

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

REGINALD S. LEWIS	:	CIVIL ACTION
	:	
v.	:	(CAPITAL CASE)
	:	
MARTIN HORN, et al.	:	NO. 00-CV-802

MEMORANDUM AND ORDER

Kauffman, J.

August 9, 2006

Now before the Court is the Petition of Reginald S. Lewis (“Petitioner”) for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. For the reasons that follow, the Petition will be granted with respect to Petitioner's sentence and denied with respect to his underlying conviction.

I. Background

At Petitioner’s trial, the Commonwealth established that on November 21, 1982, at approximately 6:30 p.m., Christopher Ellis was stabbed nine times by a man wielding a butcher knife in the Oxford Bar located on Oxford and Sixth Streets in Philadelphia. Commonwealth v. Lewis, 523 Pa. 466, 567 A.2d 1376, 1378 (1989) (“Lewis I”). The stabbing was witnessed by a number of the bar's patrons. Id. Each witness was shown a photo-array of eight pictures and all identified Petitioner as the one who had committed the murder. Id. Petitioner was subsequently arrested for shoplifting and, while in custody, was charged with the murder of Christopher Ellis. Id. at 472.

At trial, the Commonwealth produced six eye-witnesses, each of whom had been familiar with Petitioner prior to the murder, and each of whom identified Petitioner as the murderer. Id. There was also testimony that Petitioner was frequently seen around the neighborhood wearing

clear lens, "schoolboy" eyeglasses prior to the incident, glasses similar to those left by the assailant at the scene of the murder. Id. One witness testified that, immediately prior to the stabbing, Petitioner and the victim had been arguing over a five dollar debt apparently owed to Petitioner. Id. The bartender on duty the night of the murder testified that Petitioner previously had been a customer at the bar and also testified that Petitioner approached him the day after the murder and told him not to mention his name to the police. Id. The defense maintained that Petitioner had been in San Diego visiting his brother at the time of the incident. Id. In support of this alibi defense, Petitioner produced his brother and other family members. Id.

On August 12, 1983, the jury found Petitioner guilty of one count of first degree murder for the killing of Christopher Ellis. Petition ¶ 2. On June 25, 1984, in accordance with the jury's recommendation, Petitioner was sentenced to death. Response to Petition for Writ of Habeas Corpus ("Response") at 5.

On December 22, 1989, the Pennsylvania Supreme Court affirmed Petitioner's conviction and death sentence on direct appeal. Lewis I, 567 A.2d at 1385. Six years later, on August 7, 1995, Petitioner filed a pro se petition for post-conviction relief ("PCRA petition") under the Post-Conviction Relief Act, 42 Pa.C.S. § 9541 et seq. Rami I. Djerassi, Esq. was appointed to represent Petitioner on November 20, 1995. Petition ¶ 4. On April 10, 1996, Mr. Djerassi filed an amended PCRA petition and on June 18, 1996, he filed a supplemental amended petition and a memorandum of law. Response at 6.

By Order dated January 15, 1997, the PCRA court issued a ten day notice of dismissal of Petitioner's PCRA petition. Petition ¶ 5. Petitioner's newly appointed PCRA counsel, Billy H. Nolas, Esq. ("Nolas") and Robert Brett Dunham, Esq. ("Dunham"), filed objections to the

proposed dismissal, but on February 7, 1997, the Honorable Albert Sabo dismissed Petitioner's PCRA petition without a hearing. Response at 6. On appeal to the Pennsylvania Supreme Court, Nolas and Dunham filed a new brief on Petitioner's behalf. Response at 7. However, on January 19, 2000, the Pennsylvania Supreme Court affirmed the denial of the petition for PCRA relief. Commonwealth v. Lewis, 560 Pa. 240, 743 A.2d 907 (2000) (“Lewis II”) (reargument denied, April 10, 2000).

On February 7, 2000, while Petitioner’s motion for reargument was pending, Governor Ridge signed a death warrant, ordering his execution for April 4, 2000. Petition ¶ 7. By order dated February 16, 2000, this Court stayed Petitioner's execution. Petitioner then filed the present Petition for Writ of Habeas Corpus, alleging the following grounds for relief:

1. Trial counsel rendered ineffective assistance at the penalty stage of Petitioner’s trial. Petition at Count I.
2. The jury was tainted by the racially discriminatory manner in which the prosecutor exercised peremptory strikes, in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Petition at Count II.
3. Trial counsel rendered ineffective assistance at the guilt stage of Petitioner’s trial. Petition at Count III.
4. The Commonwealth suppressed exculpatory evidence of Petitioner’s alibi defense in violation of Brady v. Maryland, 373 U.S. 83 (1963). Petition at Count IV.
5. The Commonwealth failed to prove beyond a reasonable doubt that Petitioner acted with malice or premeditation. Petition at Count V.
6. A prior New Jersey felony conviction was an invalid basis for the jury to find an

- aggravating circumstance. Petition at Count VI.
7. The death sentence was based upon an aggravating circumstance that is unconstitutionally vague. Petition at Count VII.
 8. The penalty phase jury instructions and verdict sheet unconstitutionally indicated that the jury was required to unanimously find a mitigating circumstance before it could give effect to the circumstance in its sentencing decision. Petition at Count VIII.
 9. The prosecutor introduced impermissible victim impact testimony at sentencing. Petition at Count IX.
 10. Prosecutorial misconduct at sentencing. Petition at Count X.
 11. The trial court failed to instruct the jury that a life sentence would result in Petitioner's life-long incarceration without the possibility of parole. Petition at Count XI.
 12. The trial court's instructions precluded the jury from giving weight to any mitigating evidence supported by the record. Petition at Count XII.
 13. The trial court gave a defective reasonable doubt instruction at the guilt phase that was not corrected at the sentencing phase. Petition at Count XIII.
 14. Petitioner did not receive the "proportionality review" mandated by 42 Pa.C.S. § 9711(h)(3)(iii). Petition at Count XIV.
 15. All prior counsel were ineffective for failing to raise or properly litigate each of the above cited errors. Petition at Count XV.
 16. Petitioner is entitled to relief from his conviction and sentence because of the

cumulative effect of the errors described above. Petition at Count XVI.

The Court will address these claims for relief in the order listed above after first considering the issues of exhaustion and procedural default.¹

II. Exhaustion and Procedural Default

A. Exhaustion

Petitioner's habeas petition, filed in September 2000, is governed by the Antiterrorism and Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996). Under AEDPA, a federal court may not grant a habeas petition unless the applicant has exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1). The exhaustion requirement ensures that state courts are provided with the first opportunity to review federal constitutional challenges to state court convictions, thus preserving the role of state courts in protecting federally guaranteed rights. Rose v. Lundy, 455 U.S. 509, 515 (1982). To satisfy the exhaustion requirement, a petitioner must demonstrate that he has "fairly presented" all claims in the federal petition to the state courts, including the highest court in which the petitioner was entitled to review. Whitney v. Horn, 280 F.3d 240, 250 (3d Cir. 2002).

