

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

NATHANIEL RHODES, JR. : CIVIL ACTION  
: :  
v. : :  
: :  
DAVID A. VARANO, et al. : NO. 08-3236

**REPORT AND RECOMMENDATION**

**ELIZABETH T. HEY**  
**UNITED STATES MAGISTRATE JUDGE**

**March 26, 2009**

Nathaniel Rhodes filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in July of 2008. The Honorable Cynthia Rufe, to whom the case is assigned, referred the case to the undersigned to prepare a Report and Recommendation and subsequently appointed counsel to represent Mr. Rhodes. Appointed counsel filed an amended petition on November 24, 2008. Because I conclude that the state court's adjudication of Rhodes' Batson claim<sup>1</sup> involved an unreasonable determination of clearly established federal law, I recommend that the writ be granted, but stayed to give the state court the opportunity to conduct a proper Batson inquiry. I recommend that the writ be denied as to all other claims.

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<sup>1</sup>Batson v. Kentucky, 476 U.S. 79 (1986), prohibits discrimination in jury selection.

## **I. FACTS AND PROCEDURAL HISTORY:**

Rhodes is serving a 25-to-50 year sentence for robbery. The trial court set forth the facts of the case in its August 27, 2004, unpublished opinion:

The charges stemmed from events occurring in the early morning hours of November 22, 2003. At approximately 2:30 a.m. that day, Sam Qawasmy was working alone at a 7-11 convenience store located at 1503 West Main Street in West Norriton, Montgomery County. Qawasmy, the store owner, noticed a male individual wandering around outside the store. . . . [Rhodes] entered the store wearing a hooded sweatshirt with the hood pulled up over his head. [Rhodes] asked Qawasmy for a pack of cigarettes. After Qawasmy placed the cigarettes on the counter, [Rhodes] told Qawasmy to “give me the money.” When he made this statement, [Rhodes] had his right hand inside a pocket on the sweatshirt and he was pushing his hand from the inside toward Qawasmy. Fearing [Rhodes] had a gun, Qawasmy opened the cash register, which contained \$42.00, and put the till up on the counter. [Rhodes] grabbed the money and asked “That’s it?” After Qawasmy replied “Yeah, that’s what I have,” [Rhodes] walked back toward the door and exited the store. Qawasmy then pushed a concealed button to call for police and walked to the front of the store. There, he observed [Rhodes] get in the passenger side of a small, light-colored foreign car that was headed in the direction of Montgomery Avenue.

Qawasmy, who also owns a 7-11 convenience store at 788 East Johnson Highway in Norristown, Montgomery County, then called the employee working at that store, Kimo Fahim, to advise him that he had just been robbed and to be alert for a man matching [Rhodes’] description. . . .

At approximately 2:45 a.m., a police radio transmission announced that the 7-11 in West Norriton had just been robbed. The transmission described the assailant as a black male, wearing blue jeans, dark shoes, and a dark-colored sweatshirt. It also stated that the assailant was riding in a light-colored foreign car. Thereafter, around 5:00 a.m., [Rhodes] walked into the 7-11 on East Johnson Highway. He was wearing the same clothes as when he robbed Qawasmy in West Norriton. [Rhodes] ordered a pack of cigarettes from

Fahim but, when a delivery man began to enter the store, [Rhodes] told Fahim he forgot his wallet and ran out of the store. Fahim then called the police and Qawasmy to report that a man matching [Rhodes'] description had just been in the store. . . . Upon viewing a surveillance videotape of the Norristown 7-11, Officer [Charles J.] Leeds immediately recognized [Rhodes] and identified him as Nathaniel Rhodes. . . . About an hour later, a radio transmission indicated that a man fitting [Rhodes'] description was spotted near the "A-Plus" Mini-Market at the intersection of Haws Avenue and Main Street in Norristown. [Rhodes] was stopped by police while walking about a block away from the mini-market. At the time, [Rhodes] was wearing blue jeans, a gray sweatshirt, black shoes and glasses. He also had been seen by a patrolling officer exiting a light-colored foreign car.

Subsequent to [Rhodes] being detained, Sergeant [Robert] Sobeck telephoned Qawasmy and asked him to come to the scene. Upon arriving and seeing [Rhodes], Qawasmy immediately identified [Rhodes] as the man who had robbed him earlier that morning. Qawasmy was then driven to the Norristown Police Department and shown a photo array. Qawasmy identified [Rhodes] from a photo array that contained images of seven other men of similar race and hairstyle. Consequently, [Rhodes] was placed under arrest and charged with various crimes related to the incident at the West Norriton 7-11.

Commonwealth v. Rhodes, No. 08491-03, at 1-4 (Mont. C.C.Pl. Aug. 27, 2004) (O'Neill, J.) (citations to transcript omitted) ("Trial Court Op.").

