

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

HENRY FAHY : CIVIL ACTION
 :
 v. :
 :
 :
 MARTIN HORN, Commissioner, Pennsylvania :
 Department of Corrections; CONNER :
 BLAINE, JR., Superintendent of the State :
 Correctional Institution at Greene; :
 and JOSEPH P. MAZURKIEWICZ, :
 Superintendent of the State Correctional :
 Institution at Rockview : No. 99-5086

MEMORANDUM AND ORDER

Norma L. Shapiro

August 26, 2003

I. FACTUAL BACKGROUND¹ AND PROCEDURAL HISTORY

The procedural history of this capital conviction is extensive and complex. Petitioner has filed numerous appeals and petitions for post-conviction relief² in the state system, four of

¹Petitioner's conviction occurred more than twenty years ago; a detailed recitation of every fact related to this matter would be prolonged and unnecessary. This section briefly recites the factual background and procedural history necessary to understand the current posture of the action. Additional facts relevant to either procedural issues or petitioner's substantive claims for relief are set forth herein with the court's discussion of those issues and claims.

²Under Pennsylvania's Post Conviction Hearing Act, 42 Pa.C.S. § 9541 (superseded and replaced by the Post Conviction Relief Act ("PCRA") in 1988), a defendant who has appealed his or her conviction, and has been unsuccessful, can also file a petition with the trial court (the "PCRA court") to obtain a new trial or an acquittal based on, among other things, violations of the Constitution of the Commonwealth of Pennsylvania or the Constitution or laws of the United States. The denial of a PCRA petition may be appealed to the Pennsylvania Superior Court and the Pennsylvania Supreme Court.

which resulted in published opinions. Commonwealth v. Fahy, 512 Pa. 298, 516 A.2d 689 (1986) (affirming sentence of death imposed by Pennsylvania trial court on automatic appeal); Commonwealth v. Fahy, 537 Pa. 533, 645 A.2d 199 (1994) (affirming denial of Fahy's PCRA petition challenging jury instruction on "torture" as an aggravating circumstance); Commonwealth v. Fahy, 549 Pa. 159, 700 A.2d 1256 (1997) (affirming validity of Fahy's waiver of all collateral or appellate proceedings); Commonwealth v. Fahy, 1999 Pa. LEXIS 3004, 737 A.2d 214 (1999) (affirming Judge Sabo's order dismissing Fahy's fourth PCRA petition).³ In addition, this petition for a writ of habeas corpus was addressed previously in federal court: first, in an unpublished order by Chief Judge Giles; and next, in a published opinion by the Court of Appeals affirming that order. Fahy v. Horn, 240 F.3d 239, 246 (3d Cir. 2001) (amended petition for habeas corpus should be treated as first petition under principles of equitable tolling).

On January 24, 1983, Henry Fahy was tried before a jury with the Honorable Albert F. Sabo, Court of Common Pleas of Philadelphia County, presiding. The prosecution presented evidence that on January 9, 1981, Fahy entered the home of twelve year-old Nicoletta ("Nicky") Caserta, a neighbor's daughter, had forced sexual

³Throughout the course of this action, these opinions sometimes have been referred to as "Fahy-1," "Fahy-2," "Fahy-3," and "Fahy-4." For purposes of clarity, the court will preserve those designations herein.

intercourse with her and dragged her to the basement. Nicky's corpse was discovered later that day by her stepfather, Paul Piccone. Police investigators testified the child's body had a T-shirt and an electrical cord wrapped around the neck, multiple tears to the vagina and rectum, and eighteen stab wounds to the chest. The jury, returning guilty verdicts on all counts, convicted Fahy of first-degree murder, rape, burglary and possession of instrument of crime.

The jury then conducted a separate sentencing hearing. In determining that Fahy should receive a sentence of death rather than life imprisonment, the jury found the following three aggravating circumstances: 1) "The defendant committed a killing during the perpetration of a felony," 42 Pa.C.S. § 9711(d)(6); 2) "The defendant has a significant history of felony convictions involving the use or threat of violence to the person," 42 Pa.C.S. § 9711(d)(9); and, 3) "The offense was committed by means of torture," 42 Pa.C.S. § 9711(d)(8). Two mitigating circumstances were found: 1) "The defendant was under the influence of extreme mental or emotional disturbance," 42 Pa.C.S. § 9711(e)(2); and 2) "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired," 42 Pa.C.S. § 9711(e)(3).

Sentencing was deferred pending the filing and disposition of post-trial motions which were argued before the court en banc, and

denied on November 2, 1983. Fahy was sentenced to death for the homicide conviction, ten to twenty years for the burglary conviction, two and one-half to five years for the weapons conviction, and ten to twenty years for the rape conviction.

On appeal, the sentence was affirmed. See Fahy-1. The Pennsylvania Supreme Court held: there was sufficient evidence to support the conviction; the evidence supported the finding that his confession had been voluntary and Fahy had knowingly and intelligently waived his rights; prosecutorial misconduct did not result from Fahy's unsolicited testimony regarding incarceration for former crimes; the phrase "significant history" in the death penalty statute was not unconstitutionally vague or overbroad; the jury's finding of substantial mental impairment did not preclude the death penalty; and, death was not a disproportionate punishment for the crimes of conviction. Id.

Fahy filed a petition under Pennsylvania's Post Conviction Hearing Act, 42 Pa.C.S. § 9541 (superseded and replaced by the Post Conviction Relief Act ("PCRA") in 1988) ("first PCRA petition"), but he did not pursue the petition, and it was dismissed without prejudice in 1987.

In 1992, the Governor of Pennsylvania issued Fahy's death warrant. Fahy again sought relief ("second PCRA petition"); he obtained a stay of execution and remand from the Pennsylvania Supreme Court to the Philadelphia Court of Common Pleas to consider

whether trial counsel had been ineffective. On remand, Judge Sabo affirmed the death sentence, and Fahy appealed, see Fahy-2. On appeal, the Pennsylvania Supreme Court held that trial counsel's failure to request a definition of the term "torture" for the jury did not constitute ineffective assistance. The United States Supreme Court denied certiorari in January, 1995, and a second death warrant was signed in May, 1995.

On July 7, 1995, the Pennsylvania Supreme Court granted a second stay to permit Fahy thirty days to file a third PCRA petition. In that timely filed petition, Fahy argued that he suffered from a mental illness and trial counsel should have presented expert testimony to prove his illness was a mitigating circumstance. He also claimed a competency hearing should have been held before the penalty phase of his trial.⁴ After a hearing, the PCRA court concluded, in part, that the jury had in fact found relevant mitigating circumstances regarding both mental disturbance and substantial impairment even in the absence of an expert opinion. Judge Sabo denied the petition; Fahy appealed again to the Pennsylvania Supreme Court.

While that appeal was pending, Fahy moved to waive his rights to all appellate proceedings and collateral relief. Fahy's counsel

⁴Also at this time, Fahy requested the federal court stay his execution to permit him to file a habeas corpus petition. Because the state court had already issued a stay of execution, this court dismissed the petition, without prejudice, for failure to exhaust state remedies.

then filed a motion asking the PCRA court to determine whether or not he was competent to waive rights. The Pennsylvania Supreme Court remanded to the PCRA court to determine whether Fahy fully understood the consequences of a waiver of all appellate and collateral relief. On August 9, 1996, Fahy appeared before the PCRA court and confirmed his desire to waive all appeals and collateral relief. The PCRA court found him competent to do so.

On appeal to the Pennsylvania Supreme Court, Fahy's counsel alleged that Fahy no longer wished to waive his rights.⁵ On September 17, 1997, the Pennsylvania Supreme Court, unanimously affirming Judge Sabo, held that Fahy had knowingly renounced all collateral and appellate proceedings in the August, 1996 colloquy. See Fahy-3. An application for reargument filed by Fahy's counsel was denied.

On November 12, 1997, Fahy's counsel filed a fourth PCRA petition. The PCRA court dismissed this petition because it was time-barred and failed to set forth a prima facie case that a miscarriage of justice had occurred. The Pennsylvania Supreme Court, affirming the petition was untimely under the Post Conviction Relief Act, noted the Court lacked jurisdiction to review it. See Fahy-4. The decision was based on the November 17, 1995, PCRA amendment requiring all PCRA petitions "including a

⁵Before the appeal was heard, by order dated October 23, 1996, the Pennsylvania Supreme Court denied the petitioner's March, 1996, motion to remand for a competency evaluation.

second or subsequent petition, shall be filed within one year of the date the judgment becomes final" 42 Pa.C.S. § 9545(b)(1).

Another warrant setting Fahy's execution for October 19, 1999, was signed, but six days prior to the scheduled date, Fahy filed a motion for a stay of execution and an amended habeas petition in federal court. Chief Judge Giles, acting as emergency judge, granted a 120 day stay, and determined that the amended petition should not be treated as a successive petition and despite the one-year statute of limitation under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d)(1), the petition was subject to both statutory and equitable tolling.⁶ On appeal by the Commonwealth, the court rejected statutory tolling but affirmed the application of equitable tolling. See Fahy v. Horn, 240 F.3d 239, 246 (3d Cir. 2001). The United States Supreme Court denied certiorari, and the habeas petition is before this court.

II. PROCEDURAL ISSUES

Before considering the merits of Fahy's petition, it is necessary to address threshold issues of jurisdiction.

⁶Chief Judge Giles stated that his decision would be subject to modification by this judge (to whom the petition was originally assigned) within 35 days of the date of his order. After considering the matter, this judge agreed that Fahy's amended petition was properly filed.

A. WAIVER

1. Relevant Facts

Fahy wrote to the state trial court in November, 1991, before the Governor had issued a death warrant; he asked the judge not to accept any last-minute petitions on his behalf unless filed by Fahy himself. Fahy stated that he understood the issues in his case and that those issues should be raised only "if I so choose." Shortly thereafter, following the Governor's signing of the first execution warrant, Fahy filed his second PCRA petition, and his execution was stayed.

In May, 1995, the Governor signed a second execution warrant. On December 5, 1995, during the pendency of an appeal from the denial of his third PCRA petition, Fahy filed a handwritten, pro se petition requesting the PCRA court to allow him to waive all collateral proceedings and withdraw any appeals in order for his death sentence to be carried out "at once." See December 5, 1995, Motion Respectfully Requesting the Right to Waive All Collateral Proceedings; and to Withdraw Any Appeals, That Execution May Be Scheduled and Thereafter Administer At Once.

On March 22, 1996, Fahy's attorneys, arguing public interest requires a psychiatric evaluation whenever a defendant decides to waive his collateral and appellate rights in a capital case, filed a motion requesting that the PCRA court determine Fahy's

competency. Following the colloquy proceedings, discussed infra, that motion was denied.

In April, 1996, Fahy again wrote the trial court to protest what he perceived to be his lawyers' strategy of delay. He complained that his counsel was engaging in tactics contrary to his wishes, and asked the court to intervene.

On July 17, 1996, the Pennsylvania Supreme Court ordered Judge Sabo to conduct "a colloquy to determine whether petitioner fully understands the consequences of his request to withdraw his appeal and to waive all collateral proceedings." On August 2, 1996, Fahy appeared for the colloquy, but requested an additional week, and a transfer from Philadelphia County prison to SCI-Graterford ("Graterford") during that week, to consider his decision further. Fahy explained: "[E]very time I'm brought down to this county I go through threats and I go through situations. Such as now where an officer by the name of Caserta, the same name of the [victim's] family, he tells me he's related to the Caserta family, and indeed, Caserta is written on his pin on his chest on his name tag. So now I am in the condition here that I got an officer making threats to me." (Notes of Testimony ("N.T.") 8/2/96, 25-26). The PCRA court granted both requests and continued the colloquy for one week.

On August 7, 1996, during the week allowed by the PCRA court for contemplation, Fahy executed a sworn declaration stating that he wished to litigate his case with the assistance of his current

counsel. See August 7, 1996, Fahy Declaration.

On August 9, 1996, Fahy again appeared before the PCRA court for and the colloquy. Counsel for Fahy immediately attempted to bring his sworn declaration to the court's attention, and Fahy stated that he wanted to speak to Judge Sabo off the record. (N.T. 8/9/96, 2). Judge Sabo denied the request to speak off the record but told Fahy he would answer any questions he had in open court. (Id. at 3). Judge Sabo then asked Fahy if he had an opportunity to speak to the attorneys from the Center for Legal Education, Advocacy & Defense Assistance ("CLEADA") during his week at Graterford. Fahy responded that he had spoken to them on three separate days, and again that morning before the colloquy. Fahy admitted that the last time the CLEADA attorneys had come to Graterford, he had signed papers stating that he desired their representation, but that he was no longer sure of that decision and troubled by the prospect of undergoing mental health testing.

FAHY: "I would like to know if, if I decide to go through with this and not withdraw my petition, would I have to be then put through all kinds of tests, of doctors' tests and psychologists' tests? I mean doesn't the order say that you are to determine my competency?"

COURT: "Sure."

FAHY: "I am."

COURT: "You and I know that you are not insane, right?"

FAHY: "Yes."

COURT: "Those attorneys might think you're insane, but I don't think ..."

FAHY: "I would like the District Attorney to continue his

proceedings, please."

(N.T. 8/9/96, 4-6). Counsel for Fahy requested the opportunity to question him regarding the decision to go forward; Judge Sabo denied the request. "He is my witness. The Supreme Court sent him down here for me to decide, not you." (Id. at 6). Following another statement by Fahy concerning his conflicted feelings, Judge Sabo asked, "Are you telling me you wish to withdraw your appeal to the Pennsylvania Supreme Court and to the Federal Courts?" Fahy's answer: "Yes." (Id. at 9). At the time, there was no federal proceeding, and Fahy's counsel objected to his waiver of such rights. Counsel asked to be heard on that objection a total of five times, (id. at 9-11), but was denied each request. Judge Sabo explained: "I don't care what your objections are. We're not here to retry this case. We're down here because the Supreme Court wants to make sure that he understands what he is giving up. And I've tried to explain to him what he is giving up. He knows what he's giving up. He just told me that." (Id. at 10).

Fahy told the court he had changed his mind since signing the declaration, and no longer wanted representation from the CLEADA lawyers. Fahy said he understood that his attorneys "meant well" but that he did not wish to pursue any further appeals:

I just don't want you to file any more petitions for me. When I leave here, don't ask the Court to reconsider, the Supreme Court. I know what I'm doing. I don't need to be brought down here on some petition

as [one of my attorneys] put the remand in for my Petition that I filed on December 5th which is marked as Exhibit C-1. I don't need some action put on that. I know what I want. If I hadn't known what I want I never would have filed a Petition. It just got to the point and that time that this is it. It's been since 1981, I have been on death row since 1983. Forgive me. I know you all mean well. It's just I think your energy could be well spent on someone who is, who is ready to receive it. There is no use in giving it to me when I don't want it. Not at this time. It's over.

(N.T. 8/9/96, 11).

Following Fahy's statement, his counsel again requested the chance to question him regarding the waiver; at which point, counsel for the Commonwealth also suggested to the court that "some more-detailed formal questions" addressing "step by step, the rights that he is in fact relinquishing" were necessary to ensure the record's completeness. (Id. at 12-13). Fahy's counsel interjected that there existed a need to inquire into "psychologically significant" facts, to which the court responded: "What do you mean psychologically? You argue it to the Supreme Court. There is nothing wrong with his brains. His brains are better than yours." (Id. at 13-14).

Judge Sabo allowed the Commonwealth to proceed. During the subsequent questioning, Fahy was asked if he understood he might, as some point, be asked to speak to a doctor to determine his competence; Fahy replied that he thought the Supreme Court had directed Judge Sabo to make such a determination, and that he

sought to avoid seeing any doctors. (N.T. 8/9/96, 19). A second attorney for the Commonwealth then examined Fahy, "asking questions in an abundance of caution," (id. at 21), to satisfy the court on the question of competence. Judge Sabo announced, "He's already satisfied me. I think he's more competent than all you attorneys out there." (Id. at 22). Counsel for the Commonwealth continued to question Fahy, in response to which Fahy demanded, "Would you like me to name the 42 Presidents, would that convince you?" (Id.).

Counsel for Fahy then attempted to make a mental health proffer, which was rejected (id. at 23), and to ask questions of Fahy about the conditions of his incarceration, but was denied the chance (id. at 24).

COUNSEL FOR FAHY: "And, Your Honor, just so that we are clear: we ask for permission to either ask the questions or make a proffer."

COURT: "And I said to you, you will take it up with the Supreme Court."

Id. at 30. After approximately one hour and ten minutes, the hearing concluded.

Subsequently, on October 23, 1996, the PCRA court denied the March, 1996, motion filed by Fahy's counsel to determine competency to waive all appellate proceedings. Fahy's counsel then appealed Judge Sabo's determination regarding waiver and alleged that, notwithstanding Fahy's letter and testimony, his rights to

collateral and appellate review had not been waived. Fahy's counsel relied on a subsequent declaration of counsel containing a number of purported facts regarding the waiver colloquy and on a Fahy declaration signed August 21, 1996, twelve days after the waiver colloquy. Allegations primarily concerned coercion by guards, and the assertion that Fahy really did want to pursue appeals. The Supreme Court of Pennsylvania found the alleged facts unsupported by the hearing transcript. On September 17, 1997, that Court, unanimously affirming Judge Sabo, held Fahy had renounced all collateral and appellate proceedings in the 1996 colloquy. Recognizing that, when conducting a waiver colloquy, a trial court must satisfy itself the defendant's waiver was knowing, intelligent and voluntary, the court stated:

In the instant case, the trial court conducted a colloquy lasting more than an hour during which appellant clearly and unambiguously stated that he wished to waive his right to all further appeals and that he wanted his sentence carried out as soon as possible. He stated that he understood that his sentence likely would be carried out if he waived his appellate rights. He also repeatedly stated that he wanted his attorneys not to file any further appeals or petitions on his behalf. As a result of the colloquy, the court accepted appellant's waiver. A review of the transcript of the colloquy hearing in this matter reveals that the trial court conducted an adequate waiver colloquy before accepting appellant's waiver as being made knowingly and voluntarily.

700 A.2d at 1259 (Fahy-3). An application for reargument was denied.

Following the Pennsylvania Supreme Court's affirmation of Fahy's waiver, counsel filed a fourth and final PCRA petition on

November 12, 1997. The PCRA court dismissed the petition on two grounds: 1) failing to set forth a prima facie case that a miscarriage of justice occurred; and 2) timeliness. In Fahy-4, the Pennsylvania Supreme Court, affirming the PCRA court's finding that the petition was time-barred, concluded it lacked jurisdiction to review the merits of the petition. Waiver was referenced by way of a footnote only, which read in part:

As noted above, this court determined in September 1997 that Appellant had knowingly renounced all collateral and appellate proceedings regarding his conviction and sentence. ... [Fahy] now wishes to pursue collateral review of his case. ... The Commonwealth argues that Appellant has no right to file his PCRA petition in light of his formal waiver We need not address the issue of whether CLEADA attorneys have authority to file this fourth petition for collateral relief or whether Appellant did withdraw, or even whether he may withdraw, his waiver of collateral and appellate proceedings at this juncture. Assuming, arguendo, that Appellant has now renounced his earlier waiver, as determined herein, Appellant is not entitled to relief as his petition is untimely.

Fahy, 737 A.2d at 224, n.9.

Based on the its resolution of the procedural issues surrounding Fahy's purported waiver, this court held an evidentiary hearing regarding competency and voluntariness over three days in November and December of 2002.

2. Arguments

a. Reviewability

Fahy asserts that his various declarations of his desire to litigate allow him to pursue his claims. He contends the issue of waiver is not before the court, because only his current desire is

relevant.