The fair presentation requirement is met when a petitioner presents the federal claim's "factual and legal substance to the state court in a manner that puts them on notice that a federal claim is being asserted." McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999). Generally, a petitioner must present to the state courts the unexhausted claim for collateral review before he can obtain federal habeas review. Rose, 455 U.S. at 522. However, a federal habeas court may

¹ Because the Court will vacate Petitioner's sentence based on the claim found in Count I, it need not consider the claims that seek the vacating of his sentence contained in Counts VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, and XVI.

excuse petitioner's failure to exhaust his claim if state court review is "clearly foreclosed." See Doctor v. Walters, 96 F.3d 675, 681 (3d Cir. 1996); Peterson v. Brennan, 1998 WL 470139, *4 (E.D. Pa. Aug. 11, 1998) (both citing Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993)).

Petitioner has satisfied the exhaustion requirement. Thirteen of his claims were presented, virtually verbatim, to the Pennsylvania Supreme Court on PCRA appeal. See Lewis Initial Brief of Appellant, December 5, 1997; Lewis II, 560 Pa. 240, 743 A.2d 907 (2000). Although the Pennsylvania Supreme Court did not reach the merits of each of Petitioner's PCRA claims, the claims were properly exhausted because the court was fairly given the opportunity to address them. In addition, state court review is now "clearly foreclosed" as to the claims asserted in Counts XIV, XV, and XVI which were brought for the first time in the Petition; accordingly, the Court will excuse Petitioner's failure to raise them in state court.

B. Procedural Default

The doctrine of procedural default bars federal review of habeas claims when a state court declines to review a claim based on an "independent and adequate" state procedural rule. Wainwright v. Sykes, 433 U.S. 72, 81-82 (1977). The parties agree that Counts I, IV, VI, and parts of Counts II and V were addressed by the Pennsylvania Supreme Court on the merits and are not defaulted.² Respondents argue that Counts III, VII, VIII, IX, X, XI, XII, and XIII were

² With respect to Count II, Respondent argues that while Petitioner did in fact raise a Batson claim on direct appeal, it was not the "substantial equivalent" of the claim presented before this Court and, accordingly, those parts of the claim that are newly raised are procedurally defaulted. The Court will address this contention in the section devoted to the Batson claim. With respect to Count V which goes to the sufficiency of the evidence to sustain a conviction for first degree murder, Respondent again argues that the claim presented before this Court is not the "substantial equivalent" of the claim presented before the state court. This Court disagrees. Petitioner's claim that there was not sufficient evidence to convict him of first degree murder was fully presented to the state court and therefore is not defaulted.

disposed of by the Supreme Court on procedural grounds and thus defaulted. Additionally, Respondents argue that Counts XIV, XV, and XVI were raised for the first time before this Court and are procedurally defaulted.³

The Pennsylvania Supreme Court concluded that the group of claims asserted in Counts III, VII, VIII, IX, X, XI, XII, and XIII had been waived due to procedural deficiencies and so declined to review them on merits. However, Petitioner contends that the procedural rules on which the Pennsylvania Supreme Court relied were inadequate.

In judging whether a state procedural rule is “adequate,” the reviewing court must determine whether the rule was “firmly established and regularly followed” at the time the alleged procedural default occurred. Ford v. Georgia, 498 U.S. 411, 423-24 (1991) (citing James v. Kentucky, 466 U.S. 341 (1984)). This standard is met where “(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 (1996). The Court finds that the Pennsylvania Supreme Court’s application of the waiver rules in Petitioner’s case was not “consistent with other decisions.”

For two decades, between 1978 and 1998, the Pennsylvania Supreme Court applied a relaxed waiver doctrine to capital cases. Commonwealth v. Albrecht, 554 Pa. 31, 720 A.2d 693, 700 (1998). This doctrine was so well established that the Third Circuit concluded that the Pennsylvania Supreme Court had a “practice of reaching the merits of claims in PCRA petitions

³ Because the Court finds that the allegations in Count I require that Petitioner’s sentence be vacated, it need not reach the claims raised in Counts XIV and XV or the sentence related aspects of Count XVI.

in capital cases regardless of the failure of the petition to meet the appropriate procedural criteria.” Banks v. Horn, 126 F.3d 206, 214 (3d Cir. 1997).

This practice changed, however, in 1998, when the Pennsylvania Supreme Court decided Albrecht. 720 A.2d at 707 (“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.”) (internal citations omitted). Thus, at the time of Petitioner’s direct appeal in 1984, the Pennsylvania Supreme Court did not consistently and regularly apply the PCRA waiver rules. To the contrary, the Court appeared to disregard the PCRA waiver rule in favor of a more relaxed standard that permitted review of all capital claims, even those not raised on direct appeal. Accordingly, because the PCRA waiver rule applied by the Pennsylvania Supreme Court in Petitioner’s appeal was not firmly established and regularly followed until 1998, several years after the alleged procedural default occurred, it cannot be considered “adequate,”⁴ and this Court is not barred from considering claims III, VII, VIII, IX, X, XI, XII, and XIII on the merits despite the Supreme Court’s ruling that they were procedurally waived.⁵ Because there is no decision of the Pennsylvania Supreme Court to which this court must defer for legal conclusions, the Court will review these claims de novo. Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001).

⁴ See Bronshtein v. Horn, 2001 WL 767593, *5 (E.D.Pa. 2001) (quoting Doctor, 96 F.3d at 684) (“[t]he Court of Appeals for the Third Circuit has [held] that the relevant moment for determining the adequacy of the state rule is ‘not when the [Pennsylvania court] relied on it, but rather ... the date of the waiver that allegedly occurred.’”).

⁵ Numerous Third Circuit cases are in accord on this issue. See e.g., Doctor, 96 F.3d 675; Rollins v. Horn, 2005 WL 1806504 (E.D.Pa. July 26, 2005); Pursell v. Horn, 187 F.Supp.2d 260 (W.D.Pa. 2002); Bronshtein, 2001 WL 767593. However, because the Court is vacating the sentence based on Count I, it need not consider claims VII, VIII, IX, X, XII which relate solely to Petitioner’s sentence and the sentencing claims found in Count XIII.

III. Legal Standard

Counts I, II, IV, V, and VI were reviewed by the state courts on the merits. Accordingly, the review of those decisions is governed by AEDPA:

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

28 U.S.C. § 2254(d).

In Williams v. Taylor, 529 U.S. 362 (2000), Justice Sandra Day O'Connor explained the two part analysis that federal habeas courts are required to perform as set forth in 28 U.S.C. § 2254(d). Id. at 404-410. The court must first determine whether the state court decision was “contrary to ... clearly established federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d). A state court decision can be contrary to Supreme Court precedent in two ways: (1) “if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law,” or (2) “if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to that reached by [the Supreme Court].” Williams, 529 U.S. at 404-05. However, a state court need not reference the relevant Supreme Court cases or even be aware of them, as long as neither the reasoning nor the result contradicts the governing federal law. Early v. Packer, 537 U.S. 3, 8 (2002).

