

STANDARD OF HABEAS REVIEW

The Antiterrorism and Effective Death Penalty Act ("AEDPA") instructs that "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State Court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

28 U.S.C. § 2254(d). Accord Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 885-91 (3d Cir. 1999).

In addition to mandating deference to the legal and factual determinations of state tribunals, the AEDPA creates a presumption that the factual findings of state tribunals are correct and places the burden of rebutting that presumption on a habeas petitioner "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

ANALYSIS

I. Double Jeopardy

Chief Judge Melinson found that since Cicchinelli failed to exhaust the claim of Double Jeopardy in state court and

the opportunity timely to do so is no longer available to him, the claim is procedurally defaulted. R&R at 6. Cicchinelli does not maintain that he presented in state proceedings a claim of Double Jeopardy, but nevertheless argues that he should not be deemed procedurally defaulted. Cicchinelli pursued in his Post-Conviction Relief Act (PCRA) petition a claim of compulsory criminal joinder under 18 Pa. C.S. § 110 (2001). "While § 110 is not a codification of the federal constitutional protection against double jeopardy," he proffers, "it is the statutory mechanism through which double jeopardy is barred. It is, in every respect, the functional equivalent of a Double Jeopardy Clause." Objections at 1-2.

Exhaustion requires that petitioners "'fairly present' federal claims to the state courts." Duncan v. Henry, 513 U.S. 364, 365 (1995). Notice is not enough. Keeney v. Tomayo-Reyes, 504 U.S. 1, 10 (1992). The petitioner must "afford the State a full and fair opportunity to address and resolve the claim on the merits." Id. 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. Vaughan, 172 F.3d 255, 261 (3d Cir. 1999) (emphasis added). It is not always necessary that a petitioner explicitly reference federal law. While a petitioner need not "invoke the talismanic phrase" and "have cited 'book and verse' of the federal constitution," "it is not sufficient that a somewhat similar state-law claim was made."

Id. (internal quotations omitted). "[P]etitioners must have communicated to the state courts in some way that they were asserting a claim predicated on federal law." Id.

Cicchinelli argues that by presenting a claim in state court for violation of 18 Pa. C.S. § 110 (a state statute entitled, "when prosecution barred by former prosecution for different offense") he effectively presented a Double Jeopardy claim. He claimed in state court, and he contends now, that a former prosecution in Montgomery County for indecent assault and corruption of minors barred this prosecution. He argues that since § 110 fulfills the purpose of the Double Jeopardy Clause, he apprized the state court of all the relevant factual and legal determinants. Objections at 4-5. Since § 110 is more protective of a defendant's rights than the Double Jeopardy Clause (so the argument goes), had the state tribunals been confronted with a Double Jeopardy claim styled as such it is unlikely they would have decided the issue any differently than they did. Id. at 5-6.

Section 110 provides in relevant part, "Although a prosecution is for a violation of a different provision of the statutes than a former prosecution or is based on different facts, it is barred by such former prosecution under the following circumstances:

- "(1) The former prosecution resulted in an acquittal or in a conviction...and the subsequent prosecution is for:
 - (i) any offense of which the defendant could have been convicted on the first prosecution;
 - (ii) any offense based on the same conduct or

arising from the same criminal episode, if such offense was known to the appropriate prosecuting officer at the time of the commencement of the first trial and was within the jurisdiction of a single court unless the court ordered a separate trial of the charge of such offense...."

18 Pa. C.S. § 110 (2001). The purposes of Section 110 are twofold: "(1) to protect a person accused of crimes from governmental harassment of being forced to undergo successive trials for offenses stemming from the same criminal episode; and (2) as a matter of judicial administration and economy, to assure finality without unduly burdening the judicial process by repetitious litigation." Commonwealth v. Hude, 458 A.2d 177, 180 (Pa. 1983).