The Commonwealth counters that once a petitioner has lost his rights, he is not free to change his mind capriciously, so his waiver remains valid. Though conceding the relevance of waiver to this action, the Commonwealth denies the issue is subject to de novo review, and claims the waiver prohibits consideration of Fahy's petition. In support of its position, the Commonwealth argues that under 28 U.S.C. § 2254(d),⁷ this court must accord deference to the state court's determination that Fahy's waiver was valid. It is alleged the state court considered and rejected, on the merits, Fahy's claim he was coerced into waiving his rights, and the Commonwealth contends, the state court's decision in Fahy-3 was neither "contrary to," nor an "unreasonable application of," Supreme Court precedent. 28 U.S.C. § 2254(d); see Terry Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (section 2254(d)(1) is a command that a federal court not issue the

⁷Section 2254(d) of Title 28 provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

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

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

habeas writ unless the state court was wrong as a matter of law or unreasonable in its application of law).

b. Knowing, intelligent and voluntary

Asserting the waiver can be considered by this court, Fahy argues that the colloquy conducted by the PCRA court was grossly inadequate and marked by fundamental deficiencies including: 1) Judge Sabo's predilection to find Fahy's waiver valid; 2) Judge Sabo's prevention of meaningful participation by Fahy's counsel in the proceeding; and 3) Judge Sabo's failure to ensure that Fahy understood he would be abandoning specific claims.

The Commonwealth, reasserting its position that under 28 U.S.C. § 2254(d) this court must defer to the state court's ruling concerning waiver, contends that it was not necessary for the PCRA court to advise Fahy of all specific legal claims he might have raised on appeal. In support, the Commonwealth cites United States v. Broce, 488 U.S. 563, 573-74, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989) ("Our decisions have not suggested that conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty. Waiver in that sense is not required Relinquishment derives not from any inquiry into a defendant's subjective understanding of the range of potential defenses, but from the admissions necessarily made upon entry of a voluntary plea.").

c. Competency

Fahy argues that, absent any valid competency determination, there can be no knowing and voluntary relinquishment of rights to post-conviction relief. He alleges that, because no competency examination was conducted or allowed, the state court's determination that the waiver was knowing, voluntary, and intelligent, was meaningless.

The Commonwealth argues that a competency determination is not required for a valid waiver, and is not a necessary precursor to a knowing, voluntary and intelligent waiver. Counsel assert that the cases upon which Fahy relies hold that a competency hearing is required only when competency is disputed, and Fahy himself insisted he was competent during the colloquy. See N.T. 8/9/96, 19 (COMMONWEALTH: "[Y]ou understand that your attorneys have at some point taken the position that you are not competent to make this decision?" COUNSEL FOR FAHY: "That is an incorrect characterization, Your Honor. I object. That is not the position we have taken.")

The Commonwealth claims the findings of both the PCRA court and the Supreme Court of Pennsylvania make clear competency was evaluated. Judge Sabo concluded: "I will inform the Supreme Court of Pennsylvania that you were knowingly waiving all your appellate rights and all your PCRA rights. ... I am making the decision he's fully competent, he knows what he's doing." And, in reviewing this

determination, the Pennsylvania Supreme Court in Fahy-3 said, "Thus, at the August 9, 1996 hearing, the court found that [Fahy] was competent, and was knowingly waiving all rights to further collateral and appellate review." 700 A.2d at 1259.

3. Discussion

a. Reviewability

Waiver remains an issue in this action. If Fahy were correct that any defendant who has engaged in waiver proceedings may, without exception, change his or her mind whenever he or she chooses, the doctrine of waiver would be rendered purposeless. See Commonwealth v. Bronshtein, 556 Pa. 545, 554, 729 A.2d 1102, 1006 (1999) (upholding the validity of a knowing, intelligent, and voluntary waiver of a capital prisoner's right to pursue post-conviction remedies).

The case law upon which Fahy relies does not establish his right to pursue his claims, as a matter of due process, simply because he has changed his mind regarding waiver. In Lonchar v. Thomas, 517 U.S. 314, 316 116 S. Ct. 1293 (1996), petitioner contended that the appellate court erred in allowing dismissal of his first federal habeas petition for "general equitable reasons" distinct from those embodied in the "relevant statutes, Habeas Corpus Rules, and applicable precedents."⁸ Petitioner had,

⁸The habeas petition was dismissed by the Eleventh Circuit Court of Appeals because of petitioner's "inequitable conduct";

throughout his trial and mandatory appeal, expressed his desire to die and refused to participate in his trial, but had an apparent change of heart and filed an "eleventh-hour" petition.

On certiorari, the Court considered whether a federal court may dismiss a first federal habeas petition for "equitable reasons" distinct from reasons allowed by federal statutes and rules, or well-established precedent. In addressing government contentions of delay and "abuse of the writ" the Court held that settled precedent and habeas corpus rules should have guided the lower courts in examining Lonchar's petition, not the generalized equitable considerations alleged by the government. 517 U.S. at 332. Dismissal of the petition was vacated.

In dicta, the Lonchar court concedes that petitioner's withdrawal of his state court habeas petition might serve as a ground for a state law procedural bar to a second state petition, which in turn, "might also prevent litigation of similar claims in federal court," id. at 331, but this court is not bound by a hypothetical, factually distinguishable from this action. Lonchar did not involve any hearing or colloquy regarding petitioner's desire to waive his rights; although Lonchar repeatedly expressed a desire to be executed, he only moved to waive his rights to automatic appeal, and was unsuccessful in doing so. Lonchar

he waited over six years to seek federal relief and filed at the last minute.

requires that federal courts, if dismissing a petition, adhere to the framework of the Habeas Corpus Rules and settled precedent, but it does not require, as a matter of due process, that a federal court reach the merits of claims filed by every capital petitioner who has waived his rights and later changed his mind. "Lonchar does not remotely hold that a defendant's change of mind and current desire to litigate automatically controls and renders nugatory a previously accepted and affirmed waiver." Commonwealth v. Saranchak, 767 A.2d 541, 545 (Pa. 2001) (Castille, J., dissenting).

In both Smith v. Armontrout, 865 F.2d 1502 (8th Cir. 1988) (en banc), and St. Pierre v. Cowan, 217 F.3d 939 (7th Cir. 2000), also invoked by Fahy, other circuits have recognized that a defendant is able to waive rights, so long as he or she is competent and the waiver is knowing, intelligent and voluntary. In Smith, the court denied the request of next friends to hold a competency hearing; the court stated that defendants can "waive their remedies if they have the capacity to appreciate their position and make a rational decision, and if they do not suffer from a mental disease, disorder, or defect that may substantially affect this capacity." 865 F.2d at 1506 (citing Rees v. Peyton, 384 U.S. 312, 314 (1966)). However, in a footnote the court noted:

The possibility always exists that Mr. Smith may change his mind again. We direct the respondent Armontrout to deliver to Mr. Smith in person a copy of this opinion. If Mr. Smith changes his mind again, we direct the

respondent Armontrout to inform the Clerk of this Court at once. The writer of this opinion believes that Smith's petition for habeas corpus, considered on its merits, is not frivolous. If Smith changes his mind about pursuing his remedies, it is my intention to grant a certificate of probable cause and issue a stay of execution, pending determination by this Court of the appeal on its merits.

Id. at 1507, n.6.

From this footnote, Fahy argues his right to pursue his claims as a matter of due process, but neither Smith nor St. Pierre signify that a waiver by a capital defendant is always ineffective if the defendant changes his mind. Both cases recognize society has a strong interest in the legitimacy of capital proceedings, but as noted in St. Pierre: "There must be an end-point to a defendant's efforts repeatedly to waive and un-waive his rights. Normally, that end-point occurs when a court has before it reliable evidence that a waiver was, in the words of Johnson v. Zerbst, an intentional relinquishment of a known right, and that it was made under circumstances that drove home to the defendant the importance of what she was doing." 217 F.3d at 950 (internal citation omitted).

There are circumstances under which a defendant, even one sentenced to death, can waive rights, and indeed even un-waive them; however, though a defendant's capital status is meaningful to courts considering waiver issues, the paramount inquiry must be the knowing and voluntary nature of the waiver itself.

The PCRA court and the Pennsylvania Supreme Court were both satisfied Fahy's waiver was knowing, intelligent and voluntary. Fahy claims the colloquy, by which Judge Sabo made his determination, was grossly inadequate. Before it is possible to address those claims, this court must address the standard of review applicable to the state court determination that Fahy's waiver was valid, see Fahy-3.

b. Standard of Review

The Commonwealth argues Fahy is not free to attack the validity of the waiver, and the court is precluded from conducting a de novo review, because of the deference due the waiver determination under 28 U.S.C. § 2254(d). Fahy contends that § 2254(d) has no place in this inquiry because there was no real "adjudication on the merits" as required by the statute. See Hameen v. Delaware, 212 F.3d 226 (3d Cir. 2000) (standard of review established by § 2254(d) not applicable unless clear from the face of the state court decision that the merits of petitioner's claims were examined in light of federal law as established by the U.S. Supreme Court), cert. denied, 121 S. Ct. 1365 (2001); but see Werts v. Vaughn, 228 F.3d 178, 195, n.13 (3d Cir. 2000) (finding procedurally defaulted a claim rejected by the state court as meritless without discussion).

The AEDPA heightened the level of deference accorded to state court determinations, both factual and legal. See Dickerson v.

Vaughn, 90 F.3d 87, 90 (3d Cir. 1996). As to legal conclusions, the statute prohibits a federal court from granting habeas relief based on a claim adjudicated on the merits in state court, unless such adjudication: (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)(1) & (2). Factual issues determined by a state court are presumed to be correct and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Section 2254(d) provides 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 ..." 28 U.S.C. § 2254(d) (emphasis added). In Cristin v. Brennan, 281 F.3d 404, 413, 417-18 (3d Cir. 2002), the Third Circuit analyzed the word "claim" in the introductory language of § 2254(e)(2).⁹ Addressing

⁹28 U.S.C. § 2254(e)(2) reads:

- (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that --
 - (A) the claim relies on --

the petitioner's argument that "claim" is limited to substantive allegations of constitutional error and not threshold determinations regarding procedural default, the court stated:

This is a reasonable argument, though the term 'claim' is not defined in AEDPA. Lacking any more specific guidance from Congress, we give the words of a statute their ordinary, contemporary, common meaning. Black's Law Dictionary defines 'claim' as follows: 'To demand as one's own or as one's right; to assert; to urge; to insist. A cause of action. Means by or through which a claimant obtains possession or enjoyment of privilege or thing. Demand for money or property as of right, e.g. insurance claim.' Black's Law Dictionary 247 (6th ed. 1990). Thus, while the definition begins with general terms, its latter half focuses on 'claim' as shorthand for a 'cause of action' or 'means' of obtaining possession or enjoyment of some privilege. In the context of habeas corpus, that privilege would be freedom from incarceration, and a 'claim' would be the substantive argument entitling the petitioner to that relief.

The Commonwealth is unable to demonstrate anywhere in AEDPA that the term 'claim' was intended by Congress to encompass excuses to procedural default. In fact, AEDPA's use of the word 'claim' uniformly comports with [petitioner's] more limited definition of a 'cause of action' or 'means by or through which a claimant obtains ... enjoyment of [a] privilege.' Black's Law Dictionary 247. For example, the term 'claim' is used in § 2254(d), also added by AEDPA, in the following sentence. 'An application for a writ of habeas corpus on behalf of a

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- (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
 - (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
- (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

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’ By stating that an ‘application for a writ of habeas corpus’ can be granted ‘with respect to any claim,’ the sentence clearly implies that Congress used the term ‘claim’ as a substantive request for the writ of habeas corpus.

The Third Circuit’s analysis makes clear that the term “claim” in both § 2254(d) and § 2254(e)(2) refers to a substantive request for habeas relief. The waiver issue does not regard entitlement to relief on the merits, so this court is not required to accord deference to the state court’s conclusions under § 2254(d).

This does not mean that no deference must be accorded the state proceedings. Factual determinations were made in the waiver proceeding, so the proper inquiry regards what deference is required, if any, under § 2254(e)(1). That provision of the AEDPA reads in relevant part:

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1).¹⁰ The Commonwealth argues that the

¹⁰Prior to the enactment of the AEDPA, the standard governing factual determinations now found in § 2254(e)(1) was contained in § 2254(d). That standard essentially codified Townsend v. Sain, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963), and read, in part:

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish ...

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

28 U.S.C. § 2254(d) (superseded by § 2254(e) (1996)). Unlike the pre-AEDPA directive regarding state court factual determinations, the current § 2254(e), read literally, eliminates the requirement that findings must be in writing, and drops federal standards relevant to the state court's fact-finding process and evidentiary record.

Whether Townsend still informs the application of what is now § 2254(e)(1) is a source of some debate. As noted by one commentator:

Bluntly stated, it appears that the federal habeas courts must accept state court findings at face value-no questions asked. A change of that kind would be dramatic and not something that anyone would lightly read into the new law. ... I read § 2254(e)(1) to drop the specific procedural and substantive standards contained in the former § 2254(d). But I do not read it to dispense with a federal court's rudimentary responsibility to ensure that it is deciding a constitutional claim based on factual findings that were forged in a procedurally adequate way and were anchored in a sufficient evidentiary record.

Yackle, Larry W., Federal Evidentiary Hearings Under the New Habeas Corpus Statute, 6 B.U. Pub. Int. L.J. 135, 140-41 (1996).

Pennsylvania Supreme Court considered the record and unequivocally stated the issue of coerced waiver had been litigated, considered and rejected. See Fahy-4, 737 A.2d at 219 (“[T]he assertion that his guards influenced the validity of [Fahy]’s waiver was previously litigated and rejected by this court. On appeal from the PCRA court’s determination that [Fahy]’s waiver was valid, [Fahy] specifically argued that his decision to waive appellate and collateral review was motivated by abuse and harassment by his guards, i.e., the conditions of his incarceration. This court nevertheless found [Fahy]’s waiver of his rights to be valid.”); see also Fahy-3, 700 A.2d at 1259 (“A review of the transcript of the colloquy hearing in this matter reveals that the trial court conducted an adequate waiver colloquy before accepting [Fahy]’s waiver as being made knowingly and voluntarily. ... There is literally nothing in the record to support counsel’s representation that [he] did not knowingly and voluntarily waive his appellate rights.”). The Commonwealth argues that the presumption of correctness clearly applies and the finding is entitled to deference.

Fahy argues that deference is not required under § 2254(e)(1) because Judge Sabo refused to consider affidavits alleging harassment and coercion by the guards that rendered the waiver null and void. The colloquy was a blatantly inadequate fact-finding

endeavor since Fahy's counsel was not permitted to proffer mental health evidence or inquire into critical issues surrounding confinement and their impact on Fahy's decision to waive. Fahy points to comments made by Judge Sabo such as, "I talked to the man. I don't need to be a psychologist or psychiatrist. I could talk to him, I know he is sane," and "Those attorneys may think you're insane but I don't think [so]." Because the Pennsylvania Supreme Court's review of the waiver was limited to the record and Judge Sabo's decision, and because Fahy's declarations regarding coercion were not considered, petitioner contends this court need not defer to the state court findings as § 2254(e)(1) directs. But see Armstead v. Scott, 37 F.3d 202 (5th Cir. 1994) (state court's "paper hearing" sufficient for denial of habeas relief and entitled to presumption of correctness since state judge, the same one who presided over petitioner's guilty plea, had opportunity to assess petitioner during his plea and determine his credibility); see also Willis v. Lane, 479 F. Supp.7 (E.D. Tenn.), aff'd without opinion, 614 F.2d 773 (6th Cir. 1979) (petitioner's conclusory allegation that inquiry conducted by trial judge was inadequate to determine his competency to stand trial was insufficient to overcome presumption that state hearing judge's finding that such inquiry was adequate was correct).

Under § 2254(e)(1), factual determinations by state courts are presumed correct absent clear and convincing evidence to the

contrary. A federal habeas court "must afford state courts' factual findings a presumption of correctness, which the petitioner can overcome only by clear and convincing evidence." Duncan v. Morton, 256 F.3d 189, 196 (3d Cir. 2001). The presumption applies to the reasonable factual determinations of state trial and appellate courts. See id. State court factual determinations that are "well-supported and subject to the presumption of correctness" are not "unreasonable." Id. at 198. In Campbell v. Vaughn, 209 F.3d 280, 285-86 (3d Cir. 2000), the court also noted that under the habeas statute, an implicit finding of fact is tantamount to an express one, so deference is due to either determination. The Commonwealth adds that this court is bound by the state court's credibility determinations, see Weeks v. Snyder, 219 F.3d 245, 259 (3d Cir. 2000) (federal habeas statute provides federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by the federal habeas courts).

However, as the United States Supreme Court recently stated:

Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.

Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 1041, 154 L.

Ed. 2d 931 (2003). "A federal habeas court has an obligation to give full consideration to the evidence in the record, and must not simply 'rubber stamp' the findings of the state courts." Lambert v. Blackwell, 2003 U.S. Dist. LEXIS 5125 (E.D. Pa. April 1, 2003) (Brody, J.).

In conducting a waiver colloquy, a trial court must determine that the defendant knowingly and voluntarily waived his rights. See Commonwealth v. Michael, 544 Pa. 105, 108, n.2, 674 A.2d 1044, 1045 (1996) (Six days after he pleaded guilty to first degree murder, appellant informed the trial court that he wished to withdraw his guilty plea. The trial court, denying the request, found on the record that appellant's guilty plea was knowing and voluntary.). Id. at 108. Whether a competency determination is a necessary precursor to waiver and whether such a determination, required or not, was in fact made by the state court, is disputed.

Fahy argues that Judge Sabo was required to conduct a competency exam before finding a valid waiver. In support of this contention, Fahy cites Whitmore v. Arkansas, 495 U.S. 149, 100 S. Ct. 1717, 109 L. Ed. 2d 135 (1990). Whitmore, like the majority of published cases dealing with waiver of appeals by capital defendants, concerned "next-friend" standing, when an individual proceeds on behalf of a defendant because the defendant is allegedly unable to litigate because of some form of incompetence. Whitmore held that a next-friend will not enjoy standing where an

evidentiary hearing reveals the defendant gave a knowing, intelligent and voluntary waiver of his right to proceed. In other words, once the Arkansas court determined the defendant was competent, next friend status could not be conferred because it assumed defendant's incompetence. There is no next-friend issue in this action; further, the Court in Whitmore expressly stated that it had not determined "whether a hearing on mental competency is required by the United States Constitution whenever a capital defendant desires to terminate further proceedings" 495 U.S. at 165.

Fahy also cites Godinez v. Moran, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993) ("A criminal defendant may not be tried unless he is competent, and he may not waive his right to counsel or plead guilty unless he does so competently and intelligently."). Godinez, requires a competency hearing when competency is a disputed issue. See id. at 402, n.13 ("We do not mean to suggest, of course, that a court is required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his right to counsel. As in any criminal case, a competency determination is necessary only when a court has reason to doubt the defendant's competence."). The Commonwealth argues that the state court correctly concluded Fahy was competent to waive his rights; it implies competence was at least enough of an issue for the state court to have rendered a

decision on the matter.

Godinez does not resolve neatly the conflicting positions of the parties, but it does elucidate the distinctions underlying an inquiry into a defendant's waiver of rights:

The two questions--the competency to waive a right and whether the waiver was knowing and voluntary--are distinct, although we have noticed in reviewing the record in this case and researching the applicable law that the distinction is not always made clear. The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the ability to understand the proceedings. The purpose of the 'knowing and voluntary' inquiry, by contrast, is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced.

509 U.S. at 401, n.12 (internal citations omitted) (emphasis in original). Clearly, the present parties, like those referenced by the Supreme Court in Godinez, are not wholly clear on the distinction. The confusion is understandable, as the Supreme Court has established no bright lines.

In Rees v. Peyton, 384 U.S. 312, 314, 86 S. Ct. 1505, 16 L. Ed. 2d 583 (1966), the Court declared the standard to determine competency to waive appeals in death sentence cases: "whether he has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder or defect which may substantially affect his capacity in the premises." The Rees court gave no instruction regarding making

this determination.

Ten years later, in Gilmore v. Utah, 429 U.S. 1012, 1013, 97 S. Ct. 436, 50 L. Ed. 2d 632 (1976), the Court stated that the defendant was competent to waive his death sentence appeals because it was "convinced that [he] made a knowing and intelligent waiver of any and all federal rights ... and, specifically, that the State's determinations of his competence knowingly and intelligently to waive any and all such rights were firmly grounded." The Court made no reference to Rees v. Peyton. In 1985, the Supreme Court denied a petition for writ of certiorari to review a court of appeals decision, Rumbaugh v. Proconier, 753 F.2d 395 (5th Cir. 1985), that attempted to flesh out the Rees standard.