A state court decision involves an unreasonable application of Supreme Court precedent:

(1) “if the state court identifies the correct governing legal rule from the Court’s cases but unreasonably applies it to the facts of the particular state prisoner’s case,” or (2) “if the state court either unreasonably extends a legal principle ... to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.”

Williams, 529 U.S. at 407-08.

IV. Petitioner’s Claims for Relief

1. Count I - Ineffective Assistance of Counsel at Penalty Phase

Petitioner argues that he was denied his constitutionally guaranteed right to the effective assistance of counsel when his attorney failed to investigate or present to the jury significant mitigating evidence regarding his mental illnesses as well as his physically and psychologically traumatic upbringing.⁶

The Supreme Court set forth the standard by which courts must evaluate claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984). First, the defendant must show that counsel’s performance was deficient. This requirement involves demonstrating that counsel made errors so serious that he was not functioning as the “counsel” guaranteed by the Sixth Amendment. Id. at 687. Second, the defendant must show that the deficient performance prejudiced the defense. Id. This requires showing that counsel’s errors deprived the defendant of a fair trial.

Counsel’s performance is deficient if his representation falls “below an objective standard

⁶ Petitioner exhausted this claim on post-conviction review before the Pennsylvania Supreme Court. Lewis II, 743 A.2d at 909; See supra, Part II.B. Because the Pennsylvania Supreme Court reached the merits of this claim, this Court must apply AEDPA’s deferential standard of review. See supra, Part III.

of reasonableness” or outside of the “wide range of professionally competent assistance. Id. at 690. In examining the question of deficiency, “[j]udicial scrutiny of an attorney’s performance must be highly deferential.” Id. at 689. In addition, judges must consider the facts of the case at the time of counsel’s conduct, and must make every effort to escape what the Strickland court referred to as the “distorting effects of hindsight.” Id.

A defendant is deemed to be prejudiced by counsel’s ineffectiveness only if he can show a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. Id. at 694. The Strickland court defined a reasonable probability as “a probability sufficient to undermine confidence in the outcome.” Id. When a defendant challenges a death sentence, “the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” Id. at 695.

A. Deficient Performance

Petitioner alleges that trial counsel was deficient in that he failed to conduct any investigation or other preparation for the penalty phase of trial, particularly concerning substantial mitigating evidence about his mental health and cognitive and emotional impairment which, he argues, is largely the product of a deeply traumatic upbringing. Petitioner contends that, at the time of the trial, information was available to counsel from “numerous sources” that he had long suffered from serious mental illnesses and that trial counsel was clearly deficient for failing to investigate his mental health and family background for possible use in mitigation of his death sentence.

Respondents claim that the Pennsylvania Supreme Court properly denied this claim

because trial counsel had no reason to suspect that there was any evidence of mental illness that could serve as a mitigating factor. Respondents also dispute the existence of such mitigating evidence, pointing to a mental health evaluation conducted contemporaneously with the sentencing hearing that did not uncover the evidence of mental illness and family trouble that Petitioner now claims were a pervasive part of his upbringing.

The evidence that Petitioner has presented, both in the PCRA courts and in his habeas proceedings, reveals that he does in fact suffer from a host of mental health issues, many of which may be attributable to his deeply troubled family background. Petitioner's mother drank turpentine when she was pregnant with Petitioner in order to re-start her menstrual cycle. Appendix to Petition for Writ of Habeas Corpus ("App.") Ex. 1, Declaration/Affidavit of Carlease Lewis ("Ex.1"), ¶ 2. Although she always suspected something was wrong with Petitioner, it became obvious to her that he was different after he suffered a massive head injury at the hands of his father, who slammed his head against a bathtub when he was a young child. Id. ¶ 3. Petitioner's mother noticed that his behavior changed markedly after this incident, that he became "difficult and moody," and often came to her early in the morning to complain of headaches. Id. ¶¶ 5,6.

Petitioner's brother described the abuse inflicted on Petitioner and his siblings by their father:

A lot of what happened to Reggie, myself, our sister, Diane and the other kids as children explains why we have all had problems as adults. My father was a very vicious, disturbed, and unpredictable man.

I know our father sexually molested our sister Diane when she was very young, up until the time he abandoned the family for all those years. Reggie was about eight years old when my father left. No one in the family wants to talk about how my father came back later to Diane and offered her money for her to

sleep with him again. I too am ashamed for what happened in our family for so long. I know the problems that Diane, myself and particularly Reggie experienced in adult life have to do with the sexual abuse our father committed against us as children.

My father would beat us as punishment and then he would also beat us differently – in a very perverted way. My father had no problem with hitting you right where you stood and knocking you to the floor for little or no reason. My father could change moods in a matter of seconds before you realized what was coming and could get away. In many ways, Reggie’s mood swings as a child and in his adult life remind me of my father’s unpredictability.

My father would also punished [sic] us all together. These beatings had a sick sexual nature to them that was unmistakable. My father would take all the children and strip them naked one by one. Next he would take electrical cord or rope and tie our hands as we stood naked. He would make us all lie side by side on the floor and hog tie our hands to our feet so that we were completely helpless and exposed. My father would then stand over each one of us with a belt and beat us walking back and forth.

App. Ex. 5, Declaration/Affidavit of Tyrone Ferguson, ¶¶ 3-6.

Likewise, Petitioner’s sister described the abuse she suffered at the hands of her father as well as Petitioner’s attempts to protect her. App. Ex. 4, Affidavit/Declaration of Diane Lewis, ¶ 10, 11. She also described Petitioner’s mental health issues, saying that she “always knew that something was mentally wrong with Reginald.” *Id.* ¶ 12. Petitioner’s youngest brother, Michael, told similar stories of abuse and trauma during Petitioner’s early years. He reported that their “father beat Reginald with his fists even though [he] was very young.” App. Ex. 2, Affidavit/Declaration of Michael Lewis, ¶ 2

It is clear that all members of Petitioner’s family believe that the above had a profound effect on his mental health. Michael recounted instances in which Petitioner, at the age of fourteen, believed that Satan was trying to kill him and tore up his room with a knife, allegedly fighting the devil. *Id.* ¶ 7. Petitioner’s mother tried to stop him, but “he had a wild look in his

eye and he took the knife and tried to stab our mother.” Id. ¶ 8. Petitioner’s paranoia was so deep-seated that, fearing something might happen to him in his sleep, he forced himself to stay up for days at a time. Id. ¶ 10; Ex. 1 ¶ 6; Ex. 4 ¶ 17; Ex. 5 ¶ 9.