Following a trial before the Honorable Steven T. O'Neill, a jury convicted Rhodes of robbery and related charges.<sup>2</sup> Rhodes retained new counsel for sentencing. On June 21, 2004, Rhodes was sentenced to 25-to-50 years' imprisonment on the most serious

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<sup>2</sup>Rhodes was principally charged with first-degree felony robbery, and the remaining counts charged lesser forms of robbery and theft. N.T. 3/12/04 at 276-81; 6/21/04 at 3.

robbery count, pursuant to Pennsylvania's "three strikes" provision, 42 Pa. C.S.A. § 9714. N.T. 6/21/04 at 9-8, 12, 18-20. All other counts merged for purposes of sentencing. Id. at 20.

On direct appeal, Rhodes' counsel challenged the trial court's ruling regarding identifications made by Mr. Qawasmy, the prosecutor's discriminatory use of peremptory strikes, testimony of Mr. Qawasmy that he had been robbed previously, and identification statements made by Mr. Fahim. On May 2, 2005, the Superior Court affirmed. Commonwealth v. Rhodes, No. 1971 EDA 2004 (Pa. Super. May 2, 2005) ("Superior Court Op.").

Rhodes' counsel then filed a Petition for Allowance of Appeal, challenging only the peremptory strikes used by the prosecutor in jury selection. Commonwealth v. Rhodes, 1971 EDA 2004, Petition for Allowance of Appeal from Judgment of Superior Court. On October 25, 2005, the Pennsylvania Supreme Court denied the petition. Commonwealth v. Rhodes, 470 MAL 2005 (Pa. Oct. 25, 2005).

On November 16, 2005, Rhodes filed a pro se petition pursuant to Pennsylvania's Post Conviction Relief Act, ("PCRA"), 42 Pa.C.S.A. §§ 9541-9551. After the court

appointed counsel, an amended petition was filed, presenting the following claims:

Ineffective assistance of trial counsel for:

- failing to file a pretrial motion for a physical line-up,
- failing to call Sergeant Sobeck as a witness for the defense,
- failing to object to the identification testimony of Officer Leeds,
- eliciting testimony from Officers Bishop and Leeds regarding their prior contact with Rhodes,
- withdrawing the objection to the Commonwealth's request that the jury be given certain evidence at the start of deliberations,

Ineffective assistance of appellate counsel for:

- failing to file a post sentence motion, and
- failing to raise a sufficiency of the evidence claim on direct appeal.

The trial court held an evidentiary hearing on September 20, and denied the petition on September 26, 2006. On appeal to the Superior Court, Rhodes presented the same claims, and added a separate claim of trial counsel ineffectiveness for failing to inform him of all the options, guidelines, and consequences during the plea bargaining stage of the proceedings.<sup>3</sup> The trial court issued a lengthy opinion addressing Rhodes' original PCRA claims. Commonwealth v. Rhodes, No. 8491-03 (Mont. C.C.Pl. Sept. 17, 2007) ("PCRA Op."). The Superior Court affirmed, relying on the trial court's opinion and finding the additional claim waived. Commonwealth v. Rhodes, 1942 EDA 2007 (Pa. Super. Feb. 27, 2008). Rhodes did not seek review in the Pennsylvania Supreme Court.

On July 9, 2008, Rhodes filed this federal petition for habeas corpus raising nine issues. Doc. 1. Appointed counsel then filed a motion for leave to amend (Doc. 14) and

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<sup>3</sup>Because Rhodes was not promptly notified of the denial of his PCRA petition, he sought leave to file an appeal nunc pro tunc, which was granted on June 7, 2007. Commonwealth v. Rhodes, No. 8491-03, at 2-3 (Mont. C.C.Pl. Sept. 17, 2007) (O'Neill, J.).

brief in support (Doc. 15), addressing the first four of the issues Rhodes raised:

1. The state courts erred in failing to suppress the photographic array and subsequent in-court identification made by Mr. Qawasmy because the array was unduly suggestive (discussed infra, at 35-40),
2. The prosecutor's use of a peremptory challenge to strike an African-American juror and to exercise another strike to prevent an African-American from serving on the jury violated Batson v. Kentucky, 476 U.S. 79 (1986), and all counsel were ineffective for failing to properly preserve this issue (discussed infra, at 11-34),
3. Trial counsel was ineffective for failing to request a physical lineup photo array, or otherwise preclude identification testimony by Mr. Fahim (discussed infra, at 40-42),
4. Trial counsel was ineffective for failing to call Sergeant Sobeck to question him about a discrepancy between the clothing described by Mr. Qawasmy and the clothing recovered from Rhodes (discussed infra, at 43-45).