Finally, following the Court's decision in Whitmore regarding next-friend standing, many courts, assuming the Supreme Court agreed with the Arkansas' standard for competency since it had not renounced it, adopted the "Arkansas Standard" dictating that a capital defendant could forego his appeals "only if he has been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence." Franz. v. State, 754 S.W.2d 839, 843 (Ark. 1988).

In Fahy's case, the Pennsylvania Supreme Court remanded to the PCRA court for "a colloquy to determine whether petitioner fully understands the consequences of his request to withdraw his appeal

and to waive all collateral proceedings." The plain language of the court's directive does not clarify the scope of the inquiry, i.e., if it was limited to whether Fahy did understand and acted uncoerced, or if it also encompassed the separate query regarding Fahy's ability to understand, see Godinez, 509 U.S. at 401 n.12. During the colloquy, Judge Sabo made repeated references to the "one purpose" for which the Supreme Court of Pennsylvania had referred the matter to him, (see, e.g., N.T. 8/9/96, 31); it is evident from the colloquy transcript that his singular purpose did not include conducting a competency hearing. However, at the conclusion of Fahy's colloquy, Judge Sabo made a twofold finding: "I will inform the Supreme Court of Pennsylvania that you were knowingly waiving all your appellate rights and all your PCRA rights. ... I am making the decision he's fully competent, he knows what he's doing." (Id.). In reviewing this determination, the Supreme Court of Pennsylvania said, "Thus, at the August 9, 1996 hearing, the court found that appellant was competent, and was knowingly waiving all rights to further collateral and appellate review." Fahy-3, 700 A.2d at 1259.

This court concludes deference need not be accorded these determinations. First, Fahy has rebutted by clear and convincing evidence the presumption that this court defer to the state court's findings regarding competency; indeed, the evidence establishes no real competency determination was undertaken by the PCRA court and

thus, there is nothing to which this court can defer. When Fahy inquired of Judge Sabo, "I mean doesn't the order say that you are to determine my competency?" the Judge responded, "You and I know that you are not insane, right? ... Those attorneys might think you're insane, but I don't" (N.T. 8/9/96, 4-6). When Fahy's counsel added that there existed a need to inquire into "psychologically significant" facts, the court responded: "What do you mean psychologically? You argue it to the Supreme Court. There is nothing wrong with his brains. His brains are better than yours." (Id. at 13-14). When Fahy's counsel attempted to proffer evidence, it was refused. Judge Sabo also refused counsel the opportunity to question petitioner regarding alleged coercion to waive. The PCRA court and the Pennsylvania Supreme Court's conclusory determination of competency failed to set forth factual findings, so a presumption of correctness is inapplicable. See Spencer v. Donnelly, 193 F. Supp. 2d 718, 731 (W.D. N.Y. 2002) ("A mere conclusion that the defendant was provided effective assistance of counsel does not constitute a finding of fact for purposes of 28 U.S.C. § 2254(e)(1).").

A valid waiver of post-conviction relief requires that a court determine both the petitioner's ability to understand, and that petitioner does understand and freely chooses to waive. Gilmore, 429 U.S. at 1013 (the defendant was competent to waive his death sentence appeals because determinations of his competence knowingly

and intelligently to waive any and all such rights were firmly grounded); Rees, 384 U.S. at 314 ("whether he has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation ..."); Franz, 754 S.W.2d at 843 (Whitmore standard allows waiver of rights only when one has been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights). Because no competency determination was made, deference under § 2254(e)(1) cannot be accorded to the state court's finding that Fahy's waiver was knowing, intelligent and voluntary.

This court must make its own finding of facts regarding waiver. Spencer, 193 F. Supp. 2d at 731.

A direct appeal from a criminal conviction is a matter of right, and waiver or abandonment of this right will not be assumed unless the facts clearly support such an assumption. ... [A]ppellants' factual allegations taken together, if true, raise a bona fide issue as to whether their direct appeals were knowingly, understandingly, and voluntarily abandoned. In these circumstances, an evidentiary hearing must be held to resolve the issue of waiver.

Morris v. United States, 503 F.2d 457, 459 (5th Cir. 1974); see also Rees, 384 U.S. at 313 (remanding for a competency hearing where capital petitioner sought to "forego any further legal proceedings").

4. Evidentiary Hearing in Federal Court to Resolve Waiver Issues

a. The Hearing

This court held an evidentiary hearing on waiver and issues related thereto on November 18, 2002, November 22, 2002, and December 12, 2002.¹¹ Counsel first examined Fahy regarding his past efforts to waive his rights. Fahy testified that underlying his attempts to waive all appeals and collateral relief was a desire to avoid the temporary transfers to Philadelphia that accompanied appearances before the PCRA court.

¹¹The Commonwealth argued this court was not entitled to conduct a hearing under 28 U.S.C. § 2254(e)(2), which provides, in part, "If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that [the failure is excused for an enumerated reason]." But, § 2254(e)(2) only imposes onerous conditions on federal courts seeking to conduct evidentiary hearings where the petitioner has procedurally defaulted in pursuing an evidentiary hearing in state court. Cristin, 281 F.3d at 411. Fahy's counsel moved for remand to the PCRA court to determine competency to waive all appellate proceedings, and the motion was denied. All attempts by Fahy to develop the record during the colloquy were also rebuffed, so the Commonwealth has not established Fahy's failure to develop the facts. Even if it could, "2254(e)(2) was not intended to govern all evidentiary hearings in habeas actions." Id. at 413 ("Simply put, [petitioner] is not in that group that 'would have had to satisfy Keeney's test' [requiring an excuse for failure to develop facts] because the issue on which the District Court granted him an evidentiary hearing -- whether he can establish an excuse for his procedural default -- is not one for which he 'failed to develop' a record in state court."). Id.

COUNSEL FOR FAHY: "What difficulties were you having being transported back and forth?"

FAHY: "It's difficult. Whenever I get to this issue, it's difficult for me to talk about."

COUNSEL FOR FAHY: "Describe in your words some of the - what those problems were."

FAHY: "They involved threats, beatings, threats of both of me and towards my family members from officers and sheriffs alike

... ."

COUNSEL FOR FAHY: "Did anything happen, as far as you recall, either [where you were housed] at the CFCF or in the transport for that August 2, [1996,] hearing?"

FAHY: "The problem started before I went to court. It started when I was first transferred to CFCF. I arrived at CFCF and they placed me within the receiving cell. Me and two other inmates ... was speaking to the officer And after the officer had left ... he had told me to watch my back and that he said the officer had asked him to make arrangements that I be jumped and beaten. And he was saying - pronouncing the name of the officer in a way that I didn't recognize But after we had spoken, some 20-25 minutes later, the officer called me to the cell door. And he had got close enough to me and pointed to his name tag and he said to me ... 'You are in shit now.'"

COUNSEL FOR FAHY: "Who was it that said that?"

FAHY: "His name on his tag was Caserta."

(N.T. 11/18/02, 9-10, 14-15).

Regarding specific instances of abuse, it was explained to Fahy that "it would be helpful to the court if we could know whether between 1981 and '96 you were ever actually beaten in contrast to being afraid of being beaten." (Id. at 19). In response, Fahy recounted that, in 1981, he had been beaten as he waited in a holding pen at City Hall. He added that, in the years leading up to the colloquy before Judge Sabo in August of 1996, he suffered something less than beatings but still considered by him to constitute a form of abuse.

FAHY: "For instance, if I was getting transferred to court and I was being changed in the change room, there would be a guard and a sheriff. And they would just rough or push you or shove you in an abusive way, just to get across their point. And they didn't have to beat me as they did the first time. I knew what they were saying from the way they would treat me."

COURT: "What was their point? You said pushing and shoving to make their point. Was it that you should get in the van or you should hurry up, or what was the point?"

FAHY: "The point was that they were giving me a message from day one that they wanted me to waive my appeal."

(Id. at 22-23).

COUNSEL FOR FAHY: "Did you want to waive having your issues heard by the courts?"

FAHY: "Never."

COUNSEL FOR FAHY: "Now, let me take you ahead to the morning of August 9, [1996]. Did something happen that day during the transport and if so, what?"

FAHY: "The morning of the 9th, when they called me down to prepare for the transfer, as I was entering the bus, an officer relayed a message to me and told me, 'You know what you must do to stay out of shit.' And I took that as being a message that was relayed from the earlier message from Caserta. And that was that I still had to go down, and no matter even if I was at Graterford, I would still have to go down and give up my appeals.

"He is a Caserta, he made it known to me that he was a Caserta. I took that, indeed, if the Casertas wanted from day one that I was given the death penalty to be put to death, then surely he wanted the same."

(Id. at 27-28).

Fahy also stated that, on arriving at the courthouse for the colloquy on August 9, 1996, one of the sheriffs inquired, "'You do have other children, don't you?'" He testified this instilled even greater fear in him because one of his daughters had been murdered earlier that year. (N.T. 11/18/02, 30). As a result of his fear and the ongoing threats, Fahy testified, he asked to speak to Judge Sabo privately before the colloquy commenced.

FAHY: "Because my intention was that I wanted, if I could talk to Sabo or someone in the authority figure off the record and let them know what was going on, that I wouldn't have to waive my appeals as I did. And when Sabo told me that I couldn't speak to him off the record privately, there was nothing else I could do."

COUNSEL FOR FAHY: "And Henry, why did you tell Judge Sabo that you wanted to waive having your issues heard and that was the decision that you were making?"

FAHY: "I said it because I did not want my family hurt and I did not want myself hurt anymore. I wrote that letter in a manner that I knew it had to be written. I knew I had to write it in a legal term and make legal sense. I couldn't put in the letter, 'Dear Sabo, I'm being beaten everyday, I don't want to come down there no more.' So, I wrote the letter in a legal term and I tried to make it seem legal so that when Sabo got it, it would be accepted and filed.

(N.T. 11/18/02, 31-34).

Fahy also testified to his state of mind, and the actions he took, following the colloquy.

COUNSEL FOR FAHY: "Do you remember preparing an affidavit - and for the record your Honor, it's dated August 21, 2002, I'm sorry, August 21, 1996 - about what had happened?"

FAHY: "Yes, I signed the affidavit verifying the fact that I was threatened and I was abused. And the reasons of why I waived my appeals. And then I, even then, did not want to waive them, but thought I had no other choice but to waive them."

(Id. at 40).

Dr. Lawson Bernstein, on behalf of Fahy, and Dr. John O'Brien, on behalf of the Commonwealth, gave expert testimony regarding Fahy's mental health to this court at an evidentiary hearing in November, 2002. In addition to reviewing documents, Dr. Bernstein, a clinical and forensic neuropsychiatrist, examined Fahy on one occasion in 1997, and observed an examination conducted by Dr. O'Brien in November, 2002, where he had the chance to ask some

further questions. Dr. Bersnstein testified that, as he understood it, "The issue before the court today regards Mr. Fahy's capacity to make a knowing and voluntary waiver of his right to further appeal based on two colloquies with Judge Sabo on August 2nd and 9th of 1996, and his mental state at that time." (Id. at 88).

According to Dr. Bernstein, Fahy suffers from a history of major depression with psychotic features, post-traumatic stress disorder, and either dementia due to traumatic brain injury or cognitive disorder not otherwise specified. (Id.). Dr. Bernstein testified that Fahy was diagnosed with post-traumatic stress reaction in 1981 and that reaction stemmed from the beating Fahy suffered at the hands of the county correction officers. But, Dr. Bernstein stated:

The post-traumatic stress disorder ... refer[red] to in terms of my affidavit refers to that post-traumatic episode of post-traumatic stress disorder, and then the disorder in its ongoing state as its augmented by further events. That is to say, the descriptions Mr. Fahy gave regarding the abuses he suffered at the hand of county corrections officers and/or sheriffs, the either physical beatings and/or physical abuse or threats.

When there was the threat of bodily injury, the key to the diagnosis of post-traumatic stress disorder is there either has to be an event or threat of an event in which there is a potential harm to the physical integrity or life of the individual or someone close to that individual. ... [V]erbal threats per se are not in and of themselves sufficient to make a diagnosis of post-traumatic stress disorder. Verbal threats to this gentleman's life and/or his family in the context of this matter would be, because of the life-threatening nature of the threats.

(N.T. 11/18/02, 90-91). When asked his opinions concerning Fahy's

mental state at the time of the 1996 waiver colloquy, Dr. Bernstein testified:

I concluded and I stated in the affidavits a number of findings. Number one, that Mr. Fahy was acutely psychiatrically ill; that is to say, in the throes of an active psychiatric disorder or disorders in full fruition and in an untreated state - that those psychiatric disorders, but in particular post-traumatic stress disorder and the tendency towards paranoia and delusional thinking very much were at the seat of his decision not to pursue his right to further appeal. That is to say Mr. Fahy fully believed as a result of these disorders and/or any actions on the part of corrections officers or both, that his life was in danger, that the lives of his family members and his existing daughter were in danger at the time of the two hearings, and specifically, the August 9th hearing, and that he chose to - well, perhaps choose is the wrong word. He did not pursue, or withdrew his request to pursue, his rights for further hearings because of the fixed belief that to do otherwise would put either his life or the lives of his family members in jeopardy, and also subject him to further abuse, which he found both intolerable and terrifying.

(Id. at 94-94). Dr. Bernstein stated that neither his review of Fahy's mental history, nor his own examinations of Fahy, revealed malingering¹² on Fahy's part (id. at 95), but added that he could not be certain all of the events contributing to Fahy's terror really had occurred.

It is my opinion with a reasonable degree of medical certainty that Mr. Fahy believed that his family's life was in jeopardy, as well as his own. How he arrived at that belief, whether it was the result of an actual event or his psychiatric illness or a compendium of the two is ultimately irrelevant to my opinion. If I had to put my nickel down, I suspect something happened. He

¹²Webster's New World Dictionary defines malingering, "to pretend to be ill or otherwise incapacitated to escape duty or work."

interpreted it as an actual threat and that was the foundation, the faulty foundation for his decision making throughout the proceeding ... with Judge Sabo.

(Id. at 101-102).

Dr. O'Brien, a board-certified psychiatrist, and consultant for the Philadelphia Court of Common Pleas, also testified to Fahy's psychiatric background and his ability to make a knowing, voluntary and intelligent waiver in 1996. In addition to reviewing materials related to Fahy's background and the waiver proceedings, Dr. O'Brien conducted a clinical evaluation of Fahy on November 8, 2002. On direct examination, Dr. O'Brien testified that, though the August 9, 1996, colloquy did not form an adequate basis for Judge Sabo's finding of competence, "Mr. Fahy was quite tenacious about basically pleading his case And, I would have to say ... that there's nothing in the transcript that reflects that Mr. Fahy was intimidated. ... I don't share the conclusion that his constellation of cognitive and psychiatric or psychological difficulties renders him susceptible to that." (N.T. 11/18/02, 157). He added, "Mr. Fahy is able to, and was able to at that time, explain himself [and] respond to questions posed to him" (Id. at 156). Dr. O'Brien stated that Fahy had his mind made up to waive when the colloquy took place, but that he changed his mind following conversations with his current counsel and fellow death row inmates. (Id. at 166-67).

COMMONWEALTH: "[B]ased on your reading of the transcripts, you were able to conclude that his actions were voluntary in

August of 1996?"

DR. O'BRIEN: "It's my opinion that they were voluntary and knowing or intelligent, in the sense that he understood his circumstances clearly, and what the consequences would be of his decision.

"And, in my opinion, there is no indication in the transcript, and certainly no indication from concurrent correctional records, of psychiatric illness or symptoms or anything that would support a conclusion that he was not competent."

(Id. at 169).

b. The Determination

As discussed above, the Supreme Court's treatment of competency to waive appeals and collateral relief has not been unambiguous. Though Gilmore, like Rees, concerned a defendant's competence to waive his death sentence appeals, 429 U.S. at 1013, a discussion of Rees is absent from the Gilmore decision. Nevertheless, most trial courts invoke the standard announced in Rees when called upon to determine whether a person under sentence of death is mentally competent to choose to forego further appeals and collateral attacks on his conviction and sentence: "whether he has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder or defect which may substantially affect his capacity in the premises," 384 U.S. at 314. See, e.g., West v. Bell, 242 F.2d 338 (6th Cir. 2001); Mata v. Johnson, 210 F.3d 324 (5th Cir. 2000); Mack v. State, 1998 Miss. LEXIS 89 (March 12, 1998). Finally, Godinez clarified that competency to waive a right, and the

question of whether the waiver was knowing and voluntary, are distinct inquiries.

A determination of competency has a "modest aim." Godinez, 509 U.S. at 402. Bearing in mind that objective, this court finds Fahy did possess the discrete capacity to understand the proceedings at issue, going back to and including the August, 1996, colloquy before Judge Sabo. Dr. Bernstein stated that, at the time of the 1996 colloquy, Fahy was "acutely psychiatrically ill," though he did not offer a medical opinion regarding competence. This is not altogether surprising, as Fahy's counsel, though persistent in raising the issue of competency, never took the position their client was actually incompetent. According to the Commonwealth's expert, Dr. O'Brien, Fahy exhibited no indication of psychiatric illness or symptoms that would support a conclusion he was not competent in August, 1996. (N.T. 11/18/02, 169). In either case, "the presence or absence of mental illness or brain disorder is not dispositive" in determining competency. See Mata, 210 F.3d at 329.

This court finds Fahy was competent to make the waivers with which the Commonwealth charges him, but that does not conclude the inquiry. In addition to determining competence, the court must satisfy itself that the waiver of his constitutional rights was knowing and voluntary, and not the product of coercion. "A waiver is voluntary if, under the totality of the circumstances, [it] was

the product of a free and deliberate choice rather than coercion or improper inducement." United States v. Doe, 155 F.3d 1070, 1074 (9th Cir. 1998). Put differently, a decision is involuntary if it stems from coercion, whether mental or physical.

Courts have recognized that a decision to waive the right to pursue legal remedies is involuntary if it results from duress, including conditions of confinement. See, e.g., Smith v. Armontrout, 812 F.2d 1050, 1058-59 (8th Cir.) (reviewing for error the district court's determination on whether petitioner's particular conditions of confinement rendered his decision to waive appeals involuntary), cert. denied, 483 U.S. 1033 (1987); Groseclose ex rel. Harries v. Dutton, 594 F. Supp. 949, 961 (M.D. Tenn. 1984) ("In the judgment of this Court, the conditions of confinement inflicted on [prisoner] are so adverse that they have caused him to waive his post-conviction remedies involuntarily."). Here, there is no allegation that the day-to-day conditions of Fahy's confinement on death row caused him to attempt to waive his rights. Rather, Fahy argues the conditions he encountered when made to travel for PCRA appearances provided the impetus for his efforts to waive. His fear of reprisal and abuse, though not a traditional "condition of confinement" may still render his waiver involuntary.

Fahy was beaten while in a City Hall holding cell in 1981, an experience Dr. Bernstein testified so scarred Fahy that it

triggered a post-traumatic stress reaction which ultimately developed into an ongoing disorder. Fahy was threatened, whether directly or indirectly, by guards, one of whom shared a last name with Nicky Caserta, Fahy's victim. Fahy testified that he knew the Caserta family wanted him dead and this guard was no different. He was told that he knew what he had to do "to stay out of shit." In addition, Fahy's fears were heightened following the murder of his own daughter. He stated that, during a transfer to the PCRA court, he was asked by an officer whether he had "other children." This, to Fahy, was a clear indication that the lives of his other children were in danger should he choose to try and save his own life.

Though the evidence does not establish Fahy actually suffered the myriad forms of "abuse" to which he testified, it does substantiate Fahy's claims that he lived in a state of fear and acute agitation caused by the expectation of danger. As stated by Dr. Bernstein, "Fahy believed that his family's life was in jeopardy, as well as his own. How he arrived at that belief, whether it was the result of an actual event or his psychiatric illness or a compendium of the two is ultimately irrelevant to my opinion. ... I suspect something happened. He interpreted it as an actual threat and that was the foundation, the faulty foundation for his decision making throughout the proceeding ... with Judge Sabo." (N.T. 11/18/02, 101-102). Where a defendant was "induced

by threats or promises to discontinue improper harassment, misrepresentation, or improper inducements" his waiver cannot be deemed voluntary. Comer v. Stewart, 230 F. Supp. 2d 1016, 1064 (D. Ariz. 2002).