Petitioner’s family also described how he suffered from manic mood swings which he attempted to regulate with drug use. Ex. 5 ¶¶ 13, 14; Ex. 4 ¶¶ 17-19; Ex. 2 ¶¶ 14-16. His sister Diane described an incident when Petitioner climbed onto the roof with a “strange look in his eye” and spoke of a voice who had told him he could fly. When his family tried to talk him down, he told them that “they did not understand his powers.” Ex. 4 ¶ 13. Friends also described Petitioner’s personality disorder. Otis McClendon, a childhood acquaintance, said that it was obvious to him that there was “something seriously wrong with [Petitioner]....in fact, all the kids we went to school with thought Reggie was either crazy or psychotic.” App. Ex. 6, Affidavit/Declaration of Otis McClendon, ¶ 2. Another childhood friend said that his “first and lasting impression of Reginald Lewis is that he is crazy.” App. Ex. 3, Affidavit/Declaration of Clarence Edwards, ¶ 2.

As a result of his behavior problems, Petitioner’s mother ordered him out of the house when he was fifteen. Ex. 1 ¶ 7. After that, he spent nights on the porch, “cursing at [his] mother and threatening to burn the house down. He often disappeared for days and the family did not know where he slept at night. Ex. 2 ¶ 12. According to friends, he often slept on the top floor of an abandoned house. Ex. 6 ¶ 4.

In addition to this mitigation testimony that family members and friends were willing to provide, Petitioner claims that medical witnesses could have testified to cognitive, mental and emotional problems from which he suffered. To this end, four mental health evaluations,

performed from 1983 to 1997, were appended to the Petition.

On August 18, 1983, following the jury's imposition of a death sentence, Petitioner was examined by Edwin P. Camiel, M.D. to determine if he was mentally competent to receive the death sentence that the jury had imposed. The sources of information that Dr. Camiel used in forming his opinion were an hour and a half interview with Petitioner, a Court history, and a previous court clinic evaluation dated March 3, 1976. App. Ex. 8, Mental Health Evaluation, Dr. Edwin Camiel ("Ex. 8"), at 1. Dr. Camiel concluded that Petitioner was "competent for any sentence the Court wished to impose." Id. at 4. In reaching that conclusion, however, he noted Petitioner's grandiose self-image and "socialization" defects and diagnosed Petitioner with Antisocial Personality Disorder. Id.

Less than a year after Dr. Camiel's report, Petitioner was examined by a psychologist, Dr. Stewart Wellman, at the request of the Pennsylvania Department of Corrections. App. Ex. 9, Psychological Report on Reginald Lewis, June 8, 1984 ("Ex. 9"). Unlike Dr. Camiel, Dr. Wellman administered personality and intelligence tests which resulted in a diagnoses of borderline mental retardation. Id. at 1. Dr. Wellman found a significant gap between Petitioner's verbal abilities, which were good, and his non-verbal abilities which were poor. In his report, he opined that this was indicative of organic brain damage and noted the severe head trauma that Petitioner suffered at the hands of his father as a possible cause. Id. Dr. Wellman concluded that individuals with Petitioner's profile "often show evidence of paranoid mentation and disordered thinking." Id. at 2. He went on to report that Petitioner's reality ties "can be marginal and fluctuating" and that there was "potential for an overt psychotic breakdown." Id. He recommended ongoing monitoring and support.

On November 18, 1993, Petitioner was again examined by a psychiatrist working for the Philadelphia Probation and Parole department to determine if he was competent for sentencing.⁷ See App. Ex. 7, Mental Health Evaluation - Reginald Lewis, Joaquin Canals, M.D. (“Ex. 7”). Like Dr. Camiel, Dr. Canals based his findings solely on an interview with Petitioner and Petitioner’s court history. Id. at 1. Dr. Canals reported that Petitioner described his family history as normal, his parents as “decent law abiding citizens” and said that he was never deprived of food or shelter as a child or sexually molested. Id. Petitioner reported that he was not on any medication but that he often felt naturally high without drugs and could go days without getting any sleep.⁸ Id. Dr. Canals concluded that Petitioner suffered from Explosive Disorder, Antisocial Personality Disorder, Paranoid Personality Disorder, Hypomanic Personality Disorder and possibly Bipolar Disorder of the manic type. Id. at 5.

The most extensive report on Petitioner’s mental health was made by Dr. Robert Berland, a forensic psychologist. See App. Ex. 10, Declaration of Dr. Robert M. Berland, Ph.D. (“Ex. 10”). Dr. Berland’s report was prepared at the request of Petitioner’s counsel, and Respondents have challenged its accuracy and veracity. Dr. Berland visited Petitioner at SCI-Greene in May of 1997, where he administered several psychological tests, including the Minnesota Multiphasic Personality Inventory (MMPI) and the Wechsler Adult Intelligence Scale (WAIS). He also conducted five independent interviews with Petitioner’s family members and acquaintances. Id. at 1.

⁷ This evaluation pertained to an unrelated court proceeding.

⁸ Dr. Canals noted later in his report that, despite his representation, Petitioner’s medical records revealed that he took Valium and Librium.

From the interviews and tests as well as the materials he reviewed, Dr. Berland found that Petitioner had suffered from a chronic psychotic disturbance from a very young age. Id. at 2. The MMPI test revealed the presence of a “serious psychotic disturbance involving delusional paranoid thinking, psychotic mood disturbance (particularly of a manic nature) and perceptual disturbance (including hallucinations).” Id. at 2-3. Importantly, Dr. Berland did not find any evidence of an attempt by Petitioner to fake or exaggerate his symptoms. Id.

Petitioner had a Full Scale IQ score of 86 on the WAIS test, putting him in the bottom range of average intelligence. Dr. Berland noted that evidence of the subtest profile suggested “the presence of diffuse, or widespread damage to his cerebral cortex in both the left and right hemispheres” and said this profile was “typical of someone whose initial, substantial injury was congenital, having occurred during pregnancy, at the time of his birth, or during the first year or so of life.” Id. at 3. Dr. Berland also noted that the amount of turpentine Petitioner’s mother claims to have ingested during her pregnancy with Petitioner, in addition to the head trauma he suffered at the hands of his father when he was a young child, likely contributed to his impairment. Id. at 14-15.

Petitioner is entitled to relief only if he can demonstrate: (1) that United States Supreme Court precedent requires an outcome contrary to that reached by the state court; or (2) the state court decision represents an unreasonable application of Supreme Court precedent.

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

Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a

reasonable decision that makes particular investigations unnecessary.

Strickland, 466 U.S. at 690-91. Thus, under Strickland, where counsel has no strategic or other reason for failing to investigate, the failure is objectively unreasonable. This duty to investigate becomes particularly significant when applied to mitigating evidence, which the Supreme Court has recognized as playing an important role in “ensuring that a capital trial is both humane and sensible to the uniqueness of the individual.” Peterkin v. Horn, 176 F.Supp.2d 342, 378 (E.D.Pa. 2001) (citing Eddings v. Oklahoma, 455 U.S. 104, 110-11 (1982)).