The Double Jeopardy Clause provides that "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"¹ and protects against "three distinct abuses": a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple prosecutions for the same offense. United States v. \$184,505.01 in U.S. Currency, 72 F.3d 1160, 1165 (3d Cir. 1995). The fundamental purpose of the Fifth Amendment protection against Double Jeopardy is that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby

¹ U.S. Const. amend. V. The Double Jeopardy Clause of the Fifth Amendment applies to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 794 (1969).

subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity...." Benton v. Maryland, 395 U.S. 784, 796 (1969).

As the foregoing suggests, Cicchinelli's argument under 18 Pa. C.S. § 110 is not without force. Indeed, the Pennsylvania Supreme Court has characterized Section 110 as having the same "underlying objective" as the protections against Double Jeopardy in the United States and Pennsylvania constitutions. See Hude, 458 A.2d at 180; see also Commonwealth v. Dozier, 482 A.2d 236, 238 (Pa. Super. 1984) (stating that "the policy considerations underlying the double jeopardy clauses are also the basic purposes of [§ 110]"). The lineage of Pa. C.S. § 110 is intertwined with the Double Jeopardy Clause of the Fifth Amendment. The Supreme Court of Pennsylvania first announced a rule of compulsory criminal joinder, now codified in Section 110, requiring "a prosecutor to bring, in a single proceeding, all known charges against a defendant arising from a 'single criminal episode.'" Commonwealth v. Campana, 304 A.2d 432, 441 (Pa. 1973) ("Campana I"). The court suggested that it premised its holding on the Double Jeopardy Clause of the federal constitution. See id; see also Commonwealth v. Campana, 314 A.2d 854, 855 (Pa. 1974) ("Campana II") (construing Campana I). After the United States Supreme Court vacated the court's decision and remanded for clarification as to whether it predicated its holding on federal law, the Pennsylvania Supreme Court retreated from the constitutional intimation in its earlier opinion. See Campana

II. It held that the rule of compulsory criminal joinder that it had articulated was an exercise of state court supervisory power, and the Pennsylvania General Assembly, which enacted Section 110 in the interim between Campana I and Campana II, legislated a result that is "entirely in harmony" with the principle in Campana I. Id. at 855-56.

It may be possible that raising Section 110 in state proceedings effectively apprizes a state court of the claim of Double Jeopardy and gives a state court a full and fair opportunity to consider the constitutional dimensions of the successive prosecutions. It is equally true, however, that Section 110 goes beyond implementing the constitutional right not to be placed in double jeopardy. See Commonwealth v. Pfeifer, 730 A.2d 489, 491 (Pa. Super. 1999) (stating that "18 Pa.C.S. Section 110 statutorily extends Federal and Pennsylvania constitutional protections against double jeopardy"). A comparison of the scope of Section 110 and the Double Jeopardy Clause confirms that the statute is far more reaching. Further, while 18 Pa. C.S. § 110 fulfills the purpose of the Double Jeopardy Clause to protect defendants against the harassment and anxiety of repetitious prosecutions, it also serves a purpose, judicial economy, that is outside the intent of the Framers of our federal constitutional provision. See supra at 5-6. The Pennsylvania Supreme Court noted that a purpose of Section 110, and a consideration in applying it, is whether consolidation of charges in a single prosecution will avoid "substantial

duplication and waste of judicial resources." Commonwealth v. McPhail, 692 A.2d 139, 141 (Pa. 1997). Since the Section 110 bar of successive criminal prosecutions performs a function other than to implement the Double Jeopardy Clause, we must assess the context and manner in which Cicchinelli presented his Section 110 claim in his state proceedings.

Clearly, under the facts of this case, Cicchinelli did not fairly present a federal claim of double jeopardy. As Chief Magistrate Judge Melinson stated, "Cicchinelli limited his challenge to the Delaware County conviction to a claim that the trial court did not have jurisdiction to consider the charges pursuant to the compulsory joinder provisions of 18 Pa.C.S. § 110(1)(ii)." R&R at 5.