Counsel also incorporated Rhodes' original petition, which raised the following additional five claims:

5. Trial counsel was ineffective for failing to object to the identification testimony of Officer Leeds (discussed infra, at 46-47),
6. Trial counsel was ineffective for eliciting testimony from Officers Bishop and Leeds regarding their prior contacts with Rhodes (discussed infra, at 48-49),
7. Trial counsel was ineffective for withdrawing the objection raised to the Commonwealth's request that the court send certain evidence out with the jury (discussed infra, at 49-50),
8. Appellate counsel was ineffective for failing to file any post-sentence motions (discussed infra, at 50-51),
9. Appellate counsel was ineffective for failing to raise a sufficiency of the evidence claim on direct appeal (discussed infra, at 52-53).

In response to the original petition, Respondents argued that Rhodes' first claim

was procedurally defaulted because the state courts were not put on notice that the claim was of a constitutional dimension, and that the remaining claims were meritless. (Doc. 6). In his response to counsel’s amended petition, Respondents continued to rely on the original response because no new issues had been raised. See Doc. 18 at 2.

In this Report, I will first address the standards applicable to habeas review, including the limits of habeas relief as to claims arising under state law. I will then proceed to apply those standards to this case.<sup>4</sup>

## II. APPLICABLE LAW

### A. Exhaustion and Procedural Default

A federal court, absent unusual circumstances, should not entertain a petition for writ of habeas corpus unless the petitioner has first satisfied the exhaustion requirement of section 2254. See 28 U.S.C. § 2254(b). Under section 2254(c), a petitioner will not be deemed to have exhausted available state remedies if he had the right under the law of the state to raise, by any available procedure, the question presented, but failed to do so.

O’Sullivan v. Boerckel, 526 U.S. 838 (1999) (“we ask not only whether a prisoner has exhausted his state remedies, but also whether he has properly exhausted those remedies, i.e., whether he has fairly presented his claims to the state courts”); see also Picard v.

Connor, 404 U.S. 270 (1971). “The exhaustion requirement ensures that state courts have

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<sup>4</sup>The petition is clearly timely. Prior to the time Rhodes could have sought certiorari in his direct appeal, he filed a PCRA petition. Thus, the habeas limitations period did not begin until the conclusion of his collateral appeal on March 29, 2008. Rhodes filed this petition less than four months later on July 9, 2008.

the first opportunity to review convictions and preserves the role of state courts in protecting federally guaranteed rights.” Lines v. Larkins, 208 F.3d 153, 159 (3d Cir. 2000) (quoting Caswell v. Ryan, 953 F.2d 853, 856 (3d Cir. 1992)). The habeas corpus petitioner has the burden of proving exhaustion. Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997).

A petitioner’s failure to exhaust his state remedies may be excused in limited circumstances on the ground that exhaustion would be futile. Lambert, 134 F.3d at 518-19. Where such futility arises from a procedural bar to relief in state court, the claim is subject to the rule of procedural default. As the Third Circuit has held,

claims deemed exhausted because of a state procedural bar are procedurally defaulted, and federal courts may not consider their merits unless the petitioner “establishes ‘cause and prejudice’ or a ‘fundamental miscarriage of justice’ to excuse the default.”

Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000) (quoting McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999)); see also Coleman v. Thompson, 501 U.S. 722, 731 (1991).

The “cause and prejudice” standard applies whether the default in question occurred at trial, on appeal, or on state collateral attack. Edwards v. Carpenter, 529 U.S. 446, 451 (2000).<sup>5</sup>

**B. Standard of Review for Claims Addressed on the Merits**

The Antiterrorism and Effective Death Penalty Act (“AEDPA”) limits federal habeas review of state court judgments. Werts, 228 F.3d at 195. In effect since 1996, the

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<sup>5</sup>For brevity’s sake, because I do not find any of Rhodes’ claims defaulted, I have omitted discussion of the standards to establish cause and prejudice or actual innocence.

AEDPA increased the deference federal courts must give to the factual findings and legal determinations of the state courts. Id. at 196 (citing Dickerson v. Vaughn, 90 F.3d 87, 90 (3d Cir. 1996)). A petition for habeas corpus may only be granted if (1) the state court’s adjudication of the claim “resulted in a decision contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;” or if (2) the adjudication “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. Werts, 288 F.3d at 196 (citing 28 U.S.C. § 2254(e)(1)).

The Supreme Court expounded upon the two clauses of section 2254(d) in Williams v. Taylor, 529 U.S. 362 (2000). First, under the “contrary to” clause, “a federal habeas court may grant the writ if the state court arrives at 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.” Id. at 412-13. Second, under the “unreasonable application” clause, “a federal habeas court may grant the writ if 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.” Id. at 413. This is an objective inquiry, meaning that the state court was not only in error, but that its erroneous application of clearly established federal

law was objectively unreasonable. Id. at 409; Werts, 288 F.3d at 196. An “unreasonable application” occurs “if the state court either unreasonably extends a legal principle from our precedent 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.