Respondents urge this Court to ignore many of Petitioner’s submissions, particularly the affidavits of friends and family, as self-serving, after the fact testimony that “was not available to petitioner’s previous lawyers because it had not yet been created.” Response at 61. This argument has little merit. Each of the witnesses who submitted an affidavit states unequivocally that trial counsel never asked about Petitioner’s background and all stated they would have testified at sentencing had they been asked.

Respondents also urge the Court to ignore Dr. Berland’s mental health evaluation in favor of Dr. Camiel’s because (1) his evaluation was performed closer in time to the murder, (2) he is an objective court appointed expert, (3) he is a psychiatrist as opposed to a psychologist and, (4) he is from Philadelphia, whereas Dr. Berland is from Florida. Response at 53-55. However, when all four mental health reports are viewed together they do not, in any meaningful way, contradict one another. Dr. Camiel’s report was based on a one and a half hour interview with Petitioner and some court documents. His conclusion that Petitioner suffered from Anti Social Personality Disorder as well as flights of grandiosity, but was ultimately competent to be

sentenced, in no way contradicts the report of the other court-appointed expert, Dr. Wellman, or Petitioner's expert, Dr. Berland, who, after conducting actual tests, determined that Petitioner suffered from additional personality disorders and organic brain damage. Furthermore, nowhere does Dr. Berland contradict Dr. Camiel's conclusion that Petitioner was competent to be sentenced. His evaluation was for different purposes: to determine whether or not there would have been compelling mitigating evidence for Petitioner to present at his sentencing hearing.

Trial counsel passed away shortly after the end of Petitioner's trial. However, an examination of the transcript along with the compelling evidence that Petitioner has offered leads to the conclusion that there can be no reason, strategic or otherwise for trial counsel's failure to investigate and present mitigating evidence.

Trial counsel's opening, which covers only one and a half pages of the transcript, failed to even mention mitigating circumstances. He called no witness to testify on Petitioner's behalf during the sentencing phase even though many have declared that they wished to do so. Instead, trial counsel called only Petitioner himself and, through further incompetence, managed to open the door to testimony indicating that Petitioner had attempted to shoot a police officer during the course of the commission of a prior felony. N.T. 8/12/83, 1365-66.

Like his opening statement at sentencing, trial counsel's closing was brief - two and a half pages of transcript. N.T. 8/12/83, 1375-77. Again, counsel made no argument for mitigation. If any further proof of counsel's lack of preparation were necessary, it is found in a comment he made to the court at sidebar just prior to making his closing argument at sentencing. He said, quite candidly to the trial judge, "I just - I have not gone through this." Id.

In spite of all this evidence, the Pennsylvania Supreme Court found that counsel's

performance was not deficient. The Court summarily rejected Petitioner’s claim of ineffectiveness at the penalty phase finding that his “claim that he suffers from brain damage or serious mental illness is ... simply not supported by the record.” Lewis II, 743 A.2d at 906. Ultimately, the Court concluded that because Petitioner played an active role in the proceedings, spoke in a coherent manner, and in the opinion of the Court showed no signs of brain-damage or mental illness, “trial counsel and subsequent appellate counsel cannot be ineffective for failing to investigate, discover and present evidence of such brain damage or mental illness.” Id.

This Court finds that the above analysis was an unreasonable application of Strickland and its progeny which impose a duty on counsel to investigate or make “an objectively reasonable decision” not to investigate.⁹ Strickland, 466 U.S. 690-91; Williams v. Taylor, 529 U.S. 362, 396 (2000) (trial counsel has an obligation “to conduct a thorough investigation of the defendant’s background”). In the instant case, the fact that trial counsel did not have information about Petitioner’s mental health condition or family background supports the conclusion that he failed to investigate. It does not, as the Pennsylvania Supreme Court concluded, justify the failure to investigate and present evidence in mitigation of a sentence of death.

The fact that trial counsel failed to present any evidence whatsoever in mitigation leads inexorably to the conclusion that he failed to make any reasonable effort to uncover such evidence. Had the Pennsylvania Supreme Court reasonably applied the Strickland and Williams standards regarding counsel’s duty to investigate, it could have come to no conclusion other than Petitioner’s trial counsel rendered constitutionally ineffective assistance at the sentencing phase.

⁹ The Pennsylvania Supreme Court makes no reference to Strickland anywhere in its opinion.

B. Prejudice

This Court further finds that Petitioner was prejudiced by trial counsel's failure adequately to prepare for the penalty phase of the trial and investigate or present mitigating evidence to the jury.¹⁰

In a Pennsylvania capital case, after a first degree murder verdict is recorded and before the jury is discharged, the court conducts a separate sentencing hearing in which the jury determines whether the defendant will be sentenced to death or life imprisonment. 42 Pa. C.S.A. § 9701(a). The jury is instructed that a sentence of death must be imposed if it unanimously finds at least one aggravating circumstance and no mitigating circumstance or if it unanimously finds one or more aggravating circumstances that outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases. 42 Pa. C.S.A. § 9711(c)(iv). In addition, aggravating circumstances must be proved beyond a reasonable doubt; mitigating circumstances need be proved only by a preponderance of the evidence. 42 Pa. C.S.A § 9711(c)(iii).

The jury at Petitioner's trial found one aggravating circumstance: a significant history of prior criminal convictions. Memorandum of Law in Support of Petition for a Writ of Habeas Corpus ("Petitioner's Memorandum"), at 27. This finding was based on evidence that Petitioner had been convicted of two prior felonies: aggravated assault and murder. N.T. 8/12/83, 1329-1387. Because trial counsel presented no evidence in mitigation, the jury was required by law to impose a sentence of death.

¹⁰ The Pennsylvania Supreme Court did not reach the prejudice inquiry, dismissing the claim of ineffective assistance of trial counsel at the penalty phase on the ground that counsel's performance was not deficient.

Had the jury heard the evidence regarding Petitioner's life history and the conclusions reached by some of the mental health experts, there is a reasonable probability that at least one juror would have found the mitigating circumstances to outweigh the aggravating circumstances. Therefore, the Court finds that trial counsel's deficient performance was prejudicial to Petitioner and that his constitutional right to effective assistance of counsel as defined in Strickland was violated. Accordingly, the Court will grant Petitioner's writ of habeas corpus and direct that he either be given a new sentencing hearing or sentenced to life imprisonment.

2. Count II - Commonwealth's Exercise of Peremptory Challenges.

Petitioner claims that the Commonwealth exercised its peremptory challenges in a racially discriminatory manner in order to exclude blacks from the jury in violation of the Equal Protection Clause of the Constitution as articulated in Batson v. Kentucky, 476 U.S. 79 (1986).¹¹ For the reasons that follow, the Court finds that Petitioner's claim is without merit.¹²

In order to state a prima facie Batson claim, a defendant must establish that he is a member of a cognizable racial group and that the facts and circumstances of the case raise an inference that the prosecutor asserted his challenges in a discriminatory manner. Id. at 96. The following factors must be considered: (1) the number of racial group members in the panel; (2) the nature of the crime; (3) the race of the defendant; (4) a pattern of strikes against racial group

¹¹ Petitioner exhausted this claim on direct appeal before the Pennsylvania Supreme Court. Lewis I, 567 A.2d at 1381 n. 3; See supra, Part II.B. Because the Pennsylvania Supreme Court reached the merits of this claim, this Court must apply AEDPA's deferential standard of review. See supra, Part III.

