishes a high standard as an “*unreasonable* application of federal law is different from an *incorrect* application of federal law.” Terry Williams, 529 U.S. at 410 (emphasis in original).

Whether a state court’s decision under the second prong of §2254(d) was based on an “unreasonable determination of the facts in light of the evidence presented in the State court proceedings” remains a highly fact-bound inquiry. As a matter of standard statutory interpretation, this prong of § 2254(d) should be read in conjunction with § 2254(e)(1), which requires a federal court to apply a presumption of correctness to factual determinations made by the state court. See 28 U.S.C. § 2254(e)(1).

Using these standards, I find that the state court’s decision in Rico’s case satisfies neither the first nor the second part of § 2254(d)’s threshold for issuance for a writ of habeas corpus. Rico’s objections to the magistrate judge’s report all center on whether it was constitutional error for the Supreme Court of Pennsylvania to hold that Batson v. Kentucky, 476 U.S. 79 (1986) did not mandate that Italian-Americans be considered a cognizable racial group entitled to protection in the jury selection process. As Magistrate Judge Rapoport’s report demonstrates, however, the U.S. Supreme Court’s decision in Batson did not so mandate that Italian-Americans be recognized as a cognizable racial group. Mag. Rep. at 10, 13. Petitioner points to no other U.S. Supreme Court precedent that recognizes Italian-Americans as a cognizable racial group so it cannot be said that the Supreme Court of Pennsylvania violated “clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d).

Furthermore, the state courts did not unreasonably apply federal law. Batson and its progeny established a method for recognizing cognizable racial groups that the circuit courts of appeals have broken down into factors. According to the Third Circuit and the First Circuit, these factors require a defendant to show that the ethnic group is first defined and limited by some clearly identifiable factor or factors; second, that it possesses a common thread of attitudes, ideas or experiences; third, that it shares a community of interests such that the group’s interest cannot be adequately represented if the group is excluded from the jury selection process; and fourth, that the ethnic group has experienced or is experiencing discriminatory treatment and is in need of protection from community prejudices. United States v. DiPasquale, 864 F.2d 271, 277 (3d Cir. 1988); United States v. Bucci, 839 F.2d 825, 833 n.11 (1st Cir. 1988); United States v. Sgro, 816 F.2d 30, 33 (1st Cir. 1987). The Supreme Court of Pennsylvania recognized those tests and applied them in such a manner as to conclude that the Supreme Court had not mandated that Italian-Americans always be recognized as a cognizable group. Commonwealth v. Rico, 711 A.2d 990, 994 - 96 (Pa. 1998). The Supreme Court of the United States might eventually hold that the Supreme Court of Pennsylvania’s application of those tests was incorrect, but, as the Terry Williams Court noted, the potentially incorrect result of an application of law does not make the application unreasonable. Terry Williams, 529 U.S. at 410. And the Supreme Court of Pennsylvania’s application of United States Supreme Court precedent is likely accurate as in J.E.B. v. Alabama, one of the last major cases interpreting Batson, Justice O’Connor’s concurring opinion on a close vote may have signaled the end of the expansion of groups to be specially protected during voir dire. See J.E.B. v. Alabama, 511 U.S. 127, 148 (1994) (“Because I believe the peremptory [strike] remains an important litigator’s tool and a fundamental part of the process of selecting impartial juries, our increasing limitation of it gives me pause.”) (O’Connor, J., concurring).

1. The Report and Recommendation are APPROVED and ADOPTED.
2. The petition for a writ of *habeas corpus* is DENIED with prejudice.
3. The petitioner having failed to make a substantial showing of the denial of a constitutional right, there is no ground to issue a certificate of appealability.
4. The Clerk of the Court shall mark this case closed for statistical purposes.

BY THE COURT:

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William H. Yohn, Jr., Judge

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Finally, after review of the facts as determined by the state courts, I cannot conclude that there has been an “unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” In his objections, petitioner quibbles with statements made by the magistrate judge about the voir dire of two of the venire persons. It is, however, the findings of the state courts that are relevant. Given the presumption of correctness under AEDPA and the trial court’s unique ability to make determinations of credibility at trial, I find no “unreasonable determination of fact” there.