Fahy was given a week's time, from August 2 to August 9, 1996, to contemplate his decision to waive, but this does not automatically render his waiver voluntary. Transcripts of the waiver proceedings before Judge Sabo make explicit that the court did not care to hear, much less consider, the reasons underlying Fahy's request for more time, or his counsels' position on the circumstances they claimed were prompting the waiver itself. Fahy stated he was thinking, "if I could talk to Sabo or someone in the authority figure off the record and let them know what was going on, that I wouldn't have to waive my appeals as I did. And when Sabo told me that I couldn't speak to him off the record privately, there was nothing else I could do." (N.T. 11/18/02, 31). It is impossible to know if the coercive nature of the colloquy proceedings colored Fahy's actions; however, the evidence establishes that Fahy either was, or believed he was, improperly induced to waive his rights.

Although the Supreme Court has never held that a capital defendant may not waive his right to review, United States v. Hammer, 226 F.2d 229, 237 (3d Cir. 2000), it has emphasized repeatedly "the crucial role of meaningful appellate review in

ensuring that the death penalty is not imposed arbitrarily or irrationally." Parker v. Dugger, 498 U.S. 308, 321, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991). Fahy's representations that he never wanted to waive his rights and still has no desire to do so are powerful. Fahy testified that he wants his claims heard, and he wants to live. Though "the doctrine of waiver is, in our adversary system of litigation, indispensable to the orderly functioning of the judicial process," Commonwealth v. McKenna, 476 Pa. 428, 441, 383 A.2d 174, 180 (1978), "there are occasional rare situations where an appellate court must consider the interests of society as a whole in seeing to it that justice is done, regardless of what might otherwise be the normal procedure." Id. "The Constitution requires a waiver that literally carries with it life-or-death consequences to be made knowingly and intelligently." St. Pierre, 217 F.3d at 948. Fahy has rebutted by clear and convincing evidence Judge Sabo's factual findings, see 28 U.S.C. § 2254(e)(1), and established he did not waive his rights to all appeals and collateral relief in the August 9, 1996, colloquy.

B. EXHAUSTION AND PROCEDURAL DEFAULT

1. Legal Principles

This court's ability to review Fahy's claims hinges on the interplay between the doctrines of exhaustion and procedural default. O'Sullivan v. Boerckel, 526 U.S. 838, 844-45, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999). Underlying both concepts are

concerns regarding comity and federalism; a state must be given a chance to correct its own alleged mistakes before the federal habeas court is asked to do so. See id.

The exhaustion requirement functions to ensure that state courts have the initial opportunity to review federal constitutional challenges to state convictions. "State prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan, 526 U.S. at 845; see also Dreher v. Pinchak, 2003 U.S. App. LEXIS 3859, at *13 (3d Cir. Mar. 3, 2003)(citation omitted). A federal habeas petitioner must show that the claims included in his petition were fairly presented to each level of state court. Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993). To "fairly present" a claim, a petitioner must assert the factual and legal grounds of the federal claim with sufficient precision to provide the state court with notice and an opportunity to pass on the claim. See Keller v. Larkins, 251 F.3d 408, 413 (3d Cir. 2001). "Specifically, a habeas petitioner's state court pleadings must demonstrate that he or she has presented the legal theory and supporting facts asserted in the federal habeas petition in such a manner that the claims raised in the state courts are 'substantially equivalent' to those asserted in the federal court." Dreher, 2003 U.S. App. LEXIS at *13 (citing Doctor v. Walters, 96 F.3d 675 at 678). If a claim has not been

fairly presented to the state courts, but state procedural rules preclude a petitioner from seeking further state court relief, the claims are technically exhausted, but "procedurally defaulted." Lines v. Larkins, 208 F.3d at 160.

Procedural default also occurs where a state prisoner presents a federal claim to the state court, but the state court refuses to review that claim on procedural grounds (i.e., the claim was presented out of time). Harris v. Reed, 489 U.S. 255, 263, 103 S. Ct. 308, 109 L. Ed. 2d 1038 (1989). Ordinarily, procedural default precludes federal habeas review of the defaulted claim, see Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977); however, a claim is only procedurally defaulted if the state procedural rule is independent of federal law and adequately provides the state court with grounds to bypass review of federal issues. A purported procedural default that is not independent and adequate may be disregarded; the claims are to be treated by the federal court as exhausted and ripe for merits based review. See Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983).

The "independent and adequate" requirement is based on the Constitution's prohibition against advisory opinions. The federal habeas court's remedy is limited to reversing and remanding on a federal ground. If the state court has decided against petitioner on an independent and adequate state ground, any federal habeas

relief would be merely advisory, because it would not change the outcome of the state court decision. See Lambrix v. Singletary, 520 U.S. 518, 523, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997). However, because the absence of federal review might undermine federal constitutional rights, requiring an independent and adequate state ground ensures that this does not happen. See Herb v. Pitcairn, 324 U.S. 117, 125, 65 S. Ct. 459, 89 L. Ed 2d 789 (1945).

If an asserted state ground is not independent of federal law, then a federal habeas writ would not be an advisory opinion, because the federal writ would, through the Supremacy Clause, supersede the state court's determination of federal law. In Michigan v. Long, 463 U.S. at 1032, the Supreme Court held that federal court review remains available when the asserted state ground is not independent of federal law. An asserted alternative state ground is not independent of federal law if it:

fairly appears to rest primarily on federal law, or [is] ... interwoven with the federal law, [or when] ... the adequacy and independence of any possible state law ground is not clear from the face of the opinion [But if] a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

Long, 463 U.S. at 1041.

When a state court refuses to reach the merits of a federal

constitutional challenge because that challenge did not satisfy a state procedural rule, a federal court will defer to that judgment so long as the state procedural rule is "consistently or regularly applied," Johnson v. Mississippi, 486 U.S. 578, 589, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988), and is "firmly established and regularly followed." James v. Kentucky, 466 U.S. 341, 348, 104 S. Ct. 1830, 80 L. Ed. 2d 346 (1984). If a state Supreme Court occasionally forgives procedural default, but applies it in the "vast majority" of cases, then the federal habeas court ordinarily should give the state rule preclusive effect. See Dugger v. Adams, 489 U.S. 401, 410 n.6, 109 S. Ct. 1211, 103 L. Ed. 2d 435 (1989).

A procedural default is adequate only if: "(1) the state procedural rule speaks in unmistakable terms; (2) all state appellate courts refused to review the petitioner's claims on the merits; and (3) the state courts' refusal in this instance is consistent with other decisions." Doctor v. Walters, 96 F.3d 675, 683-84 (3d Cir. 1996). Adequacy is evaluated as of the date of the default. Id. at 684.

If a procedural default is both independent and adequate, a federal habeas court may still undertake merits based review if the petitioner demonstrates "cause" for the default and resulting "prejudice," Edwards v. Carpenter, 529 U.S. 446, 451, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000), or the petitioner shows that the

federal court's refusal to hear the claim would result in a "miscarriage of justice." Wainwright, 433 U.S. at 91. To show cause, a petitioner must show that a factor "external to the defense impeded counsel's efforts to comply with the State's procedural rule." Coleman v. Thompson, 501 U.S. 722, 753, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). To show prejudice, the petitioner must prove that errors at trial "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Murray v. Carrier, 477 U.S. 478, 494, 111 S. Ct. 2639, 91 L. Ed. 2d 397 (1986).

Exhaustion applies even where the petitioner claims that the ineffectiveness of his counsel created the procedural default precluding merits-based review. A habeas petitioner cannot claim that procedural default was caused by ineffective assistance of counsel without first presenting that claim to the state courts. Edwards, 529 U.S. at 452.

2. Relevant Facts

On August 4, 1995, Fahy filed his third PCRA petition. See Court of Common Pleas, Appeals Division, Docket Entry 37. In it, he claimed: 1) his trial counsel had been ineffective for failing to present evidence at sentencing regarding Fahy's mental health and that such evidence would have supported finding a third mitigating factor; 2) trial counsel was ineffective for failing to object to the prosecutor's closing argument which lessened the

jury's sense of responsibility; 3) trial counsel was ineffective for failing to object to the prosecutor's allusion to sexual misconduct not resulting in a conviction during the penalty phase; 4) trial counsel was ineffective for failing to object to numerous instances of prosecutorial misconduct during the guilt and penalty phase; 5) the trial court failed to protect Fahy's rights by informing the jury it must consider the first degree murder charge prior to, and to the exclusion of, lesser included offenses, by failing to account for changes made to the verdict form after verdict recorded, and by giving inappropriate instructions on the intent requirement for first degree murder; 6) trial counsel was ineffective for failing to request a competency examination and failing to object to inappropriate instructions regarding certain mitigating factors including the "age" and "catch-all" factors; 7) trial counsel's performance as a whole constituted ineffective assistance in violation of federal and state constitutional guarantees; 8) the death penalty as applied in Pennsylvania violates the Eighth Amendment proportionality requirement; and, 9) "The integrity of the judicial system does not allow for the defendant's execution at this time." Id. Fahy supplemented the petition on September 12, 1995, with authority relevant to his claim that counsel was ineffective for failing to object to the introduction of uncharged sexual crimes during the penalty phase of trial. See Court of Common Pleas, Appeals Division, Docket

Entry 38. After an evidentiary hearing, Judge Sabo denied the petition, see Findings of Fact, Conclusions of Law, and Adjudication dated October 25, 1995 (Respondents' Exhibit 1), and Fahy appealed to the Pennsylvania Supreme Court. While the appeal was pending, Fahy initiated the waiver of his rights discussed in section A, supra. The Pennsylvania Supreme Court remanded to the PCRA court for a colloquy on waiver, but retained jurisdiction over Fahy's petition for post conviction relief. The PCRA court, with Judge Sabo presiding, determined Fahy had knowingly renounced all rights to appeal and collateral relief. Following the waiver proceedings, Fahy signed an affidavit stating he did not wish to relinquish his rights and wanted to litigate his claims.

By letter dated September 6, 1996, the Prothonotary of the Supreme Court of Pennsylvania directed counsel to follow the briefing schedule already established, but limited argument to Fahy's understanding of the waiver proceedings. Therefore, on appeal, the sole issue considered by the Pennsylvania Supreme Court was the validity of the purported waiver. See Fahy-3. The underlying claims initially raised by Fahy in his third PCRA petition were not addressed.

Fahy's counsel then filed a fourth PCRA petition in November, 1997, in which he raised twenty-one issues.¹³ The PCRA court

¹³The issues raised were:

1. Whether the absence from the record of the transcript of the voir dire proceedings violated Fahy's's rights to

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- meaningful appellate review and effective assistance of counsel and whether prior counsel were ineffective for failing to raise this matter?
2. Whether Fahy is entitled to relief from his convictions and sentence because the Commonwealth used its peremptory strikes in a racially discriminatory manner?
 3. Whether Fahy's sentence should be vacated because the jury was never given any instruction concerning the meaning of the torture aggravating circumstance, including the fact that a finding of the torture aggravator requires a finding of intent to torture?
 4. Whether Fahy's sentence should be vacated because there is no definitive proof that the jury found the torture aggravating circumstance, rendering his death sentence unreliable, and whether Fahy was denied meaningful proportionality review on direct appeal?
 5. Whether the trial court erred in denying relief and declining to conduct a hearing on Fahy's claim of ineffective assistance of counsel during the sentencing stage?
 6. Whether the trial court failed to accurately instruct the jury on parole?
 7. Whether Fahy is entitled to relief because a confession was unconstitutionally obtained and used against him?
 8. Whether Fahy's conviction must be vacated because of prosecutorial misconduct during the guilt phase of trial?
 9. Whether Fahy's sentence must be vacated because of prosecutorial misconduct during the sentencing phase of trial?
 10. Whether Fahy's death sentence must be vacated because the jury was not permitted to consider and give effect to the non-statutory mitigating evidence that was presented?
 11. Whether Fahy is entitled to relief from his death sentence because the penalty phase jury instruction and verdict sheets unconstitutionally indicated that the jury had to unanimously find any mitigating circumstance before it could give effect to that circumstance in its sentencing decision?
 12. Whether Fahy's death sentence must be vacated because the proportionality performed by this court did not provide him with meaningful appellate review?
 13. Whether Fahy's convictions and sentence should be vacated because the trial court gave a defective reasonable doubt instruction at the guilt phase that was not corrected at the sentencing phase?
 14. Whether prosecutorial argument diminished the jury's sense of responsibility and violated the Sixth, Eighth, and

dismissed the petition because it was time-barred and failed to set forth a prima facie case establishing a miscarriage of justice had occurred. The fact Fahy had purportedly waived his rights to pursue post conviction relief was mentioned only in a footnote:

We need not address the issues of whether CLEADA attorneys have authority to file this fourth petition for collateral relief or whether [Fahy] did withdraw, or even may withdraw, his waiver of collateral and appellate proceedings at this juncture. Assuming, arguendo, that [Fahy] has now renounced his earlier waiver, as determined herein, [he] is not entitled to relief as his petition is untimely.

Fahy-4, 737 A.2d at 224-25 n.9.

The Pennsylvania Supreme Court affirmed; as the petition was

Fourteenth Amendments?

15. Whether Fahy's death sentence should be vacated because the jury was inhibited with respect to mitigating circumstances due to insufficient instructions by the trial court?

16. Whether Fahy is entitled to relief from his sentence because Pennsylvania's (d)(9) "significant history" of violent felony convictions aggravating circumstance is unconstitutionally vague? 17. Whether Fahy's sentence should be vacated because the trial court gave an erroneous "preponderance of the evidence" instruction at the sentencing phase?

18. Whether Fahy is entitled to relief from his conviction and sentence because the trial court gave an impermissible progression charge?

19. Whether all prior counsel were ineffective for failing to raise and/or properly litigate the issues presented in these proceedings?

20. If this court does not grant relief on the claims discussed herein, whether it should remand to the Court of Common Pleas for resolution of recently discovered claims regarding racial discrimination at capital sentencing?

21. Whether relief is appropriate because of the cumulative effect of the errors described in this brief?

Fahy-4, 737 A.2d at 216 n.5.

untimely under the Post Conviction Relief Act, it determined it lacked jurisdiction to review it. See Fahy-4. Both the decision of the PCRA court, as well as that of the Pennsylvania Supreme Court, were based on the November 17, 1995, amendment to the PCRA, requiring all PCRA petitions "including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final" 42 Pa.C.S. § 9545(b)(1). A judgment becomes final "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." 42 Pa.C.S. § 9545(b). Because Fahy's judgment became final on January 19, 1987, upon the expiration of the 90-day period for seeking appellate review to the United States Supreme Court of the state court's October 21, 1986 order affirming conviction and judgment of sentence, see Kapral v. United States, 166 F.3d 565 (3d Cir. 1999), the fourth PCRA petition had been filed more than ten years out of time.

The Pennsylvania Supreme Court also considered certain exceptions to the timeliness requirement, outlined in 42 Pa.C.S. § 9545(b)(1).¹⁴ Claiming he had been threatened and harassed by

¹⁴(b) TIME FOR FILING PETITION.--

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
(i) the failure to raise the claim previously was the result of interference by government officials with the

guards at the time of his waiver colloquy, Fahy argued that his untimeliness should be excused because his failure to raise claims was the result of "interference by government officials." See 42 Pa.C.S. § 9545(b)(1)(i). The court held that the issue of waiver had been litigated and rejected; Fahy had, in the past, offered the same explanation for his waiver, the court stated, but the court had nevertheless found the waiver valid.

Assuming, arguendo, the guards had coerced Fahy, and the government interference exception to the timeliness requirement was applicable, the petition would still fail on timeliness grounds because any exception to the one-year deadline must be invoked within 60 days of the date from which the claim could have been filed. 42 Pa.C.S. § 9545(b)(2). Fahy did not file within 60 days of the known government interference (based on date of Fahy's affidavit of August 21, 1996, in which he says he was subjected to threats on August 9, 1996, the day of the colloquy). Instead, the court found, he waited for more than a year after the alleged

presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S. § 9545(b)(1).

interference, until November 12, 1997, to file the PCRA petition alleging interference. As a result, Fahy could not invoke the exception to the state timeliness requirement.

According to the Pennsylvania Supreme Court, Fahy defaulted his claims twice: 1) in January, 1988 (one year after Fahy's conviction became final), because successive petitions filed after that date were retroactively barred by the 1996 PCRA amendments, and 2) in August, 1996, as a result of Fahy's failure to file a fourth PCRA petition within sixty days of the alleged guard threats and harassment that prompted his waiver. Fahy-4, 737 A.2d at 218-219.

Claiming the court still applied the "relaxed waiver" doctrine¹⁵ at the time his petition was filed, Fahy argued he was

¹⁵The relaxed waiver doctrine is the term accorded to the Supreme Court of Pennsylvania's practice of relaxing enforcement of state procedural rules in death penalty cases. This practice had been applied in numerous capital cases both on direct appeal and in PCRA proceedings, in order to reach the merits of petitions despite violations of certain statutory and judicial procedural rules. See, e.g., Commonwealth v. Spatz, 552 Pa. 499, 716 A.2d 580, 591 (1998) (reviewing merits of claims because of "our practice to relax waiver rules in capital cases"); Commonwealth v. Beasley, 544 Pa. 554, 563, 678 A.2d 773 (1994) (Despite petitioner's failure to comply with the applicable PCRA procedural rules, which should have resulted in the action's dismissal, "since this is a capital case, this court will address appellant's claims."), cert. denied, 520 U.S. 1121, 117 S. Ct. 1257, 137 L. Ed. 2d 337 (1994); Commonwealth v. Dehart, 539 Pa. 5, 25, 650 A.2d 38 (1994) ("Appellant concedes that this issue is technically waived because it was not previously raised below, we will nonetheless address it because we have not been strict in applying our waiver rules in death penalty cases."); Commonwealth v. McKenna, 476 Pa. 428, 441, 383 A.2d 174 (1978) ("The waiver rule cannot be exalted to a position so lofty as to require this

entitled to review of his claims despite the time bar and his failure to qualify for any exceptions thereto. The court rejected this contention: "[T]his court has expressly found that the 'relaxed waiver' doctrine will no longer be applicable in post conviction appeals and affords no relief in the context of an untimely PCRA petition. The issue before the court pertains to jurisdiction and not waiver, thus, Appellant's reliance on the 'relaxed waiver' doctrine is misplaced." Fahy-4, 737 A.2d at 221 (citation omitted).

Fahy's execution was then set for October 19, 1999. Six days prior to the scheduled date, Fahy filed a motion for a stay of execution and an amended habeas petition in federal court. Chief Judge Giles, acting as emergency judge, granted a stay and concluded that, despite the one-year statute of limitations under AEDPA, 28 U.S.C. § 2244(d)(1), the petition was not time barred based on principles of both statutory and equitable tolling. On appeal, statutory tolling as a basis for hearing the petition was rejected, but it was held that equitable tolling applied. See Fahy v. Horn, 240 F.3d 239, 246 (3d Cir. 2001).

If the limitation period is not tolled in this case, Fahy will be denied all federal review of his claims.

Court to blind itself to the real issue - the propriety of allowing the state to conduct an illegal execution of a citizen."). For a lengthier exposition of cases addressing relaxed waiver, see Natali, New Bars in Pennsylvania, 73 Temp. L. Rev. at 86, n.127.

Here the penalty is death, and courts must consider the ever-changing complexities of the relevant provisions Fahy attempted to navigate. Because the consequences are so grave and the applicable law is so confounding and unsettled, we must allow less than 'extraordinary' circumstances to trigger equitable tolling of the AEDPA's statute of limitations when a petitioner has been diligent in asserting his or her claims and rigid application of the statute would be unfair.

Id. at 245. Noting that, at the time Fahy filed his fourth PCRA petition, Pennsylvania law regarding the new PCRA one-year time limitation was "inhibitively opaque," the court concluded that Fahy had reasonably and diligently asserted his claims, thereby rendering him eligible to benefit from equitable tolling. Id. The United States Supreme Court denied certiorari, and Fahy's petition is before this court.