¹² Petitioner further alleges that appellate counsel was ineffective for failing to raise this claim in a "professionally reasonable manner" on direct appeal. Because Petitioner cannot establish a prima facie case under Batson, his claim of ineffective assistance of counsel for failure to raise this claim must also fail.

members; and (5) the questions and statements during the voir dire. United States v. Clemons, 843 F.2d 741, 748 (3d Cir. 1988).

A. Review of Pennsylvania Supreme Court's Decision

This Court concludes that, on direct review, the Pennsylvania Supreme Court reasonably applied Batson in determining that Petitioner failed to make a prima facie claim of discriminatory jury selection.

Under AEDPA, federal courts must defer to state courts' factual findings if they are fairly supported by the record. 28 U.S.C. §§ 2254 (d)(2) and (e)(1). When reviewing Batson claims, state trial courts are in the best position to determine whether a prima facie claim has been made. See Batson, 476 U.S. at 98, n. 21; Riley v. Taylor, 277 F.3d 261 (3d Cir. 2001).

At trial, Petitioner failed to object to any of the Commonwealth's peremptory challenges on the basis that they were being exercised in a racially discriminatory manner. In addition, there is no record of the racial make-up of the venire or the final composition of the jury. The record before this Court is the same as that which the Pennsylvania Supreme Court considered when denying Petitioner's Batson claim on direct appeal.¹³ In ruling on the claim, the Court wrote:

The appellant also raises a claim that the Commonwealth improperly excluded potential jurors with peremptory challenges because of the race of the juror. There does not appear to be enough in this record to address the claim given appellant's failure to identify specific veniremen or specific parts of the record in support of his allegation. Therefore, absent a prima facie showing of improper use of peremptory challenges by the Commonwealth, this claim could not provide a basis for this Court to vacate the judgment of sentence of death imposed by the Court of Common Pleas of Philadelphia County.

¹³ On PCRA review, the Pennsylvania Supreme Court declined to revisit the claim as it had been "previously litigated." Lewis II, 743 A.2d at 908.

Lewis I, 567 A.2d at 1381 n.3.

Using the standard of “reasonableness” set forth by the Supreme Court in Williams, this Court cannot conclude that the Pennsylvania Supreme Court unreasonably applied Batson to the facts of Petitioner’s case. See Williams, 529 U.S. at 410. Nor was it unreasonable for the Pennsylvania Supreme Court to deny Petitioner’s request for an evidentiary hearing to further develop the record on this issue. Absent any indication from the trial court record that Petitioner could make a prima facie Batson claim, it was not unreasonable for the Pennsylvania Supreme Court to conclude that such a hearing was unnecessary.

Petitioner alleges new facts to support his claim; namely that there was a policy within the Philadelphia District Attorney’s office systematically to exclude black jurors on account of their race as evidenced by the training tape made by ADA Jack McMahon. Made in 1987, the tape offers advice to prosecutors how to effectively strike black jurors using peremptory challenges without violating Batson. The Pennsylvania Supreme Court has noted that the practices advocated by McMahon, “flaunt constitutional principals in a highly flagrant manner.” Commonwealth v. Basemore, 560 Pa. 258, 744 A.2d 717, 731, n.12 (2000). However, Petitioner’s trial occurred four years prior to the creation of the video and there has been no evidence presented to suggest that the prosecutor in Petitioner’s case engaged in those practices.

Finally, Petitioner seeks, “at a minimum,” an evidentiary hearing before this Court to establish the merits of his Batson claim. A district court’s decision on whether or not to hold an evidentiary hearing in a habeas proceeding is governed by 28 U.S.C. § 2254(e)(2) which provides:

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 claims relies on –
(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.

Petitioner’s failure to develop the factual record necessary to support his Batson claim dates back to trial when counsel failed to object to the manner in which the Commonwealth exercised its peremptory challenges. There is neither a record of the race of those stricken jurors nor any indication as to the racial composition of the jury that tried and sentenced Petitioner. Nothing in 28 U.S.C. § 2254(e)(2) excuses Petitioner’s failure in this regard. See Sistrunk v. Vaughn, 96 F.3d 666, 671 n.5 (3d Cir. 1996) (“[Petitioner] was obligated ... to develop a record [in state court] supporting [his] claim.”). Accordingly, Petitioner’s request for an evidentiary hearing will be denied.

3. Count III - Ineffective Assistance of Counsel at Guilt Phase

In Count III, Petitioner contends that he is entitled to relief from his conviction because of attorney ineffectiveness at the guilt phase of trial. Petitioner alleges that trial counsel was ineffective in the presentation of his alibi defense, namely through failure to contact, prepare and present witnesses that Petitioner had identified to counsel to substantiate his claim that he was not in Philadelphia on the night of the murder. In addition, Petitioner claims that trial counsel

was ineffective for failing to advance a theory of self-defense.¹⁴

A. Alibi Defense

To satisfy the first prong of the Strickland standard, a petitioner must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. Deficient performance has been described as falling below an "objective standard of reasonableness." Id. at 690; See supra, Part IV(1)(A).

Petitioner contends that trial counsel was unprepared to fully present the only theory of defense on which Petitioner proceeded: alibi. In particular, Petitioner faults trial counsel for not having conducted adequate preparation of Clarence Edwards, a witness who testified that he drove Petitioner to the bus station prior to November 21, the date of the murder, to travel to San Diego to visit his brother. Another alibi witness, Michael Lewis, was contacted by defense counsel only on the eve of trial and, according to Petitioner, not adequately prepared. Finally, Petitioner's girlfriend, described in the Petition as a "crucial" witness, went unrecognized by trial counsel when she walked into the courtroom during trial in violation of the sequestration order.

Petitioner's contention that the failure of the alibi defense was the result of trial counsel's lack of preparation is not supported by the record. Edwards' testimony was not complicated; he stated only that he drove Petitioner to the bus station prior to the date the murder was committed. He did not see Petitioner get on the bus nor was he in contact with Petitioner after he returned to Pennsylvania. Failure to elicit further favorable testimony was not due to counsel's lack of

¹⁴ As the Pennsylvania Supreme Court's discussion of this claim does not constitute an "adjudication of the merits," this Court will review these claims de novo. See supra, Part II B.

preparation, but rather to the witness' inability to provide it. Thus, counsel's performance could not be said to fall below an objective standard of reasonableness.