In oral argument before Judge Koudelis of the Court of Common Pleas of Delaware County, Pennsylvania, on Cicchinelli's Post-Conviction Relief Act petition, Cicchinelli, through his attorney, presented the issue of successive prosecutions in the following manner:

"The first issue deals with Section 110 of the Pennsylvania Crimes Code. And in particular, a decision that was not handed down until 1997, Commonwealth versus McPhail, dealing with the issue of jurisdiction. And Section 110 of the Crimes Codes provides that all matters arising [out of] the same criminal conduct or episode [are] supposed to be tried at or about the same time."

App. to Answer to Pet. for Writ of Habeas Corpus, Ex. E at 7. In his appeal to the Superior Court for denial of his Post-Conviction Relief Act petition, Cicchinelli presented the

following question for review: "Whether the lower court erred in accepting a guilty plea and imposing a sentence upon the appellant, where the lower court lacked jurisdiction to consider the criminal information against appellant under the provisions of 18 Pa. C.S.A. § 110." See id. Ex. I at 4. Neither in written nor oral arguments did Cicchinelli give state court tribunals an inkling that individual rights were at stake. The arguments were wholly jurisdictional. In fact, both petitioner and the Commonwealth concentrated their legal arguments largely on the interpretation of a single state court case, Commonwealth v. McPhail, 692 A.2d 139 (Pa. 1997), which interpreted a specific provision of 18 Pa. C.S. § 110, "within the jurisdiction of a single court." Id. at § 110(1)(ii). Under these circumstances, Cicchinelli did not apprise state courts of any federal constitutional challenge.

By framing his claim against successive prosecutions as jurisdictional in character, Cicchinelli not only obscured any constitutional claim for violation of individual rights, but he formulated a substantive claim of something other than Double Jeopardy. Cicchinelli claimed under § 110 and Campana that the prosecution should have brought all charges stemming from a single criminal episode together. He challenged the charges in Delaware County not because they should not have been brought at all, but because they should have been brought together with the charges in Montgomery County in a single proceeding. The Double Jeopardy Clause is not such a rule of compulsory joinder. See

United States v. Dixon, 509 U.S. 688, 704-05 (1993); Garrett v. United States, 471 U.S. 773, 790 (1985). It does not involve a rule that offenses that relate to the same criminal conduct or transaction must be tried together. Id. The essence of the Double Jeopardy Clause is that a defendant cannot be twice charged with the same offense for the same conduct, whether in the same prosecution or separate prosecutions. United States v. Bentancourt, 116 F.3d 74, 74-75 (3d Cir. 1997). It is immaterial to the Double Jeopardy analysis that a prosecutor should decide to bring the charges in separate proceedings. But that is all Cicchinelli emphasized in his Section 110 state court arguments. It is unlikely that a state court could fairly have been expected to recognize Cicchinelli's Section 110 challenge as "really" involving a Double Jeopardy claim. Cicchinelli has therefore not met his burden of showing that he fairly presented this claim for state court decision. See Coady v. Vaughn, 251 F.3d 480, 488 (3d Cir. 2001) (noting a petitioner has the burden of proving exhaustion).

We may deny a habeas claim on the merits even where the petitioner has failed to satisfy exhaustion. See 28 U.S.C. § 2254(b)(2). While we hold that the claim of Double Jeopardy is procedurally defaulted, we alternatively hold that it lacks merit.

Cicchinelli complains he was twice convicted of the same offense. He refers to his Montgomery County conviction for indecent assault and corruption of a minor and his Delaware

County conviction, the instant conviction, for indecent assault and corruption of a minor with respect to the same child. While it is true that Cicchinelli engaged in the same misbehavior against the same victim, the behavior targeted in the respective prosecutions do not constitute a single criminal episode. There is nothing offensive to the Double Jeopardy Clause that Cicchinelli be charged and prosecuted for both crimes.