3. Discussion

The Commonwealth advances several theories as to why this court is nevertheless precluded from reviewing the merits of Fahy's claims. It argues Fahy has failed to assert any claims in his current federal habeas petition not raised previously in one of his four PCRA petitions. Though some of those claims adjudicated by the Pennsylvania Supreme Court are exhausted, the state argues, the claims in Fahy's third PCRA petition were raised and waived (and never exhausted), and those in his fourth petition were raised out of time under the PCRA; in both cases, the claims are procedurally defaulted.

Fahy argues that the alleged default-by-waiver is irrelevant,

since he fairly presented and exhausted all the claims raised herein in his fourth PCRA petition. That petition was denied on the basis of the PCRA time bar, not the purported waiver, and that rule was not "firmly established and regularly followed," James v. Kentucky, 466 U.S. at 348, at the time of the alleged procedural miscue. To the contrary, Fahy asserts, the only firmly established rule in Pennsylvania capital cases at that time required merits review of all claims under the relaxed waiver doctrine, first announced in Commonwealth v. McKenna, 383 A.2d 174 (Pa. 1978).

As discussed above, when a default pursuant to an independent and adequate state rule prevents a state court from reaching the merits of a federal claim, that claim generally will not be reviewed in federal court. Laird v. Horn, 159 F. Supp. 2d 58, 70 (E.D. Pa. 2001) (internal citations omitted). Whether by waiver, statutory time bar, or previous litigation, the Commonwealth argues, Fahy has procedurally defaulted his claims and this court is precluded from conducting a merits review.

Normally, a finding regarding a petitioner's date of default is of paramount importance, since the reviewing court must determine whether the underlying state rule was consistently and regularly applied at the time of the default. Here, the Pennsylvania Supreme Court found that Fahy defaulted his claims twice: first, in January, 1988; and second, in August, 1996. The Commonwealth disputes that a default occurred in January, 1988,

and contends that the Pennsylvania Supreme Court only used that date to determine whether Fahy's fourth PCRA petition was timely under 42 Pa.C.S. § 9545(b)(1). However, even if this court were to endorse the Commonwealth's position that the correct date of default occurred in August, 1996, neither default by waiver nor the PCRA time bar were firmly established and regularly followed rules as of that date, and thus cannot be considered "adequate" state procedural rules barring consideration of Fahy's claims.¹⁶

Inextricably intertwined with the adequacy determination in this case is the doctrine of relaxed waiver. The Pennsylvania Supreme Court formerly applied a relaxed waiver rule for PCRA review of capital convictions, whereby the Court's practice was to address all issues arising in a death penalty case whether or not the issue was waived. In Commonwealth v. Albrecht, 554 Pa. 31, 720 A.2d 693 (1998), decided in November, 1998, the Pennsylvania Supreme Court explicitly abandoned the practice of reaching the merits of a capital prisoner's claims despite procedural defaults. "While it has been our 'practice' to decline to apply ordinary waiver principles in capital cases, we will no longer do so in PCRA appeals." Id. at 700. The Albrecht decision signaled a significant transformation in the court's approach to relaxed

¹⁶Section 9545 is clearly an independent state ground for reviewing habeas corpus claims, as it does not rely on federal law for its determination of the availability of state post-conviction review.

waiver; however, it does not preclude Fahy's claims because both his alleged dates of default occurred before the Albrecht decision.

In November, 1997, in concluding equitable tolling should apply to Fahy's federal habeas petition, the Third Circuit considered "the ever-changing complexities of the relevant provisions Fahy attempted to navigate." Describing Pennsylvania's procedural terrain, the court stated:

[A]t the time Fahy filed his fourth PCRA petition Pennsylvania law was unclear on the operation of the new PCRA time limit. The Pennsylvania courts could have accepted Fahy's petition as timely because of its role within the capital case, see Banks v. Horn, 126 F.3d 206 (3d Cir. 1997), or could have found the government interference exception applicable. Commonwealth v. Lark, 560 Pa. 487, 746 A.2d 585 (2000). The law at the time of Fahy's petition was inhibitivey opaque. Fahy filed his fourth PCRA petition in November, 1997, months before the Pennsylvania Supreme Court announced that it would no longer observe the relaxed waiver rule in Commonwealth v. Albrecht, 554 Pa. 31, 720 A.2d 693 (1998). Further, the Pennsylvania Supreme Court did not clarify that the state PCRA statute was jurisdictional and not waivable until 1999 In Banks, 126 F.3d at 214, we rejected the Commonwealth's claim that a PCRA petition would be timebarred and required Banks to return to state court because we could not confidently determine that the state court would not apply the relaxed waiver rule it had applied in previous capital cases. If we could not predict how the Pennsylvania court would rule on this matter, then surely we should not demand such foresight from the petitioner.

Fahy, 240 F.3d at 245.

It now seems clearly established that a late-filed PCRA petition will not be considered under the relaxed waiver rule, see

Commonwealth v. Freeman, 2003 Pa. LEXIS 216 (May 30, 2003); however, in August, 1996 (the latest of the two alleged default dates), relaxed waiver remained viable in Pennsylvania cases "because of the permanent and irrevocable nature of the death penalty." Commonwealth v. Brown, 551 Pa. 465, 711 A.2d 444, 455 (1998). As noted most recently in Freeman, "The operating principle behind that rule, as originally formulated, was to 'prevent this court from being instrumental in an unconstitutional execution.'" 2003 Pa. LEXIS 916, at *17 (quoting Albrecht, 720 A.2d at 700). It was not clearly established at the time of Fahy's waiver that a late-filed PCRA petition in a capital case would not be considered on the merits. Because the relaxed waiver doctrine remained viable at the time of Fahy's alleged defaults, his fourth PCRA petition was not dismissed on the basis of an adequate state ground; there was no procedural default sufficient to prevent consideration of the claims in Fahy's federal habeas petition.

III. REVIEW OF THE MERITS

A. STANDARD OF REVIEW

Fahy argues that, except for suppression of Fahy's confession and the torture instruction provided to the jury,¹⁷ none of the

¹⁷As to those claims, Fahy posits the state court's resolution of the suppression issue reflects an unreasonable application of the law and its resolution of the torture instruction, an unreasonable determination of the facts under 28

claims presented in his federal petition were "adjudicated on the merits" by the Pennsylvania Supreme Court. Therefore, this court is not bound by the AEDPA's highly deferential standard of review, but rather, must comport with pre-AEDPA standards and conduct a de novo review.

The Commonwealth responds that several of the claims Fahy raises in his federal petition were raised in 1995, in his third PCRA petition. Although the parties disagree over whether those claims were exhausted because of the intervening waiver proceedings, the Commonwealth argues exhaustion is irrelevant to the standard of review; the PCRA court's treatment of the claims constitutes an "adjudication on the merits," and the AEDPA standards apply.

1. Pre-AEDPA Review

Prior to the passage of the AEDPA, a state court's resolutions of constitutional issues were accorded little deference; pure questions of law, along with mixed questions of law and fact, were reviewed de novo. See Terry Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). Under the pre-AEDPA standard, a state court's factual findings were presumed correct unless, inter alia, the record did not fairly support those findings.

U.S.C. § 2254.

2. Review Under AEDPA

The AEDPA, which took effect on April 24, 1996, amended the standards for reviewing state court judgments in federal habeas petitions filed under 28 U.S.C. § 2254 by elevating the level of deference applied to state court determinations. In analyzing the merits of a habeas petitioner's claims, considerations under the AEDPA are divided; a federal court considers separately the state court's legal analysis and factual determinations. See 28 U.S.C. § 2254(d)(1)-(2). When according deference under the AEDPA, federal courts are to review a state court's determinations on the merits only to ascertain whether the state court had reached a decision that was "contrary to" or an "unreasonable application" of clearly established Supreme Court law, or if a decision was based on an "unreasonable determination" of the facts. To label a state court decision "contrary to" Supreme Court precedent, the state court must have reached a "conclusion opposite to that reached by the [Supreme] Court on a question of law or if the state court decides a case differently than the [Supreme] Court has on a set of materially indistinguishable facts." Terry Williams, 529 U.S. at 413.

An "unreasonable application" results where "the state court identifies the correct governing legal principle from the [Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." 529 U.S. at 413.

"In other words, a federal court may grant relief when a state court has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced.'" Wiggins v. Smith, 2003 U.S. Lexis 5014, at *19-20 (June 26, 2003) (O, Connor, J.) (internal citations omitted). In order for a reviewing federal court to find a state court's application of Supreme Court precedent "unreasonable," the state court decision must be "more than incorrect or erroneous"; it must have been "objectively unreasonable." Id. at *20 (citations omitted). A federal court can also grant habeas relief if a state court unreasonably determined the facts in light of the evidence presented to it, see § 2254(d)(2). Finally, factual issues determined by a state court are presumed to be correct and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. See § 2254(e)(1).

On its face, however, § 2254(d) only applies to claims that have been "adjudicated on the merits." As noted by the district court in Bronshtein v. Horn, 2001 U.S. Dist. LEXIS 9310, *37 (E.D. Pa. July 5, 2001), "There is some controversy among the circuits as to precisely what the 'adjudicated on the merits' clause means."¹⁸

¹⁸ In January, 2001, the Second Circuit Court of Appeals held that state court judges would be required to provide a thorough analysis of federal claims in order to have its decision constitute an "adjudication on the merits" and enjoy deference under the AEDPA. Washington v. Scriver, 240 F.3d 101, 107-110

(2d Cir. 2001). Six months later, in June, 2001, the same panel withdrew its opinion and issued an amended decision disposing of the case on different grounds. Washington v. Scriver, 255 F.3d 45 (2d Cir. 2001). The panel declined, in its later opinion, to render a decision on the adjudication requirement of the AEDPA, but noted in dicta that at least six justices in the seminal AEDPA case, Terry Williams v. Taylor, appeared to endorse the rationale that a state court must identify the legal principles on which it relied to effect an "adjudication on the merits." Washington v. Scriver, 255 F.3d at 62 (Calabresi, J., concurring). Only a month later, in Sellan v. Kuhlman, 261 F.3d 303, 310 (2d Cir. 2001), a different panel resolved the matter by looking to the plain language of § 2254(d). The court concluded the word "adjudication" did not inherently require a statement of causes or motives.

With its decision in Sellan, the Second Circuit joined the Fourth, Fifth, and Tenth Circuits; each has adopted a narrow definition of "adjudicated on the merits" and held that virtually any decision of a state court is an adjudication entitled to deference under § 2254(d). See Bell v. Jarvis, 236 F.3d 149 (4th Cir. 2000) (summary order is an adjudication on the merits entitled to deference under the AEDPA); Neal v. Puckett, 239 F.3d 683 (5th Cir. 2001) (same); Aycox v. Lyttle, 196 F.3d 1174 (10th Cir. 1999) (summary decision without even cursory reasoning can constitute an adjudication on the merits for purposes of the AEDPA so long as based on substantive and not procedural grounds).

The First Circuit has adopted a broader view of "adjudication." In Dibenedetto v. Hall, 272 F.3d 1 (1st Cir. 2001), the court stated:

If the state court has not decided the federal constitutional claim (even by reference to state court decisions dealing with federal constitutional issues), then we cannot say that the constitutional claim was 'adjudicated on the merits' within the meaning of § 2254 and therefore entitled to the deferential review prescribed in subsection (d).

The Sixth Circuit appears divided; it conducted a de novo review of habeas claims after an Ohio state court failed to examine petitioner's claims under the federal Constitution in Doan v. Brigano, 237 F.3d 722 (6th Cir. 2001) ("unreasonable" under Terry Williams not to analyze claims under Sixth Amendment so "contrary to" Supreme Court precedent), but accepted the

Fahy cites Hameen v. Delaware, 212 F.3d 226 (3d Cir. 2000), cert. denied, 121 S. Ct. 1365 (2001), to support his contention that his claims were not "adjudicated on the merits" and so deference should not be accorded to the PCRA court's determinations. In Hameen, the Third Circuit found that the Delaware Supreme Court had failed to examine the petitioner's claims under controlling decisions of United States Supreme Court. 212 F.3d at 248. "This point is critical because under the AEDPA the limitation on the granting of an application for a writ of habeas corpus is only 'with respect to any claim that was adjudicated on the merits in State court proceedings.' Hence we exercise pre-AEDPA independent judgment on the ... claim." Id.

The Court of Appeals' decision in Werts v. Vaughn, 228 F.3d 178, 195 n.13 (3d Cir. 2000), decided after Hameen, arguably provides a fuller picture of the broad meaning of "adjudication" under AEDPA; the Commonwealth argues that under Werts, section 2254(d) applies even where there is not a full explication of the state court's rationale.

More recently, in Chadwick v. Janecka, 312 F.3d 597, 606 (3d Cir. 2002), the Third Circuit made clear that it rejected the

notion that unreasoned state court opinions were nonetheless "adjudications on the merits" entitled to deference in Harris v. Stovall, 212 F.3d 940, 943 (6th Cir. 2000).

narrow meaning ascribed to "adjudication" embraced by the majority of circuits. It explained:

Hameen, Appel¹⁹ and Everett²⁰ stand for the proposition that if an examination of the opinions of the state courts shows that they misunderstood the nature of a properly exhausted claim and thus failed to adjudicate that claim on the merits, the deferential standards of review in AEDPA do not apply. Hameen, Appel, and Everett did not deal with summary dispositions -- but Weeks v. Angelone, 528 U.S. 225, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000), did.

In Weeks, the petitioner 'presented 47 assignments of error in his direct appeal to the Virginia Supreme Court.' The state supreme court rejected number 44 without explanation. Reviewing this claim, the Fourth Circuit recognized that the AEDPA standards do not apply when a state court has not adjudicated a claim on the merits but the Fourth Circuit held that 'where, as here, the state supreme court has adjudicated a claim on the merits but has given no indication of how it reached its decision, a federal habeas court must still apply the AEDPA standards of review.' Applying those standards, the Fourth Circuit denied the application for a certificate and dismissed the habeas petition.

[T]he Supreme Court clearly held that the § 2254(d) standards apply when a state supreme court rejects a claim without giving any 'indication of how it reached

¹⁹In Appel v. Horn, 250 F.3d 203 (3d Cir. 2001), the panel held that the petitioner had properly presented in the state courts a claim of the constructive denial of counsel but that the state courts had misconstrued the claim as one of the ineffective assistance of counsel.

²⁰In Everett v. Beard, 290 F.3d 500 (3d Cir. 2002), the court held that the § 2254(d) standards did not apply because the state courts had not adjudicated the petitioner's properly exhausted claim that his Sixth Amendment right to the effective assistance of counsel had been violated but instead had decided only that his rights under state law had not been abridged.

its decision.'

Needless to say, if Hameen, Appel, and Everett conflict with Weeks, the former must give way, but we see no such conflict. Hameen, Appel, and Everett govern when the opinion of a state court reveals that it did not adjudicate a claim; Weeks applies when a claim is rejected without explanation. In the present case, the Pennsylvania Supreme Court rejected Chadwick's claim on the merits without explanation. Weeks is therefore the governing precedent, and § 2254(d) must be applied.

Chadwick, 312 F.3d at 606 (internal citations omitted).

But under Chadwick, the Supreme Court of Pennsylvania's refusal to adjudicate the merits of any constitutional claim set forth in Fahy's fourth PCRA petition, because it was filed outside the one-year time limit contained in 42 Pa. C.S. § 9545(b), would not require application of § 2254(d). See Bronshtein, 2001 U.S. Dist. LEXIS, at *38-39 (refusing to hear merits of petitioner's claims because of the one-year time limit set forth in the PCRA not an "adjudication on the merits" so no deference under the AEDPA accorded). This court will review all new claims raised in Fahy's fourth time-barred petition de novo.

However, Fahy also filed three prior petitions for post-conviction relief in state court, some with duplicative claims, and each with a disparate procedural result. Therefore, this court will examine separately how the Pennsylvania Supreme Court handled all earlier claims, i.e., whether, under Chadwick, there was an "adjudication on the merits" entitled to deference under § 2254(d).

In his fourth, time-barred PCRA petition, Fahy reasserted many of the same claims from his third PCRA petition, addressed by the PCRA court (Judge Sabo), but not the Pennsylvania Supreme Court. Fahy argues it is only this last petition, and the resulting state court decision dismissing it as time-barred (Fahy-4), that bears relevance on the applicability of § 2254(d). The Commonwealth contends this position is misguided; it argues the PCRA court's determinations regarding those claims constitute "adjudications on the merits" despite the fact the claims were never reviewed by the Pennsylvania Supreme Court.

Even if this court is unwilling to accept Judge Sabo's determinations as "adjudications," the Commonwealth asserts, this court must interpret the Pennsylvania Supreme Court's decision in Fahy-4 as silent on the merits, and "look-through" to the last clear exposition on the merits by a state court. See Dowthitt v. Johnson, 230 F.3d 733, 753 (5th Cir. 2000) (where state habeas decision was silent on claim not raised to that court, federal habeas court should "look through to the last clear state decision on the matter"). Here, that would require this court to look back to Judge Sabo's October 25, 1995, Findings of Fact, Conclusions of Law, and Adjudication ("1995 Opinion") (Resp. Ex. 1) denying relief requested in Fahy's third PCRA petition.

In the 1995 Opinion, Judge Sabo concluded that all issues not raised in an appellant's first post-conviction petition were

waived. To overcome the procedural defect of waiver, a petitioner must show the allegations of error resulted in the conviction of an innocent individual, and Judge Sabo found Fahy's allegation failed to meet this requirement. (Resp. Ex. 1, 23). Invoking the relaxed waiver standard, Judge Sabo nevertheless addressed each of Fahy's claims. The Commonwealth argues this court must defer to Judge Sabo's legal conclusions in compliance with § 2254(d) and factual findings under § 2254(e)(1). See also Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001).

Fahy denies Judge Sabo's 1995 Opinion, addressing claims raised in Fahy's third PCRA petition, is an "adjudication on the merits." Again, Fahy argues that Fahy-4, in which the Pennsylvania Supreme Court deemed Fahy's fourth PCRA petition time-barred, is the only relevant decision to our determination regarding standard of review; like respondents, he cites a Fifth Circuit case in support of his position. See Fisher v. Texas, 169 F.3d 295 (5th Cir. 1999) (affirming trial court's denial of habeas petition). Finding that the state court had resolved petitioner's claims on procedural grounds, the Fisher court stated:

A review of the opinion rendered by the Texas Court of Appeals in this case clearly reveals that the state court did not adjudicate the merits of Fisher's Batson-religion claim. The state court explicitly decided the religion issue on waiver grounds, stating that it did not need to 'reach the question of discrimination based on religion,' because Fisher had failed to object on religion grounds at his trial. The Texas Court of Appeals's awareness of, and explicit reliance on, a procedural ground to dismiss Fisher's claim is

determinative in this case, and we therefore cannot apply the AEDPA deference standards to the state court's findings and conclusions.

169 F.3d at 300 (internal citations to record omitted). Fahy argues that, like the state court in Fisher, the Fahy-4 court's reliance on waiver, a procedural ground, to deny relief "is determinative in this case," id.

Judge Sabo's 1995 opinion constitutes an "adjudication on the merits" of the claims considered therein. Notwithstanding his pronouncement that all issues not raised in Fahy's first post-conviction petition were deemed waived under the law, Judge Sabo invoked the relaxed waiver doctrine to consider those claims. Unlike the state court in Fisher, the PCRA court ultimately did not rely on a procedural ground to deny relief, and there is no requirement, as under the doctrine of exhaustion, that mandates the highest state court pass on claims in order to effect an "adjudication on the merits." Judge Sabo's October 25, 1995, Findings of Fact, Conclusions of Law, Adjudication are entitled to deference under the AEDPA. 28 U.S.C. §§ 2254(d) & (e)(1).

B. ANALYSIS

1. Introduction

In his amended petition for habeas corpus, Fahy raised twenty-one claims for relief, some of which were addressed by the state court on direct appeal (entitled to deference under the AEDPA), several of which were "adjudicated on the merits" by Judge

Sabo following Fahy's third PCRA petition (entitled to deference under the AEDPA), and others raised for the first time in Fahy's fourth time-barred PCRA petition (entitled to pre-AEDPA, or de novo, review). He later withdrew four of the twenty-one claims, and on December 10, 2002, this court heard oral argument on six of the remaining claims.²¹

The claims presented to this court for review are as follows:

CLAIM I. Transcript of the voir dire proceedings absent from the record resulting in a violation of Fahy's rights to a meaningful appeal, and appellate counsel was ineffective for failing to ensure there was a complete record in violation of Fahy's rights under the Sixth, Eighth and Fourteenth Amendments.