Likewise, any failure that occurred in the preparation of Michael Lewis ("Lewis"), Petitioner's younger brother, appears from the record to be the fault of the witness and not trial counsel. Counsel was in contact with Lewis over a month before the trial began. N.T. 8/10/83, 1007. After that point, Lewis, a Sergeant in the Marines, was transferred from San Diego to Denver, Colorado. N.T. 8/5/83, 730. Trial counsel requested a new address for Lewis from Petitioner but even Petitioner was not able to provide that information to counsel until a week before trial. Id. Trial counsel stated on the record that he had attempted on numerous occasions to get Lewis' contact information from both Petitioner's mother and Petitioner's girlfriend, but to no avail. Id. at 731. Trial counsel clearly attempted to contact Lewis and, in the end, was able to present Lewis' testimony on his brother's behalf. Accordingly, with respect to this witness, trial counsel's performance was not deficient as defined by the Supreme Court in Strickland.

Next, Petitioner points to trial counsel's failure to recognize Petitioner's girlfriend, Stephanie McCOREY ("McCOREY"), when she entered the courtroom during trial, thereby violating the sequestration order. Petitioner asserts that trial counsel's failure to recognize her demonstrates his lack of preparedness. Again, however, Petitioner's allegations are not supported by the record.

During a contempt hearing the court conducted after she made an outburst in the courtroom, McCOREY stated that she had not identified herself as a witness to the court officer when asked since she didn't know anything about the case and did not expect to testify. N.T. 8/5/83, 662. This Court cannot conclude that it was deficient performance for counsel to fail to

recognize someone who was not going to be a witness because she knew nothing about the case.

Accordingly, the Court finds that trial counsel's presentation of Petitioner's alibi defense did not fall below an objective standard of reasonableness as defined by Strickland.

B. Self-Defense

Petitioner claims that it was objectively unreasonable for trial counsel not to pursue a theory of self-defense. The sole basis that he offers in support of a self-defense theory is the medical examiner's testimony that the victim had a blood alcohol level of .2 at the time of his death.

In light of Petitioner's assertion that he was not in Philadelphia at the time of the murder but was visiting his brother in California, trial counsel made a strategically reasonable choice not to pursue a factually contradictory theory of self-defense. It can hardly be called strategically unreasonable not to present a theory of self-defense that would be factually inconsistent with and thereby undermine the credibility of Petitioner's alibi defense. See Florida v. Nixon, 543 U.S. 175, 191 (2004). Accordingly, the Court does not find trial counsel's performance in this regard to be deficient.

4. Count IV - The Commonwealth Suppressed Exculpatory Evidence

Petitioner claims that he is entitled to relief from his conviction because the prosecution suppressed exculpatory evidence relating to his alibi in violation of Brady v. Maryland, 373 U.S. 83, (1963).¹⁵ Specifically, Petitioner claims that the Commonwealth suppressed crucial evidence

¹⁵ Petitioner exhausted this claim on post-conviction review before the Pennsylvania Supreme Court. Lewis II, 743 A.2d at 910-11; See supra, Part II.B. Because the Pennsylvania Supreme Court reached the merits of this claim, this Court must apply AEDPA's deferential standard of review. See supra, Part III.

of his alibi defense when it failed to produce bus tickets located in a briefcase seized from him. The tickets, Petitioner argues, would have corroborated his claim that he was in California on the day of the murder. Petitioner also alleges bad faith on the part of the Commonwealth, claiming that the detective who originally seized his briefcase concealed the exculpatory evidence.

On PCRA appeal, the Pennsylvania Supreme Court concluded that no Brady violation had occurred. First, it concluded that the testimony of the arresting officer did not support Petitioner's contention that the bus ticket would have contributed to his alibi defense. Lewis II, 743 A.2d at 911. The arresting officer testified that he recalled seeing a Greyhound bus ticket, whereas Petitioner stated that he took a Trailways bus to San Diego. Id. The arresting officer also testified that the ticket stub was blank and did not contain any information regarding date of travel or point of origin. Second, the Court concluded that the testimony did not support Petitioner's contention that the Detective withheld evidence because the briefcase containing his tickets was given to his then fiancé, Stephanie McCOREY. Based on these findings the Court held that there "can be no Brady violation where the prosecution did not have custody of the ticket and where it would not have provided exculpatory evidence." Id.

To establish a Brady violation, a defendant must prove: "(1) the government withheld evidence, either wilfully or inadvertently; (2) the evidence was favorable, either because it was exculpatory or of impeachment value; and (3) the withheld evidence was material." Lambert v. Blackwell, 387 F.3d 210, 252 (3d Cir. 2004). Accepting the Pennsylvania Supreme Court's finding that the evidence was neither exculpatory nor withheld from Petitioner, this Court cannot conclude under the deferential AEDPA standard that this was an "unreasonable application of" federal law.

Petitioner also argues that the PCRA court made an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(2). In Miller-El v. Cockrell, 537 U.S. 322, 340 (2003), the Supreme Court interpreted 28 U.S.C. § 2254(d)(2) to mean that “a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding.”

Detective Kane, the arresting officer, testified that he saw only a Greyhound bus ticket in Petitioner’s briefcase and that he did not recall seeing a date or place of origin on the ticket. N.T. 8/9/83, 872-73. He also testified that he gave the briefcase to the police officer who took Petitioner back to his cellroom and that it was retrieved by Petitioner’s then fiancé on March 22, 1983.¹⁶ The Pennsylvania Supreme Court found that the jury’s factual determinations after hearing this testimony were reasonable and Petitioner has offered nothing to warrant disagreement with the state court’s credibility determination. Accordingly, because this Court cannot conclude that the Pennsylvania Supreme Court unreasonably applied the principals of Brady to this claim and because Petitioner has not demonstrated that the state court unreasonably determined the facts based on the evidence, this claim will be denied.

5. Count V - Sufficiency of the Evidence

Petitioner argues that the evidence presented to the jury was not sufficient to find him guilty of first-degree murder, in violation of the Fourteenth Amendment and Jackson v. Virginia,

¹⁶ Petitioner’s own testimony weakens his argument considering that both he and his witnesses testified on numerous occasions that he took a Trailways bus to California. N.T. 8/9-10/83, 842, 979, 1065. Therefore, a Greyhound bus ticket stub would have been of no value in determining whether Petitioner left for California when he claims he did. Petitioner has failed to address this argument raised both by the PCRA court and Respondents.

443 U.S. 307 (1979).¹⁷ He contends that the Commonwealth was required to prove malice and premeditation beyond a reasonable doubt and that it failed to meet this burden. In addition, Petitioner argues that the Commonwealth was required to disprove self-defense in order to establish malice and failed to do so.¹⁸

To establish first-degree murder in Pennsylvania, specific intent to kill must be proven. Commonwealth v. Garcia, 505 Pa. 304, 310, 479 A.2d 473, 476 (1984). In reviewing the sufficiency of the evidence on direct review, the Pennsylvania Supreme Court found that the evidence produced at trial was sufficient to support a conviction for first degree murder. Lewis I, 567 A.2d at 1379. In particular, it found that the evidence showing that defendant was stabbed nine times in the chest with a deadly weapon, the fatal blow having been delivered to the heart, was sufficient to support an inference of specific intent. Id.