The Double Jeopardy Clause forbids multiple prosecutions for the same conduct unless each offense involves an element that the other does not. See United States v. Bentancourt, 116 F.3d 74, 75 (3d Cir. 1997); Blockburger v. United States, 284 U.S. 299, 304 (1932). Cicchinelli was not prosecuted twice for the same conduct. He was prosecuted in Montgomery County for sexual assault of a child at a day camp in Blue Bell, Pennsylvania where he was a counselor and the child was a camper during an eight-week period in the summer of 1992. He was charged in Delaware County for sexually assaulting the same child in the petitioner's bedroom in Havertown, Pennsylvania on weekends between November, 1992 and May, 1993. While Cicchinelli may view it as otherwise, these activities were not a single and uninterrupted course of conduct. Case law is clear that the activities prosecuted must be inherently continuous to constitute a single criminal transaction. Blockburger, 284 U.S. at 301-02. Put more concretely, at all times the defendant's behavior must be directly applicable to both criminal charges. Garrett v. United States, 471 U.S. 773, 787-89 (1985). For

example, in Garrett, the Supreme Court found that a defendant who stole a car and drove it away engaged in a unity of conduct because "every moment of his conduct was as relevant to the joyriding charge as it was to the auto theft charge." Id. at 787. Here, Cicchinelli's episodes were separated by many months and took place in different venues. Thus, in a case where the commission of sexual assault took place on two occasions against the same child victim, it is not surprising that the Sixth Circuit found, for the purpose of Double Jeopardy, two criminal episodes, not one. Loeblein v. Dormire, 229 F.3d 724, 728 (6th Cir. 2000).

II. Involuntary Guilty Plea

Cicchinelli claimed that his guilty plea was involuntary, as evidenced by the fact that although he pleaded guilty to twelve counts of corruption of minors and indecent assault, the victim of these crimes testified in open court in the petitioner's Montgomery County trial that only five episodes occurred. Mem. of Law in Support of Pet. for Writ of Habeas Corpus at 1. Cicchinelli maintains that he could not have possibly plead guilty voluntarily to crimes that never happened. Id. at 19-36

Chief Magistrate Judge Melinson treated the petitioner's challenge as a question of fact. R&R at 10-11. Judge Melinson concluded that Cicchinelli did not prove by clear and convincing evidence that his plea was involuntary, or that

the state courts' factual finding that the plea was voluntary was unreasonable. Id. at 11. This determination of voluntariness by the Court of Common Pleas of Delaware County was amply supported by the record, including testimony of the petitioner himself.²

It is worthwhile to note that Cicchinelli has not proven by clear and convincing evidence that seven counts of indecent assault and corruption of minors to which he pleaded guilty did not occur. The Affidavit of Probable Cause charged eighteen counts, and Cicchinelli read the Affidavit of Probable Cause, and with the advice of counsel plead guilty to twelve counts, in exchange for the Commonwealth not having to prove those charges at trial. The victim's testimony in another trial in which the number of assaults underlying the Delaware County prosecution was a peripheral issue, and where the assaults occurred on weekends over an eight month period, does not constitute the clear and convincing evidence the AEDPA requires.

Cicchinelli urges us to consider his challenge a question of law, Objections at 8, stating, "The question of law presented herein is whether a defendant's plea of guilty to crimes which never occurred can be constitutionally valid." Id.

² Cicchinelli and his trial attorney both testified in the PCRA hearing before Judge Koudelis, of the Court of Common Pleas of Delaware County, about the circumstances surrounding the guilty plea. Cicchinelli testified, inter alia, that he was aware that he plead guilty to twelve counts, had had "very lengthy discussions" with his attorney as to the substance of the guilty plea, understood the guilty plea was open, understood he had a right to a jury trial, and read the Affidavit of Probable Cause which he understood to contain the factual predicate of the plea. Tr. at 41-46 (Dec. 23, 1997).

at 7-8. Chief Magistrate Judge Melinson correctly stated the question of law is whether the petitioner's guilty plea was knowing and voluntary. As we are bound by clearly established Supreme Court precedent, see 28 U.S.C. § 2254(d)(1) and Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 878-89 (3d Cir. 1999), we are disabled from establishing the new beachhead to which Cicchinelli invites us.

III. Ineffective Assistance of Counsel

There being no merit to Cicchinelli's habeas claims that he was placed in Double Jeopardy and entered an involuntary guilty plea, the ineffective assistance of counsel claims associated with these contentions must also fail. See R&R at 11-12.

Stewart Dalzell, J.