CLAIM II. The Commonwealth used its peremptory strikes in a racially discriminatory and/or gender discriminatory manner. Ineffective counsel for failure to litigate this claim.

CLAIM III. Ineffective assistance of counsel during sentencing (penalty) phase of trial for:

- A. Failure to develop and present mitigating evidence;
- B. Failure to contemporaneously object or request an instruction in response to prosecutor's suggestion that Fahy was a "serial pedophile";²²
- C. Failure to contemporaneously object or request an instruction in response to prosecutor's suggestion that Fahy was involved in an incestuous relationship with the victim; and,
- D. Discussion of the possibility of parole and failure to contemporaneously object or request an instruction in response to prosecutor's arguments concerning Fahy's future dangerousness and his possibility of parole.

²¹Oral argument was heard on Claims I, III, IV, V, VIII, and IX. Fahy's 11 additional claims for relief were submitted on the briefs.

²²Claim VII discusses in more detail petitioner's claims of prosecutorial misconduct.

CLAIM IV. Penalty phase jury instructions and verdict sheet unconstitutionally indicated to jury that it had to unanimously find any mitigating circumstance before it could give effect to that circumstance.

CLAIM V. Unlawfully obtained confession was used against him at trial.

CLAIM VI. Prosecutorial misconduct during guilt phase of trial for:

- A. Improper suggestion that Fahy had an incestuous relationship with victim;
- B. Improperly eliciting testimony from Fahy regarding his prior incarceration (adjudicated by state court);
- C. Improperly asserting Fahy was a "representative of Satan"; and,
- D. Asserting belief that Fahy was lying on stand.

CLAIM VII. Prosecutorial misconduct during sentencing/penalty phase of the trial for:

- A. Improperly interjecting unadjudicated criminal conduct;
- B. Improperly arguing Fahy's future dangerousness to jury by asking, "How many more people does he have to kill?"; and,
- C. Improperly denigrated Fahy's mitigating evidence.

CLAIM VIII. Prosecutor's comment "No sentence is final until it's appealed," diminished the jury's sense of responsibility for imposing sentence in violation of Fahy's rights under Caldwell v. Mississippi.

CLAIM IX. Jury was unconstitutionally instructed on the "torture" aggravating circumstance.

CLAIM X. No definitive proof that the jury found the "torture" aggravating circumstance.

CLAIM XI. The "proportionality review" performed by the Supreme Court of Pennsylvania did not provide Fahy meaningful appellate review as mandated by Pa. and federal law.

CLAIM XII. WITHDRAWN.

CLAIM XIII. Trial court failed to properly instruct the jury on mitigating factors.

CLAIM XIV. Jury was not permitted to consider and give effect to the non-statutory mitigating evidence that was presented.

CLAIM XV. Trial court violated Simmons v. South Carolina in failing to accurately instruct the sentencing jury that, if sentenced to life, Fahy would be parole ineligible.

CLAIM XVI. Aggravating circumstance instruction (d)(9), "significant history of felony convictions involving the use of or threat of violence to the person," unconstitutionally vague.

CLAIM XVII. WITHDRAWN.

CLAIM XVIII. WITHDRAWN.

CLAIM XIX. WITHDRAWN.

CLAIM XX. All prior counsels' failure to properly investigate, research and make the objections and present the arguments raised in this petition constituted ineffective assistance of counsel (Catch-all).

CLAIM XXI. Cumulative effect of the errors described in the petition entitle petitioner to relief.

2. Discussion

CLAIM I. Transcript of the voir dire proceedings absent from the record resulting in a violation of Fahy's rights to a meaningful appeal, and appellate counsel was ineffective for failing to ensure there was a complete record in violation of Fahy's rights under the Sixth, Eighth and Fourteenth Amendments.

CLAIM II. The Commonwealth used its peremptory strikes in a racially discriminatory and/or gender discriminatory manner. Ineffective counsel for failure to litigate this claim.

Because Claims I & II are interrelated, the court addresses concomitantly issues raised by Fahy regarding voir dire of the jury. Raised for the first time in Fahy's fourth, time-barred PCRA petition, and in the absence of an "adjudication on the

merits," this court employs pre-AEDPA review. It accords de novo review pure questions of law and mixed questions of law and fact, but presumes correct the state court's factual findings unless not fairly supported by the record. See Section II(B)(4), supra.

In Claim II, Fahy alleges the Commonwealth used its challenges in a discriminatory manner, striking venire persons on the impermissible basis of race or gender. He also alleges that, because no record of the individualized voir dire exists, his rights were violated under the Sixth, Eighth and Fourteenth Amendments. Trial counsel apparently failed to order a transcript and the record was not preserved.

Fahy contends a complete state record is a fundamental prerequisite to the fair adjudication of his claims since habeas claims must be reviewed on a full record by both the PCRA court and the district court. He argues the denial of a full transcript by the state is itself sufficient to warrant relief because he was not afforded a meaningful opportunity to raise jury selection errors. See e.g., Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (relief granted for prosecutor's racially discriminatory use of peremptory challenges). Because, in the absence of a complete record, Fahy argues he cannot raise claims for which the non-existent transcripts are critical,²³ he

²³Despite this contention, Fahy has alleged a violation grounded in Batson. If Fahy is able to raise a Batson claim without the transcript, it is not clear what is preventing him from asserting any other violations related to voir dire.

requests relief based on the mere fact of an incomplete record or, alternatively, the remedy of record reconstruction.

In Pennsylvania, voir dire, though recorded, is not transcribed unless specifically ordered, see Rule 5000.2 (g) of the Uniform Rules Governing Court Reporting and Transcripts; because none of Fahy's previous lawyers requested transcription, no transcription was made. Assuming the transcripts are unavailable through no fault of Fahy, the Commonwealth contends his failure to avail himself of the provisions of Pennsylvania Rule of Appellate Procedure 1923, providing for the preparation of an agreed-upon statement of the record in the absence of transcripts, results in a waiver of his jury selection claims.²⁴

²⁴Rule 1923. Statement in Absence of Transcript

If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within ten days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the lower court for settlement and approval and as settled and approved shall be included by the clerk of the lower court in the record on appeal.

Pa.R.A.P. 1923. "Rule 1923's purpose is to provide reviewing courts with an 'equivalent picture' of the proceedings when there is not a transcription." Commonwealth v. Buehl, 403 Pa. Super. 143, 588 A.2d 522, appeal denied, 598 A.2d 281 (Pa. 1991)(internal citation omitted).

Fahy is not entitled to relief based on the mere absence of a complete record and reconstruction of the 1983 jury selection proceedings now would be futile.

The Supreme Court has emphasized the importance of reviewing capital cases on a complete record, see Dobbs v. Zant, 506 U.S. 357, 358, 113 S. Ct. 835, 122 L. Ed. 2d 103 (1993)(citations omitted), and stressed that an "appellant cannot be denied a 'record of sufficient completeness' to permit proper consideration of his claims," Mayer v. City of Chicago, 404 U.S. 189, 198, 92 S. Ct. 410, 30 L. Ed. 2d 372 (1971). However, neither the Supreme Court, nor the Third Circuit has held that an incomplete record confers automatic entitlement to relief. See, e.g., Scott v. Elo, 302 F.3d 598 (6th Cir. 2002) ("Mayer does not stand for the proposition ... that where a portion of a trial transcript is missing and unobtainable, and where a defendant makes a claim that could possibly implicate that portion of the transcript, a retrial is always necessary. Rather, ... federal habeas relief based on a missing transcript will only be granted where the petitioner can show prejudice."); Stirone v. United States, 341 F.2d 253 (3d. Cir. 1965) (failure of stenographer to transcribe voir dire was harmless error where "[t]here is no accusation even in this late collateral suit that there was error of any kind in the voir dire examination itself or that the failure of the stenographer to record the voir dire resulted in substantial error.").

To obtain relief, a defendant must demonstrate a "colorable need" for a complete transcript. Karabin v. Petsock, 758 F.2d 966, 969 (3d. Cir.), cert. denied, 474 U.S. 857 (1985). In Simmons v. Beyer, 44 F.3d 1160 (3d. Cir. 1995), there was a thirteen-year delay between petitioner's conviction and first appeal. By the time the right of appeal was granted, "portions of the trial record including a lengthy in camera voir dire of prospective jurors were missing." Id. at 1164. The appellate division of the state court remanded to reconstruct the record; petitioner's objections to the sufficiency of the reconstruction were overruled and ultimately, his conviction was affirmed.

Considering petitioner's appeal from the denial of his habeas petition, the Third Circuit held petitioner was entitled to some sort of habeas relief:

The problem here is self-evident. No one recalls how many potential African American jurors were peremptorily challenged, and the assistant prosecutor does not remember and has no notes indicating why he struck individual venirepersons. Both parties agree that further reconstruction hearings would be fruitless. Simmons' Batson claim simply cannot be reviewed without a transcript of the voir dire to allow the reviewing court to examine whom the assistant prosecutor excluded and why. We do not and cannot know whether Simmons' jury selection process was infected by racial discrimination.

Nevertheless, Simmons raised a colorable claim that the prosecution systematically excluded African Americans from the jury, and the prejudice stemming from our inability to review this claim is not fairly borne by him. The seriousness of this claim and its potential merit demand some form of habeas relief. As explained by the Batson Court, 'the core guarantee of equal protection, ensuring citizens that their State will not

discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.'

Simmons, 44 F.3d at 1168. Unlike the petitioner in Simmons, Fahy cannot demonstrate a "colorable need," Karabin, 758 F.2d at 969,.

Fahy argues the Commonwealth used its peremptory strikes in a racially and/or gender discriminatory manner to exclude African Americans and women from the jury. Because the Commonwealth had no race- or gender-neutral reason for doing so, Fahy contends, he was deprived of his rights under the Sixth, Eighth and Fourteenth Amendments, and is entitled to a new trial.

The Supreme Court's decision in Batson prohibits the use of peremptory challenges to exclude potential jurors solely on the basis of race. 476 U.S. at 83. See also Powers v. Ohio, 499 U.S. 400, 11 S. Ct. 1364 (1991) (extending holding of Batson to allow a defendant of any race to object to a prosecutor's use of race-based exclusions); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) (extending rationale of Batson to preclude the use of peremptory strikes based on gender); Rico v. Leftridge-Byrd, 2003 U.S. App. LEXIS 16690, *15-16 (3d Cir. Aug. 14, 2003) (holding it was not objectively unreasonable for the Pennsylvania Supreme Court to consider challenges to prospective Italian-American jurors under Batson). To rebut a prima facie case of discriminatory use of peremptory strikes, the prosecution must articulate a neutral,

non-discriminatory explanation for the strike or strikes. Though the prosecutor's explanation had to be "clear and reasonably specific," 476 U.S. at 98 n.20, it did not "need [to] not rise to the level justifying exercise of a challenge for cause," id. at 97.

Shortly after issuing its decision in Batson, Allen v. Hardy, 478 U.S. 255, 260-61, 106 S. Ct. 2878, 92 L. Ed. 2d 199 (1986) (per curiam), held that Batson would not be applied retroactively to cases on collateral review of convictions final before that decision was announced on April 30, 1986. The Court stated:

[R]etroactive application of the Batson rule on collateral review of final convictions would seriously disrupt the administration of justice. Retroactive application would require trial courts to hold hearings, often years after the conviction became final, to determine whether the defendant's proof concerning the prosecutor's exercise of challenges established a prima facie case of discrimination. Where a defendant made out a prima facie case, the court then would be required to ask the prosecutor to explain his reasons for the challenges, a task that would be impossible in virtually every case since the prosecutor, relying on Swain, would have had no reason to think such an explanation would someday be necessary. Many final convictions therefore would be vacated, with retrial 'hampered by problems of lost evidence, faulty memory, and missing witnesses.'

478 U.S. at 260-61 (quoting Solem v. Stumes, 465 U.S. 638, 650 (1984)). Batson is applicable to cases pending on direct review or not yet decided when the opinion was issued. See Griffith v. Kentucky, 479 U.S. 314, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987).

Fahy's judgment became final on January 19, 1987, upon the

expiration of the 90-day period for seeking appellate review to the United States Supreme Court of the state court's October 21, 1986 order affirming conviction and judgment of sentence, see Kapral v. United States, 166 F.3d 565 (3d Cir. 1999). Therefore, Fahy is not barred from raising a Batson challenge. However, Fahy is a white male. At the time of Fahy's trial, existing case law did not recognize a white defendant's claim that the Commonwealth improperly struck potential black jurors based upon race or potential female jurors based on gender. Not until 1991 and 1994, respectively, when Powers and J.E.B. were decided, were such claims cognizable. Accordingly, in order for Fahy's claim that the Commonwealth improperly struck potential jurors based upon race or gender to be cognizable, Powers and J.E.B. must apply to his case; however, Fahy's conviction became final several years before either case was decided and those decisions are not retroactive. See Commonwealth v. Tilley, 566 Pa. 312, 317 (2001) (white felon tried in 1987 not entitled to assert a Batson/Powers claim, and therefore, that he had not shown the necessary "good cause" required for discovery related to the claim). The Batson violation alleged in Claim II of the amended petition is without merit.

Fahy also argues he was deprived of his right to effective assistance of counsel. He claims appellate counsel was ineffective for failing to ensure there was a complete voir dire

record, and failing to litigate the Batson claim; he argues trial counsel was ineffective for failing to object to the prosecutor's discriminatory use of peremptory strikes.

First, Fahy contends counsel "failed" to obtain the voir dire transcripts, and that this failure denied him his right to appellate counsel altogether with respect to any issues stemming from voir dire violations. Accordingly, rather than having to establish prejudice as Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) would require, a presumption of prejudice should apply. See United States v. Cronin, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (outlining an exception to the need under Strickland to prove prejudice and stating that prejudice will be presumed if counsel "fails to subject the prosecution's case to meaningful adversarial testing..."). Batson was not decided until three years after Fahy's conviction. Counsel is not ineffective for failure to anticipate future developments of the law. Fahy's claim should be analyzed under Strickland, not Cronin. Cf. United States v. Gambino, 788 F.2d 938, 951 (3d Cir. 1986).

Under the Strickland standard, counsel was ineffective only where his or her performance fell below an objectively unreasonable standard, and the defendant was prejudiced by that performance. 466 U.S. at 687. As explained in Marshall v. Hendricks, 307 F.3d 36, 85 (3d Cir. 2002):

In order to establish prejudice, a defendant need not demonstrate that the outcome of the proceeding would have been different, but only that there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' Where prejudice is lacking, the court need not determine whether the performance was subpar. Further, it is critical that courts be 'highly deferential' to counsel's reasonable strategic decisions and guard against the temptation to engage in hindsight. In part, this is because the purpose of the rule is not to improve the standard of professional conduct, but only to protect a defendant's right to counsel. Thus, the court is not engaging in a prophylactic exercise to guarantee each defendant a perfect trial with optimally proficient counsel, but rather to guarantee each defendant a fair trial, with constitutionally competent counsel. In order to assess an ineffectiveness claim properly, the court must consider the totality of the evidence before the judge or jury.

There does not exist a reasonable probability that, but for counsel's failure to order, or ensure the preservation of, the voir dire transcript, the result of Fahy's trial would have been different. He has no cognizable claim under Batson, Powers or J.E.B. Counsel was not ineffective and Fahy is not entitled to relief on this claim.

CLAIM IV. Penalty phase jury instructions and verdict sheet unconstitutionally informed jury that it had to find any mitigating circumstance unanimously before it could give effect to that circumstance.

Fahy first raised this claim in his third PCRA petition; it was tersely disposed of by the PCRA court, see 1995 Opinion at 40 ("Defendant's challenge to this Court's instructions on mitigating circumstances also is meritless because it is based on Mills v.

Maryland, [citation], which was decided long after the verdict in this case and cannot be applied retroactively.") This does not constitute an "adjudication on the merits," as there was no analysis of the underlying claim itself.²⁵ 28 U.S.C. § 2254. Fahy again raised this claim in his time-barred fourth PCRA petition and therefore, it is entitled to de novo review.

Fahy contends he is entitled to relief from his death sentence because the penalty phase jury instructions and verdict sheet, taken together, created a barrier to the sentencing jury's consideration of all mitigating evidence in violation of the Eighth and Fourteenth Amendments.²⁶ Fahy's allegation is commonly termed a "Mills claim"; in Mills v. Maryland, 486 U.S. 367, 374, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988), the Supreme Court held that the United States Constitution prohibits a state from requiring jurors to agree unanimously that a particular mitigating circumstance exist before they can consider that circumstance in their sentencing determination.

²⁵Even if Judge Sabo's determination was considered an "adjudication on the merits" by this court, the PCRA court's failure to properly analyze Fahy's claim in accordance with Mills renders that court's determination an "unreasonable application" of Mills. See Banks, 271 F.3d at 545 n.21; 28 U.S.C. § 2254(d). Fahy is entitled to relief under either rationale.

²⁶The Eighth Amendment prohibition against cruel and unusual punishment requires that "the sentencer in a death penalty case must be permitted to consider all relevant mitigating evidence that the defendant proffers as counseling less than a sentence of death." Frey v. Fulcomer, 132 F.3d 916, 920 (9th Cir. 1997) (citation omitted).

i. Instruction/Charge

Fahy states that the trial judge charged the jury as follows:

The Crimes Code provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury finds one or more aggravating circumstance which outweighs any mitigating circumstances.

(N.T. 1040) (emphasis added). This instruction is virtually identical to that considered by the Court of Appeals in Banks v. Horn, 271 F.3d 527 (3d Cir 2001), rev'd and rem'd, Horn v. Banks, 532 U.S. 266, 122 S. Ct. 2147, 153 L. Ed. 2d 301 (2002), reaff'd on reconsid'n, Banks v. Horn, 316 F. 3d 228 (3d Cir. 2003), where the petitioner was granted habeas relief because of the state court's "unreasonable application" of Mills v. Maryland. Like Fahy, the petitioner in Banks claimed that the jury charge was written so that reasonable jurors understood unanimity was required to find a mitigating circumstance. Regarding the instruction quoted above, the Court of Appeals in Banks explained that "considered as a whole, the jury instructions leave no doubt that there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." 271 F.3d at 549.

ii. Verdict Sheet

The penalty phase verdict sheet given to and used by the jury read as follows:

We, the jury, having heretofore determined that the above-named defendant is guilty of murder of the first degree, do hereby further find that:

(1) We, the jury, unanimously sentence the defendant to:

Death

Life Imprisonment

(2) (To be used only if the aforesaid sentence is death)

We, the jury, have found unanimously

at least one aggravating circumstance and no mitigating circumstance. The aggravated circumstance(s) is/are:
_____.

one or more aggravating circumstances which outweigh any mitigating circumstances. The aggravating circumstance(s) is/are_____.
The mitigating circumstance(s) is/are_____.

First Degree Murder Verdict Penalty Determination Sheet at 1, Petitioner's Appendix (emphasis added) ("Verdict Sheet").

The verdict form utilized in Banks is substantially similar; it differs only in that jurors were provided with potential aggravating and mitigating circumstances, rather than a blank line to write them in. See Banks, 271 F.3d at 549-550 (verdict slip). The Banks court focused its analysis on the language found in part (2) of the Fahy Verdict Sheet, "We, the jury, have found unanimously." The Court of Appeals concluded that, in prefacing the remainder of the form with this language, "by implication, everything that followed was found unanimously." 271 F.2d at 550. There was "no additional language that would imply that there is a different standard for aggravating circumstances than there is

for mitigating circumstances." Id. Therefore, the Court of Appeals determined, "the structure and form of the verdict slip itself runs afoul of the dictates of Mills." Id.

iii. Discussion

The Banks court reversed the district court and granted the petitioner a writ of habeas corpus; the Commonwealth filed a writ of certiorari that was granted.