As a general matter, “it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.” Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Furthermore, where fact-specific inquiries are at issue, a federal habeas court will not disturb the

¹⁷ Petitioner exhausted this claim on direct review before the Pennsylvania Supreme Court. Lewis I, 567 A.2d at 1379-80; See supra, Part II B. Because the Pennsylvania Supreme Court reached the merits of this claim, this Court must apply AEDPA’s deferential standard of review. See supra, Part III.

¹⁸ Petitioner asserts for the first time in his habeas Petition the Commonwealth’s failure to meet its burden of disproving self-defense. Even assuming that this belated legal argument is properly before the Court, it is without merit. Petitioner cites Pennsylvania case law in support of his proposition that the Commonwealth is required to disprove self-defense in all prosecutions for first degree murder. However, those cases impose such a burden only when there is *evidence of* self-defense. See e.g., Commonwealth v. Heatherington, 477 Pa. 562, 568, 385 A.2d 338, 341 (1978). In the instant case, Petitioner made no attempt to argue self-defense and instead relied on a factually inconsistent alibi defense. At closing, trial counsel stated that there “is no issue as to self-defense ... there is no issue as to provocation.” N.T. 8/11/83, 1204.

state court’s finding unless it “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)(2). With respect to the question of whether the prosecution presented evidence sufficient to establish a finding of murder in the first degree, the Court concludes that the Pennsylvania Supreme Court’s affirmation of the factual findings on direct appellate review was reasonable; accordingly, this claim will be denied.

6. Count XIII - Constitutionality of Reasonable Doubt Instruction

Petitioner asserts that his conviction should be overturned because the reasonable doubt instruction given at trial was in violation of his due process rights.¹⁹ The reasonable doubt instruction was as follows:

A reasonable doubt is a doubt that would cause a reasonably careful and sensible person to **restrain** before acting upon a matter of importance in his own affairs. A reasonable doubt must fairly arise out of the evidence that was presented, or out of the lack of evidence presented with respect to some element of the crime. A reasonable doubt must be a real doubt. It may not be an imagined one or a speculative one, nor may it be a doubt manufactured to avoid carrying out an unpleasant duty.

N.T. 8/12/83, 1269 (emphasis added). At the time of Petitioner’s trial, the Pennsylvania standard jury instruction defining reasonable doubt, read as follows:

A reasonable doubt is a doubt that would cause a reasonably careful and sensible person to **hesitate** before acting upon a matter of importance in his own affairs. A reasonable doubt must fairly arise out of the evidence that was presented, or out of the lack of evidence presented with respect to some element of the crime. A reasonable doubt must be a real doubt, it may not be an imagined one, nor may it be a doubt manufactured to avoid carrying out an unpleasant duty.

¹⁹ As the Pennsylvania Supreme Court’s discussion of this claim does not constitute an “adjudication of the merits,” this Court will review the claim de novo. See supra, Part II B.

Pennsylvania Criminal Suggested Standard Jury Instructions § 7.01(3) (emphasis added).

Petitioner's claim is based on the trial court's use of the word "restrain" instead of "hesitate."

So long as jury instructions, taken as a whole, correctly convey the concept of reasonable doubt, the Supreme Court has held that the Constitution does not dictate the manner in which a criminal jury be instructed regarding the government's burden of proof. Victor v. Nebraska, 511 U.S. 1, 5 (1994). The correct inquiry in determining whether a reasonable doubt instruction is proper is to consider if, when "taken as a whole, the instructions correctly convey the concept of reasonable doubt to the jury." Id.

Courts in this district, when considering substantially similar instructions as the one used at Petitioner's trial, have found them to have properly conveyed the definition of reasonable doubt. See Starkes v. Markes, 524 F.Supp. 37, 40 (E.D.Pa.1981) ("although there may be a semantic difference between the terms 'restrain' and 'hesitate' when viewed in isolation, it cannot be said ... that there is a substantial difference between these two charges when each term is viewed in context of the overall charge"); Peterkin v. Horn, 176 F.Supp 2d 342, 380-81 (E.D.Pa. 2001) (finding that, when viewed as a whole, a reasonable doubt instruction substituting the word restrain for hesitate did not raise the level of doubt so high as to constitute constitutional error). In addition, the Pennsylvania Supreme Court has "sanctioned time and again" the use of word "restrain" in reasonable doubt instructions. See Commonwealth v. Cartagena, 482 Pa. 6, 26, 393 A.2d 350, 360 (1978).

Taken as a whole, this Court concludes that the instruction adequately defined reasonable doubt. Accordingly, Petitioner's request for habeas relief on this basis will be denied.

7. Count XVI - Cumulative Prejudicial Effect

Petitioner claims that, even if no individual claim warrants relief from his conviction, the cumulative effect of all the alleged errors deprived him of a fair trial.²⁰

Certain errors, harmless when viewed individually, may be so prejudicial when taken cumulatively as to warrant a new trial. Marshall v. Hendricks, 307 F.3d 36, 94 (3d Cir. 2002). In this case, however, Petitioner has failed to establish cumulative prejudicial effect. All of his claims with respect to his conviction are meritless. Accordingly, this claim will be denied.

V. Conclusion

The Court finds Petitioner's claims in support of vacating his conviction to be without merit. However, Petitioner did receive ineffective assistance of counsel at his sentencing hearing and the Pennsylvania Supreme Court's decision finding otherwise was an unreasonable application of Strickland. Accordingly, a writ of habeas corpus shall issue, directing that Petitioner either be given a new sentencing hearing or be sentenced to life imprisonment.

²⁰ Petitioner argues that these errors warrant relief from both his conviction and sentence. Because the Court has granted relief from the sentence, it need not consider this argument as it pertains to his sentence.

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

REGINALD S. LEWIS	:	CIVIL ACTION
	:	
v.	:	(CAPITAL CASE)
	:	
MARTIN HORN, et al.	:	NO. 00-802

ORDER

AND NOW, this 9th day of August, 2006, upon consideration of the Petition for Writ of Habeas Corpus (docket no. 8) and the responsive filings, it is **ORDERED** that:

1. Count I of the Petition is **GRANTED** and Petitioner's sentence is **VACATED**.
2. Counts II, III, IV, and V are **DENIED** with prejudice.
3. Counts XIII and XVI are **DENIED** with prejudice with respect to those claims which challenge the conviction and **DENIED** as moot with respect to those claims which challenge Petitioner's sentence.
4. Counts VI, VII, VIII, IX, X, XI, XII, XIV, and XV are **DENIED** as moot.
5. 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 Memorandum Opinion.
6. 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.
7. Pursuant to 28 U.S.C. § 2253 a certificate of appealability is issued with respect to those claims that were granted and those that were denied with prejudice.
8. If either Petitioner or Respondents file a timely appeal to the United States

Court of Appeals for the Third Circuit, this Order will be stayed pending disposition of that appeal pursuant to Local Rule of Civil Procedure 9.4(12).

BY THE COURT:

/s/ Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.