In Horn v. Banks, the United States Supreme Court reversed the Court of Appeals and directed it to analyze, rather than assume, whether Mills v. Maryland could be retroactively applied under the principles articulated in Teague v. Lane, 489 U.S. 288, 103 L. Ed. 2d 304, 109 S. Ct. 1060 (1989), on collateral review of Bank's conviction and sentence.²⁷

On reconsideration, the Court of Appeals concluded, "Mills did not announce a new rule of constitutional law for retroactivity purposes, and thus that our analysis and resolution

²⁷A habeas petitioner must demonstrate as a threshold matter that the court-made rule by which he seeks to benefit is not "new" or, if it is, that it applies retroactively nonetheless. See O'Dell v. Netherland, 521 U.S. 151, 155, 138 L. Ed. 2d 351, 117 S. Ct. 1969 (1997). A rule is "new" if "the result was not dictated by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301. Generally, a new rule of criminal procedure is not retroactively applied to cases unless (1) "it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or (2) it is a watershed rule, involving "procedures that . . . are 'implicit in the concept of ordered liberty.'" Id. at 311.

of Banks's Mills claim was proper." Banks, 316 F. 3d at 229-30.²⁸

Because the Court of Appeals' "judgment requiring a new penalty phase for Banks remain[ed] unchanged," 316 F. 3d at 247, Fahy's claim is meritorious. "If a jury instruction and verdict form, because of its unanimity requirements, precluded juror consideration of any and all mitigating evidence, the resulting death sentence [is] unconstitutional." Banks, 316 F.3d at 242. After considering the jury charge and verdict sheet from Fahy's trial, there is a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of constitutionally relevant evidence. See Boyde v. California, 494 U.S. 370, 380, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990). Therefore, Fahy's petition is granted with respect to Claim IV and Fahy's death sentence is vacated.

CLAIM V. Unlawfully obtained confession was used against him at trial; ineffective assistance of counsel for failure to introduce evidence of mental and emotional impairments at suppression hearing.

Fahy raised the issue of voluntariness of his confession on direct appeal from his conviction and capital sentence; because the issue was addressed by the Pennsylvania Supreme Court in affirming the conviction, see Fahy-I, the decision is accorded deference under the AEDPA. On appeal, Fahy argued the suppression court had committed error in denying his motion to suppress his

²⁸A petition for certiorari was filed May 14, 2003.

confession and the fruits thereof. Fahy-1, at 693.

The Pennsylvania Supreme Court determined:

The record reveals and the suppression court found that the evidence introduced by the prosecution was more credible than that of Appellant, and, therefore, the court refused to grant the motion to suppress.

At the suppression hearing, Detectives Chitwood and Rosenstein testified to the events surrounding the arrest and subsequent confession. Their testimony established that Appellant voluntarily appeared at the Philadelphia Police Sex Crimes Unit and was taken to the Police Administration Building for questioning regarding two warrants for rape. Detective Chitwood proceeded to inform Appellant that he was the prime suspect in the rape and murder of Nicky Caserta. The detective advised Appellant of his constitutional rights by placing a standard police form containing the Miranda rights in front of him and at the same time reading the warnings to him aloud. Appellant indicated his decision to waive his rights by initialing a standard police form containing both the warnings and questions regarding his understanding of his rights. At first, Appellant denied his involvement in the Caserta killing. However, after being shown pictures of the victim's body, Appellant exclaimed, 'I did it, I did it.' Appellant then confessed to the crimes, giving a detailed description of how he raped and killed young Nicky Caserta. Appellant also gave the exact location of where he disposed of the murder weapon and later guided the police officers to the sewer where the knife was hidden.

After reading the statement, Appellant affixed his signature to each individual page of the ten page document. Detective Chitwood testified that during the interview and confession Appellant was alert and responsive. Throughout the questioning, Appellant was neither threatened nor coerced by the police, and denied being under the influence of drugs. The complete interview lasted approximately one and one-half hours.

Appellant's testimony at the suppression hearing was totally contradicted by the testimony of the

Commonwealth's witnesses. Appellant claimed his confession was not voluntarily obtained. Appellant also claims his confession was not properly extracted, in that during the police questioning he experienced fatigue and the effects of his seizure and depression medication. We stated in Commonwealth v. Jones, 457 Pa. 423, 432-33 (1974), 'Intoxication is a factor to be considered, but it is not sufficient, in and of itself to render a confession involuntary.' 'The test is whether there was sufficient mental capacity for the defendant to know what he was saying and to have voluntarily intended to say it,' (citations omitted).

The duty of the suppression court is to determine whether the Commonwealth has established by a preponderance of the evidence that the confession was voluntary and that the waiver of constitutional rights was knowing and intelligent. Jones, id. Our responsibility on review is to determine whether the record supports the factual findings of the trial court and to determine the legitimacy of the inferences and legal conclusions drawn from those findings. Commonwealth v. Kichline, 468 Pa. 265, 361 A.2d 282 (Pa. 1976); Commonwealth v. Goodwin, 460 Pa. 516, 333 A.2d 892 (Pa. 1975). Reviewing Appellant's arguments in light of the previously espoused standard, we are convinced the suppression court was correct in ruling that Appellant's statements were admissible. Our review of the conflicting testimony illustrates that Appellant, in fact, was informed of the charges against him, advised of the nature of the questioning, and cognizant of his constitutional rights.

Fahy-I at 695-96.

In a footnote, the court observed that the detectives had Fahy read aloud a portion of his statement, before it was signed, to ensure he could read and that he understood the nature of the document he was signing. Id. at 695, n.9. The court also noted that Fahy was given bathroom and water breaks.

Fahy argues the admission of his confession at trial violated

his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). He contends the state court's determination that the evidence supported the finding that his confession was voluntary was "contrary to" clearly established federal law, or reflected an "unreasonable application" of that law. 28 U.S.C. § 2254(d). Fahy argues that under clearly established federal law, a court must consider the "totality of the circumstances" before deeming a waiver of rights voluntary. See Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986). He argues the Pennsylvania Supreme Court failed to follow Moran in finding that the voluntariness of the confession was "supported by the record." Because the court did not consider the totality of circumstances, including his mental and emotional impairments or use of medication, Fahy argues its decision was "contrary to," or an "unreasonable application" of, established federal precedent.

There are two inquiries a court must make to determine whether an accused has voluntarily and knowingly waived his Fifth Amendment privilege against self-incrimination. First, the waiver of the right must be voluntary in that it was not the product of intimidation, coercion, or deception. Moran, 475 U.S. at 421. Second, the relinquishment must be made with a full awareness of the nature of the right being waived. Id. In determining whether

a confession is voluntary, the ultimate question is "whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution." Miller v. Fenton, 474 U.S. 104, 112, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985).

Those circumstances include:

1. Police Coercion (a "crucial element");
2. Length of Interrogation;
3. Location of Interrogation;
4. Continuity of Interrogation;
5. Suspect's Maturity;
6. Suspect's Education;
7. Suspect's Physical Condition & Mental Health; and,
8. Whether Suspect Was Advised of Miranda Rights

Withrow v. Williams, 507 U.S. 680, 693-94, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993). Without coercive police activity, a confession will not be deemed involuntary. Colorado v. Connelly, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986) ("coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause").

On appeal, the Supreme Court of Pennsylvania addressed the voluntariness of Fahy's confession, and concluded:

1. There was no intimidation or coercion by the interrogating officers
- 2./4. The interview lasted approximately one and one-half hours;
3. Fahy had voluntarily appeared at the police station where the interrogation took place;

6. To ensure Fahy could read, officers had him state aloud a portion of his confession

7. Fahy was alert and responsive throughout the questioning; Fahy denied being under the influence of any drug, and was allowed bathroom and water breaks; and,

8. Fahy was advised of his Miranda rights; he was provided with a printed form and had the rights read aloud to him. Fahy signed the form;

The suppression court found the prosecution's evidence was more credible than that introduced by Fahy. The trial court's credibility determination was a subsidiary factual finding by a state court entitled to the presumption of correctness under the AEDPA. Miller, 474 U.S. at 112; 28 U.S.C. § 2254(e)(1).

The Supreme Court of Pennsylvania, in addressing Fahy's contention that his confession had not been voluntary, did not cite United States Supreme Court precedent, or use the phrase "totality of the circumstances." However, the state court case on which it relied, Commonwealth v. Jones, applied Supreme Court precedent and the "totality of the circumstances" standard of review. The Supreme Court of Pennsylvania properly considered the confession under that standard. The Pennsylvania Supreme Court of Pennsylvania stated that Fahy was "informed of the charges against him, advised of the nature of the questioning, and cognizant of his constitutional rights." Fahy-I at 696.

Because the state court applied the right rule, Fahy's entitlement to relief depends on whether application of that rule

was contrary to, or an unreasonable application of established federal law. There is no credible evidence of coercion, Fahy was apprised of his Miranda rights, demonstrated he understood those rights, denied being under the influence of medication and voluntarily appeared for the relatively brief interrogation. The Supreme Court of Pennsylvania's rationale was neither "contrary to," nor an "unreasonable application" of, clearly established federal law.

Even if the suppression court did commit error in denying Fahy's motion, he is still not entitled to habeas relief. A constitutional error implicating trial procedures is harmless if it did not have a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710 123 L. Ed. 2d 353 (1993). The introduction of a confession may be reviewed for harmless error. Arizona v. Fulimante, 499 U.S. 279, 310, 11 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). There is strong evidence of Fahy's guilt. In addition to providing officers with a detailed account of how he raped and murdered Nicky, Fahy gave police the exact location of the murder weapon and guided officers to that location where the knife was recovered. Even without the confession and the weapon discovered subsequently, Fahy confessed to two other witnesses that he had murdered Nicky. There was testimony that, having told a witness he would pick him up for work at 7:50 a.m., Fahy arrived

over an hour later. It was during this time that Nicky was killed. Leaving work shortly after arriving, he told a co-worker witness he wanted to shower. Fahy then attempted to flee to Baltimore later that night, but ran out of gasoline. The state court decision was not "objectively unreasonable," and Fahy is not entitled to relief on this claim.

Fahy also claims trial counsel was ineffective for failing to introduce evidence of his alleged mental and emotional defects to bolster the claim his confession was not voluntary. He first raised this claim in his third PCRA petition. There was an adjudication on the merits by the PCRA court in Judge Sabo's October 25, 1995, Findings of Fact and Conclusions of Law ("1995 Opinion") (Resp. Ex. 1). In the 1995 Opinion, Judge Sabo concluded:

Trial counsel was effective in litigating defendant's motion to suppress and could not have advanced his claim with expert psychiatric testimony (N.T. 1/18/93). Trial counsel did present evidence that defendant had mental problems, but the thrust of his motion was that the police tricked defendant into signing a blank form on which the police wrote the confession. Defendant's supposed mental problems had little, if anything, to do with the alleged ruse. Defendant's motion was incredible, with or without, expert testimony, and this Court properly rejected it.

(Resp. Ex. 1, 41).

To prevail on his ineffective assistance claim, Fahy must show: (1) that his counsel failed to perform adequately; and (2)

that prejudice occurred as a result. Strickland, 466 U.S. at 693-94. Prejudice occurs only when there is a reasonable probability that the result of the proceeding would have been different but for counsel's failure. Id.

First, Fahy is not entitled to relief for ineffective assistance because the underlying claim has not been established. See Holloway, 161 F. Supp. 2d at 508 ("Strickland instructs that if the petitioner has not shown that [the] underlying claim has merit, counsel cannot have been ineffective for failing to raise it."); see also Porter v. Horn, 2003 U.S. Dist. LEXIS 11352, *150 (E.D. Pa. June 26, 2003).

Second, assuming arguendo Fahy's trial counsel performed inadequately in not calling an expert witness at the suppression hearing, the admission of the confession was, at most, harmless error. Fahy has not presented evidence of a reasonable probability that, despite the strength of the other evidence, its exclusion would have altered the result of his trial. See Berg v. Maschner, 260 F.3d 869, 872 (8th Cir. 2001). Fahy is not entitled to relief on this claim.

CLAIM VI. Prosecutorial misconduct during guilt phase of trial for:

- A. Improper suggestion that Fahy had an incestuous relationship with victim;**
- B. Improperly eliciting testimony from Fahy regarding his prior incarceration (adjudicated by state court);**
- C. Improperly asserting Fahy was a "representative of**

Satan"; and,

D. Asserting belief as to Fahy's veracity.

Ineffective assistance of trial counsel for failing to object and appellate counsel for failing to preserve.

i. Standard of Review

Claims VI.A was "adjudicated on the merits" in Judge Sabo's 1995 Opinion and is thus accorded deference under the AEDPA.²⁹ Claim VI.B also will be reviewed under AEDPA standards because it was raised on direct appeal, and thus "adjudicated on the merits," see Fahy-I at 311-314; Fahy argues the state court decision was "contrary to" clearly established federal law or "an unreasonable application" of Supreme Court precedent. Fahy presented for the first time Claim VI.C in his time-barred fourth PCRA petition. For the reasons set forth, supra, this court will review this claim under pre-AEDPA standards. Finally, Claim VI.D also will be reviewed under pre-AEDPA standards. This claim was touched upon in the 1995 Opinion of the PCRA court but there was no "adjudication on the merits" under Chadwick.

ii. Legal Principles

"The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the

²⁹Though this claim was raised in state proceedings as one of ineffective assistance of counsel only, the PCRA court addressed, in its findings of fact and conclusions of law, the underlying claim of misconduct; this constitutes an adjudication on the merits subject to deference under the AEDPA. Cf. Dowthitt v. Johnson, 230 F.3d 733, 755 (5th Cir. 2000).

culpability of the prosecutor." Smith v. Phillips, 455 U.S. 209, 219, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982). This court must ask whether the conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974); "[T]he aim of due process is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused," Smith, 455 U.S. at 219. "Such an inquiry requires a focus upon the reliability of the verdict and whether the trial as a whole was rendered unfair. A prosecutor's deliberate acts might have no effect at all upon the trier of fact, while acts that might be inadvertent could serve to distract the jury from its proper task and thus render a defendant's trial fundamentally unfair." Marshall v. Hendricks, 307 F.3d at 71.³⁰

A prosecutor "may strike hard blows, but [she] is not at liberty to strike foul ones. It is as much [her] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). However, "[I]mproper conduct is not, in itself, sufficient to constitute constitutional error, even when ... that

³⁰"[D]ecisions of federal courts below the level of the United States Supreme Court may be helpful to us in ascertaining the reasonableness of state courts' application of clearly established United States Supreme Court precedent, as well as 'helpful amplifications' of that precedent." Marshall, 307 F.3d at 79 n.24.

conduct is alleged to be both deliberate and pervasive. Improper conduct only becomes constitutional error when the impact of the misconduct is to distract the trier of fact and thus raise doubts as to the fairness of the trial." Marshall, 307 F.3d at 69. Even in cases of egregious prosecutorial misconduct, such as the knowing use of perjured testimony, a new trial is required only when the tainted evidence was material to the case. Giglio v. United States, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). This materiality requirement implicitly recognizes that the misconduct's effect on the trial, not the blameworthiness of the prosecutor, is the crucial inquiry for due process purposes.

Ineffective assistance of counsel claims are governed by Strickland and its progeny. A petitioner first must show counsel's performance was deficient, that is, it "fell below an objective standard of reasonableness." 466 U.S. at 688. As explained by the court in Strickland,

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel's was unreasonable. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy.

Id. at 689.

A petitioner must also demonstrate that he was prejudiced by the deficient performance. Id. at 688. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. To establish prejudice, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Therefore, "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691.

iii. Discussion of Claims

A. Improper suggestion that Fahy had an incestuous relationship with victim. Ineffective Assistance by trial counsel for failure to object and appellate counsel for failure to preserve.

In her closing argument to the jury at the guilt stage of Fahy's trial, the prosecutor commented, "But, ladies and gentleman, you've heard of incest. And, incest occurs even when it's your natural child, unfortunately, in this society and other societies. In this case, it's not a natural relationship, it was not a blood relationship. So the fact that she knew the defendant is only one more little piece of the puzzle." (N.T., 891-892.) Fahy argues his case had nothing to do with incest and the prosecutor's comments were simply an attempt to inflame the

passions of the jury. As a result, Fahy argues, he was denied his rights under the Sixth, Eighth and Fourteenth Amendments.

The Commonwealth contends that the prosecutor's argument, when viewed in context, was not improper; the comments were made, the state argues, in response to the theory proffered by Fahy's counsel that the defendant could not have murdered Nicky because of the depth of his love for her. In closing argument, Fahy's counsel had argued:

... But, [Fahy] was shocked when he heard that little Nicoletta Caserta was dead. Nicoletta Caserta who, as he said, he loved. Nicoletta Caserta who, I suggest to you, he cherished and nourished to the point that [he] had a woman down in Baltimore with whom he sired a child – and, he pointed out yesterday on the witness stand that he named his child Nicky.

Yet the Commonwealth wants you people to believe that this man who named his child after the little girl he loved, raped her, strangled her, and stabbed her, It doesn't make sense. It doesn't wash.

(N.T., 852.)

In his 1995 Opinion, Judge Sabo made the following conclusions of law:

28. At trial, a prosecutor is permitted wide latitude in presenting arguments to the jury. Commonwealth v. Chester, 526 Pa. 578, 587 A.2d 1367, 1377, cert. denied, 112 S. Ct. 152 (1991); Commonwealth v. Brown, 489 Pa. 285, 414 A.2d 70, 76 (1980). She is entitled to argue any legitimate inferences which arise from the evidence and 'must be free to present his or her arguments with logical force and vigor.' Commonwealth v. Smith, 416 A.2d at 989 (emphasis in original). Indeed, 'a prosecutor has not only the privilege but the duty to exert [her] skills as an advocate in the manner he deems most likely to be persuasive.' Commonwealth v. Williams, 295 Pa. Super. 369, 441 A.2d 1277, 1282

(1982). Her conduct, moreover, must be evaluated in the context of the atmosphere of the trial. Comments that might appear improper viewed in isolation may in fact be a fair response to defense counsel's arguments. Commonwealth v. Gwaltney, 497 Pa. 505, 442 A.2d 236 (1982); Commonwealth v. Sanders, 380 Pa. Super. 78, 551 A.2d 239 (1988), appeal denied, 552 Pa. 575, 559 A.2d 36 (1989); Commonwealth v. Brown, 332 Pa. Super. 35, 480 A.2d 1171, 1176 (1984).

29. The record establishes that the prosecutor did not suggest to the jury that [Fahy] was involved in an incestuous relationship with the victim. The prosecutor's comments about defendant's relationship with the victim, taken in their proper context, were a direct response to defendant's contention that he could not have murdered the victim because he loved her. By pointing out that incest exists in society, the prosecutor argued that defendant could not establish his innocence by claiming that no one who knew the victim as he did would ever rape and murder her. The prosecutor was not accusing the defendant of incest. Therefore, the prosecutor was not ineffective for failing to lodge this baseless objection.

(Resp. Ex. 1, 29-31). The PCRA court, in a footnote to the conclusion of law comprised by paragraph 28, also determined that "Even if a prosecutor's remarks are intemperate, uncalled for and improper, a new trial is not necessarily required," citing Commonwealth v. Green, 525 Pa. 424, 581 A.2d 544, 561 (1990).

When addressing Fahy's contention that the prosecutor had improperly implied an incestuous relationship to the jury and that counsel was ineffective for failing to object, the PCRA court did not cite United States Supreme Court precedent. However, the state court cases on which it relied, see, e.g., Commonwealth v. Smith, 416 A.2d at 989 ("[T]he prejudicial effect of the district attorney's remarks must be evaluated in the context in which they

occurred."); Commonwealth v. Chester, 587 A.2d at 1377 ("The primary guideline in assessing a claim of error of this nature is to determine whether the unavoidable effect of the contested comments was to prejudice the jury, forming in their minds fixed bias and hostility towards the accused so as to hinder an objective weighing of the evidence and impede the rendering of a true verdict."), applied Supreme Court precedent and the correct standard of review. See Marshall, 307 F.3d at 74 (noting that these circumstances are distinguishable from those discussed in Everett v. Beard, 290 F.3d 500, 507-08 (3d Cir. 2002), where AEDPA deference did not apply because it was not clear the state court had analyzed the claim under federal standards); Chadwick, 312 F.3d at 606 ("Everett stands for the proposition that an examination of the opinions of the state courts shows that they misunderstood the nature of a properly exhausted claim and thus failed to adjudicate that claim on the merits, the deferential standards of review in AEDPA do not apply."). The PCRA court examined the merits of Fahy's claim and measured it against a standard that was consistent with federal law; its rationale is not "contrary to" or an "unreasonable application" of controlling Supreme Court precedent. Terry Williams, 529 U.S. at 413.

As to Fahy's allegations of ineffective assistance based on this claim, Under Strickland, "There can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to

raise a meritless argument." United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999); see also Reinert v. Larkin, 211 F. Supp. 2d 589, 595 (E.D. Pa. 2002) (habeas relief is not available where counsel fails to raise a meritless claim). Therefore, the state court's adjudication of Fahy's claim was not an unreasonable application of Strickland, and he is not entitled to relief on this claim. Id.

B. Improperly eliciting testimony from Fahy regarding his prior incarceration. Ineffective Assistance by trial counsel for failure to object and request instruction and appellate counsel for failure to raise the issue on direct appeal.³¹

In Fahy-I, the Supreme Court of Pennsylvania addressed Fahy's contention, raised in a motion for a mistrial, that the prosecutor had committed misconduct of constitutional magnitude by eliciting testimony from Fahy about his prior incarceration. Reviewing this claim, the Fahy-I court stated:

Appellant [Fahy] next argues that the trial court committed reversible error in failing to sustain Appellant's motion for a mistrial as a result of prosecutorial misconduct. This issue is without merit. During the early stages of trial, defense counsel and the assistant district attorney agreed not to inform the jury that Appellant had confessed to the Caserta killing during his arrest on two warrants involving independent sex crimes. Appellant specifically alleges that the prosecutor, during cross-examination of Appellant, asked a question designed to elicit an improper remark, namely, that Appellant had been incarcerated. The

³¹Though Fahy argues appellate counsel was ineffective for failing to raise this issue on direct appeal, see Mem. in Supp. of Pet., 73, he concedes that, "Claim VI.B was raised on direct appeal." Id. at 69 n.30 (citing Fahy-I).

questioning went as follows:

By Miss Rubino (A.D.A.):

Q. Mr. Fahy approximately how long did you live at 2063 East Rush Street?

A. For about two years.

Q. And how often did you during that two year period did you live there?

A. Very often.

Q. For approximately how many months in the year of 1980 did you live there?

A. Months?

Q. Yes. How many of the months in 1980 did you live there?

A. As far as I know, all of them.

Q. You were never living anywhere else besides 2063 in 1980?

A. Not that I can remember; no.

Q. In 1979, how many months did you live there?

A. '79

(There was a long extended pause.)

I'm not sure. I think I was--(Pause) I think I could have been locked up for--

Mr. Greene: Objection. (N.T. 726-27, 1-28-83).

THE COURT: Strike from the record the witness' last answer to that question as not being responsive.

Mr. Fahy, would you please answer specific questions? Don't volunteer, or go into--

THE WITNESS: I'm trying to, Your Honor.

THE COURT: The question was, how many months and you can tell us how many months. Now, you can't--

THE WITNESS: Well, I am--I believe that me and Cookie [Fahy's then-girlfriend] got in a few arguments and I was away from the house--oh, for maybe about a day or two, at my mother's or different places until Cookie cooled down. But, I don't believe I was ever away from the house in '79 for any month at all. (N.T. 726-727, 730).

In Commonwealth v. Williams, 470 Pa. 172, 368 A.2d 249, 252 (1977), the Court stated:

Although we reiterate the admonition to trial courts and prosecutors that they should exercise every possible precaution against the introduction of improper references to prior unrelated criminal activities of the accused, we nevertheless

recognize that there will be situations where, even with the greatest care, such evidence may inadvertently impregnate a trial. In such a case where it is evident that the introduction of the improper reference was not intentional and the nature of the comment was innocuous, immediate and effective curative instructions may remedy the error.

Furthermore, the Court in Williams concluded that the nature of the reference and whether the remark was intentionally elicited by the Commonwealth are considerations relevant to the determination of whether a mistrial is required. (citation omitted). In the instant case, Appellant's improper response was unsolicited. The question posed required a number answer, not the response given. Further, Appellant's statement, 'I could have been locked up,' gave no indication that he had been convicted of a crime, nor did it reveal the nature and extent of the crime for which he had been incarcerated. Also, there are situations where the taint resulting from an improper reference to an unrelated criminal act may be expunged without resort to the extreme remedy of aborting an otherwise fair trial. Williams, id.

While appellant's response was improper, it was unsolicited and stricken from the record. Appellant's remark was unintentionally introduced into the record, and was not exploited later on during the trial or closing arguments. This single, unintentional reference did not inflame the passions and prejudices of the jury to the extent that Appellant was denied a fair trial. The prosecutor's questioning was well within the limits of cross-examination and, therefore, no basis exists for the claim of prosecutorial misconduct.

Fahy-I, at 696-98. The Supreme Court of Pennsylvania's "adjudication on the merits" is entitled to deference under the AEDPA; its well-reasoned analysis is neither "contrary to," nor an "unreasonable application" of Supreme Court precedent. "Improper conduct only becomes constitutional error when the impact of the

misconduct is to distract the trier of fact and thus raise doubts as to the fairness of the trial." Marshall v. Hendricks, 307 F.3d at 69.

Trial counsel cannot be deemed ineffective for "failing to object and request an appropriate instruction;" the transcript shows that he did object, and though a curative instruction was not given, the answer was stricken from the record. The underlying claim is not meritorious and no habeas relief should be granted for ineffective assistance in this situation. See Sanders, 165 F.3d at 253; Reinert, 211 F. Supp. 2d at 595. Fahy is not entitled to relief on this claim.

C. Improperly asserting Fahy was a "representative of Satan." Trial counsel ineffective for failing to object and appellate counsel ineffective for failing to raise this issue on direct appeal.

During the guilt phase of Fahy's trial, the prosecutor remarked in closing argument: "And if there is a reprobate, profligate, and a representative of Satan who committed this act, the evidence in this case indicates that the representative of Satan in this case is seated right over there." (N.T. 879). Separately, she remarked, "But, all of those pieces put together, ladies and gentlemen, point to one conclusion, that the defendant is the representative of Satan." (N.T. 904).

Fahy argues the prosecutor's comments improperly introduced religion into the jury's deliberations and unjustly aligned the

state's case with God, a form of improper vouching,³² in violation of his rights under the Sixth, Eighth and Fourteenth Amendments. The court reviews this constitutional claim de novo as it was raised for the first time in Fahy's fourth time-barred PCRA petition.

The Commonwealth argues that, like the prosecutor's allusion to incest, these statements were made only in response to defense arguments. In his summation at the guilt phase of trial, defense counsel stated that, "[s]omeone, some representative of Lucifer or Satan went into that house and did this unconscionable deed." (N.T. 842). Arguing Fahy was not responsible for Nicky's rape and murder, defense counsel went on to say, "I submit to you at this point that somewhere out on the surface of this planet, there walks a profligate, a reprobate who committed this evil act and in his own way, he sits and chuckles knowing that he committed a terrible crime and somebody else is being tried for it." (N.T. 849-50).

In addition, the Commonwealth notes that the prosecutor's statement, when viewed fully and in context, was not improper:

And if there is a reprobate, profligate, and a

³²"Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony." United States v. Molina, 934 F.2d 1440, 1445 (9th Cir. 1991) (internal quotations omitted).

representative of Satan who committed this act, the evidence in this case indicates that the representative of Satan in this case is seated right over there. And, it is the defendant in this case because all of the evidence in this case so indicates. Not because I believe so, because I may not give my personal opinion to you, but because all of the facts of this case so indicate.

(N.T. 879) (emphasis added).

In United States v. Young, 470 U.S. 1, 18-19, 84 L. Ed. 2d 1, 105 S. Ct. 1038 (1985), the court explained, "[T]he prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." The Young court emphasized, however, that "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." Id. at 11. United States v. Walker, 155 F.3d 180, 185 (3d Cir. 1998), counsels that a case-by-case determination must be made. "In this context, defense counsel's conduct, as well as the nature of the prosecutor's response, is relevant." Young, 470 U.S. at 12.

Therefore:

In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo. Thus the import of the evaluation has been that if the prosecutor's remarks

were 'invited,' and did no more than respond substantially in order to 'right the scale,' such comments would not warrant reversing a conviction.

Courts have not intended by any means to encourage the practice of zealous counsel's going 'out of bounds' in the manner of defense counsel here, or to encourage prosecutors to respond to the 'invitation.' Reviewing courts ought not to be put in the position of weighing which of two inappropriate arguments was the lesser. 'Invited responses' can be effectively discouraged by prompt action from the bench in the form of corrective instructions to the jury and, when necessary, an admonition to the errant advocate.

Id. at 11. See also Werts, 228 F.3d at 199 (courts must consider whether defense comments clearly invited the reply when analyzing the effect of prosecutor's remarks).

This court neither endorses nor encourages the prosecutor's remark, a "response-in-kind that inevitably exacerbate[d] the tensions inherent in the adversary process," id. at 10; however, taken in context, this court concludes the "invited response" did not unfairly prejudice Fahy. The prosecutor cannot be blamed for injecting religion into the proceedings or aligning the Commonwealth with God when defense counsel was the first to invoke Lucifer. (N.T. 842). In hindsight, it is clear the prosecutor would have been wise not to respond to defense counsel's arguably improper evocation, but it is also without question that when she did choose to respond, she unambiguously stated that she was not expressing her personal opinions.

In Young, the court found that, even where a prosecutor

stated he was providing his "personal impressions," any potential harm was mitigated by the "jury's understanding that the prosecutor was countering defense counsel's repeated attacks on the prosecution's integrity and defense counsel's argument that the evidence established no such crime." 470 U.S. at 17-18.

Fahy is not entitled to relief on this claim or his related claim of counsel ineffectiveness. "There can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a meritless argument." Sanders, 165 F.3d at 253.

D. Prosecutor asserting personal belief as to Fahy's veracity. Ineffective assistance of trial counsel for failing to object and/or request corrective instructions and appellate counsel for failing to raise the issue on direct appeal.

Fahy argues that the prosecutor's repeated expressions of her personal opinion regarding his credibility during the guilt phase of his trial entitle him to relief under the Sixth, Eighth and Fourteenth Amendments. Specifically, he points to the following remarks:

All I want from you, Mr. Fahy, is the truth, if you know what that is.

And no one has a more vital interest in the outcome of the case than the defendant does.

Mr. Fahy would have you believe that he only talked to his lawyer about his testimony once or twice. Is that believable? The way Mr. Greene prepared this case, he only talked to his lawyer once or twice?

But, when it came to cross-examination, he couldn't remember the lies he told on direct examination. And, all of the sudden, he gives a completely different answer from the morning to the afternoon session. He couldn't remember which lies he was supposed to tell.³³

(N.T. 742, 881-882). Fahy argues that the prosecutor improperly expressed to the jury her personal opinions and beliefs as to his credibility and veracity.

As to the first statement, after receiving an unresponsive answer on cross-examination, the prosecutor asked Fahy if he would please answer the question posed. Fahy responded, "I'm trying to answer the question as best I can. You want me to tell you what you want." To this, the prosecutor responded, "All I want from you, Mr. Fahy, is the truth, if you know what that is." (N.T. 741-42). Trial counsel objected; the court sustained the objection and directed the jury to disregard the comment.

As to the remainder of the statements, the Commonwealth argues that it was Fahy's trial counsel who placed his client's credibility at issue, referring to Fahy as "a pioneer and crusader" for taking the stand to tell the truth. Trial counsel analogized Fahy to other great pioneers and crusaders, including Sir Edmund Hillary and Alan Sheppard. (N.T. 861-62). Not only did the prosecutor have the right to respond to trial counsel's

³³Petitioner incorrectly reproduced for this court the fourth statement he alleges constitutes prosecutorial misconduct. (Mem. in Supp. of Pet., 75). What appears above is accurate. (N.T. 881-82).

contention Fahy was a hero of some sort, the Commonwealth argues, but the transcript reveals the prosecutor explicitly informed the jury that she was unable to give her personal opinion. "You, ladies and gentlemen, will have to decide this case based on the credibility and believability of the witnesses." (N.T. 879).

Fahy cites United States v. Francis, 170 F.3d 546, 552 (6th Cir. 1999), in support of his position; however, the Francis court not only acknowledged that a prosecutor is free to attack the credibility of a defendant who takes the stand, but also stated that "a prosecutor may assert that a defendant is lying during her closing argument when emphasizing discrepancies between the evidence and that defendant's testimony," id. at 551. In Francis, the court found a prosecutor's attacks improper because, "Upon review of the record, we find no analysis of the evidence that supports her attacks. Had she wanted to give examples of discrepancies in [witness'] testimony or between his testimony and other documents, testimony or evidence, and then draw the conclusion that he had lied, that would have been allowed." 170 F.3d at 552.

Here, statements three and four, both made in closing argument, do reference evidence presented to the jury. For example, the prosecutor stated, "Mr. Fahy took the stand and went through an entire day, minute by minute practically. He told you exactly where he placed battery cables and what he did. But, when

it came to cross-examination, he couldn't remember the lies he told on direct examination. He gave a completely different answer from the morning" (N.T. 881). Following an objection by defense counsel to the use of the word lies, the trial court directed the prosecutor to rephrase, to which she responded with even more specific instances of incongruities in Fahy's testimony. "In the morning, you heard the defendant say that he didn't sign page 2 of the warnings. In the afternoon, that changed suddenly to yes, that was his signature." (N.T. 882). This is the very type of credibility attack allowed by Francis.

Even if this court found the prosecutor's statements improper, the paramount inquiry regards whether the prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process," Donnelly, 416 U.S. at 643. Recognizing that "in addressing whether or not prosecutorial misconduct has denied a defendant of a fair trial, 'the process of constitutional line drawing . . . is necessarily imprecise,'" Moore v. Morton, 255 F.3d 95 (citing Donnelly, 416 U.S. at 645), this court concludes that those statements did not deprive Fahy of a fair trial.

Fahy's trial counsel was not ineffective. First, trial counsel objected to at least two of the statements and raised the issue of prosecutorial misconduct in a motion for mistrial. Second, Strickland instructs that when the petitioner has not

shown that an underlying claim has merit, counsel cannot have been ineffective for failing to raise it. Sanders, 165 F.3d at 253. Finally, Fahy cannot show the requisite prejudice under the Strickland standard because he cannot demonstrate a reasonable probability that the outcome of his trial would have been different absent the prosecutor's allegedly improper comments.

CLAIM XX. All prior counsels' failure to properly investigate, research and make the objections and present the arguments raised in this petition constituted ineffective assistance of counsel.

Fahy's twentieth claim is a "catch-all" alleging ineffective assistance of all previous counsel for their failure to raise the issues presented in the instant habeas petition and amended petition. He argues his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated by all prior failures "to assert or adequately preserve any of the claims set forth herein at trial, in post verdict motions, on appeal, and in post-conviction proceedings." (Mem. in Supp. of Pet., 139).

As to any alleged inadequacies in Fahy's representation in state post-conviction proceedings, "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i). "There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim

constitutionally ineffective assistance of counsel in such proceedings.” Coleman, 501 U.S. at 752; Werts, 228 F.3d at 189 n.4.

Regarding any deficiencies in representation occurring prior to Fahy’s conviction, this claim raises neither distinct, nor additional, issues entitling Fahy to relief. Because this court has addressed and denied Fahy’s relevant ineffective assistance claims, its findings and conclusions need not be restated. There is no need to engage in the suggested two-step analysis set forth by the Court of Appeals in Berryman v. Morton, 100 F.3d 1089, 1101-02 (3d Cir. 1996). See Wallace v. Price, 2002 U.S. Dist. LEXIS 19973 (W.D. Pa. Oct. 1, 2002). Fahy is not entitled to relief on Claim XX.

CLAIM XXI. Cumulative effect of the errors described in the petition entitle petitioner to relief.

Fahy seeks relief based upon the sum total of the errors alleged in his petition and amended petition. Like Claim XX, this claim fails to present any issues new or different from those already addressed by the court. This court has determined Fahy is entitled to relief on Claim IV; his unsuccessful claims do not, cumulatively, entitle him to further or additional relief.

IV. CONCLUSION

Following an evidentiary hearing regarding petitioner’s competency and the voluntariness of a purported waiver to all appellate and collateral relief, this court finds Fahy competent

to make the waiver with which the Commonwealth charges him, but that the waiver of his constitutional rights was not knowing and voluntary, and the product of coercion.

The Commonwealth argues Fahy's fourth and final PCRA petition, filed more than one year after his conviction became final, requires this court to find his claims for relief procedurally defaulted under Pennsylvania's timebar; however, because the relaxed waiver doctrine applied at the time of Fahy's alleged defaults, his fourth PCRA petition was not dismissed on the basis of an adequate state ground; there was no procedural default sufficient to prevent this court from considering the merits of the claims in Fahy's federal habeas petition.

Fahy's fourth claim, in which he argues he is entitled to relief because the penalty phase jury instructions and verdict sheet unconstitutionally indicated to jury that it had to find unanimously any mitigating circumstance before it could give effect to that circumstance, is meritorious, and Fahy's death sentence will be vacated.

Claims III, VII, VIII, IX, X, XI, XIII, XIV, XV, and XVI allege constitutional error in the sentencing, or penalty, phase of Fahy's trial. Because Fahy's death sentence has been vacated, these claims are no longer pertinent, and need not be addressed.³⁴

³⁴Though Fahy's remaining penalty phase claims need not be analyzed, the court is confident that, at re-sentencing, the prosecutor will refrain from all improper tactics and comments Fahy alleges were employed or made during his first sentencing

See Porter v. Horn, 2003 U.S. Dist. LEXIS 11352, at *35
(additional penalty-phase claims rendered moot after petitioner
granted relief on jury instruction claim).

An appropriate order follows.

hearing.

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

HENRY FAHY : CIVIL ACTION
 :
 v. :
 :
 MARTIN HORN, Commissioner, Pennsylvania :
 Department of Corrections; CONNER :
 BLAINE, JR., Superintendent of the State :
 Correctional Institution at Greene; :
 and JOSEPH P. MAZURKIEWICZ, :
 Superintendent of the State Correctional :
 Institution at Rockview : No. 99-5086

ORDER

AND NOW, this 26th day of August, 2003, upon consideration of Amended Petition for Writ of Habeas Corpus (Paper #1), Memorandum of Law in Support of Petitioner Henry Fahy's Petition for Writ of Habeas Corpus (Paper #16), Petitioner's Consolidated Amendments to Petition for a Writ of Habeas Corpus and Supplemental Memorandum (Paper #42), Response to Petition for Writ of Habeas Corpus by Respondents (Paper #46), the accompanying Memorandum of Law (Paper #47) and Exhibits (Paper #48), Petitioner's Reply Memorandum in Support of Petition for Writ of Habeas Corpus (Paper #52), Response to Petitioner's Reply Brief (Paper #55), the record of Petitioner's case in state court, the expanded record and the evidence presented at evidentiary hearing held by this court on November 18, November 22, and December 12, 2002, it is **ORDERED** that:

1. Petitioner Henry Fahy's Petition for Writ of Habeas Corpus is **GRANTED** as to Claim IV, there is a reasonable likelihood the jury interpreted the penalty phase jury instructions and verdict form in a way that prevented the consideration of constitutionally relevant evidence;
2. The Petition is **DENIED** in all other respects;
3. Petitioner's death sentence is **VACATED**;
4. The execution of the writ of habeas corpus is **STAYED** for 180 days from the date of this Order, during which period the Commonwealth of Pennsylvania may conduct a new sentencing

hearing in a manner consistent with this opinion;

5. After 180 days, should the Commonwealth of Pennsylvania not have conducted a new sentencing hearing, the writ shall issue and the Commonwealth shall sentence Petitioner to life imprisonment;

6. In accordance with 28 U.S.C. § 2253, a certificate of appealability is **GRANTED** as to Claims I, II, IV, V, VI, XX, XXI.

7. If either Petitioner or Respondents file an appeal to the United States Court of Appeals for the Third Circuit, the entry of this Order will be stayed pursuant to Eastern District of Pennsylvania Local Rule 9.4 (12) pending disposition of that appeal.

S.J.