With the above principles in mind, I turn to Rhodes’ claims. I will address the Batson issue first, and then the remaining claims in the order they were raised in Rhodes’ pro se petition.

### **III. DISCUSSION**

#### **A. Batson Challenge**

Rhodes argues that the prosecution improperly used two peremptory strikes to exclude African-Americans from the jury.<sup>6</sup> The Supreme Court has repeatedly condemned the use of peremptory strikes to eliminate potential jurors on the basis of race as violative of the Equal Protection Clause. See Batson v. Kentucky, 476 U.S. 79, 84 n.3 (1986) (citing cases).<sup>7</sup>

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<sup>6</sup>Rhodes is African-American. N.T. 3/9/04 at 73 (referring to identification of Rhodes from photographic array attached to testimony).

<sup>7</sup>If a defendant’s challenge to a prosecutor’s exercise of a peremptory strikes implicates Batson, courts use a three-step framework to determine whether a prosecutor has violated the Equal Protection Clause.

First, the defendant must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Second, once the defendant has made out a prima facie case, the burden shifts to the State to explain adequately the racial exclusion by offering permissible race-neutral justifications for the strikes. Third, if a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial

The record below does not include a transcript of the voir dire or the parties' exercise of cause and peremptory strikes. N.T. 3/10/04 at 44. Nevertheless, the record does contain a transcript of the objections to the prosecutor's exercise of the two peremptories at issue, and the parties do not dispute that this record is sufficient for federal habeas review of this claim. However, before embarking on a discussion of the merits, I must first determine if the state courts addressed both Batson challenges, and, if so, how the state courts ruled. Although these questions seem simplistic, the answers are not.

1. The Trial Court Adjudicated Both Batson Challenges, But Did Not Determine Whether the Prosecutor's Strike of Prospective Juror Number 41 Was Discriminatory Within the Meaning of Batson

Rhodes challenges two of the prosecutor's peremptory strikes, to prospective juror numbers 5 and 41. The parties appear to agree that the state courts decided the challenge to the strike of number 5 on the merits under Batson. However, the parties dispute whether the state courts decided the challenge to the strike of number 41 and, if they did, on what basis. I will therefore review the state court proceedings.

The trial court addressed the defense objections to both strikes in chambers following jury selection. N.T. 3/10/04 at 45-48, 51-53. The discussion establishes that

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discrimination.

Johnson v. California, 545 U.S. 162, 168 (2005) (internal citations omitted and alteration in original). If a trial judge inquires into a prosecutors' race-neutral reasons and rules on the ultimate issue, without having determined whether a prima facie case was made out, the prima facie issue becomes moot and need not be reviewed. See Hernandez v. New York, 500 U.S. 352, 359 (1991).

there were four African-Americans in the forty-five member panel, assigned prospective juror numbers 5, 21, 33 and 35, and that the judge had previously sustained cause challenges to numbers 21 and 35. Id. at 45.<sup>8</sup> The prosecutor asserted his sixth peremptory strike<sup>9</sup> on prospective juror number 5, to which the defense objected under Batson. Id. at 45-46. The judge gave the prosecutor the opportunity to “put anything on the record” about the strike, to which the prosecutor responded that

there is no pattern as required by Batson. . . . Number 5 has a shoplifting conviction when she was 21. . . . I don’t want someone on a jury when . . . there’s a theft conviction dealing with a theft case. Additionally, she is a . . . social case worker, and her husband works at . . . a placement home where they have . . . juvenile defendants running around. Those are the reasons I struck her.

Id. at 46-47. Defense counsel challenged the sufficiency of this explanation, but the court overruled the challenge. “First and foremost, I find that there is not a pattern seeing that there are two and one is on and one is off. And although you may not agree with his reasons, the Court would find that these are at least race neutral. . . . So I deny your challenge based on U.S. versus Batson.” Id. at 47-48.

The jury was then sworn and given preliminary instructions and excused for lunch.

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<sup>8</sup>The record contains a reference to the possible presence of one additional African-American. N.T. 3/10/04 at 53. However, the Commonwealth has not asserted in its briefs that an African-American served on the jury, and did not rebut Rhodes’ direct appellate counsel’s description of the jury as “an all white twelve member jury.” Commonwealth v. Rhodes, 1971 EDA 2004, Appellate Brief, at 10.

<sup>9</sup>The prosecution and defense each had seven peremptory challenges. See Pa. R. Crim. P. 634(A)(2) (relating to non-capital trial of single felony defendant).

As soon as the jury left, defense counsel raised his second Batson challenge. Counsel explained that the final African-American prospective juror, number 33, was seated as an alternate rather than as a juror as a result of the prosecutor's exercise of his seventh and last peremptory to strike prospective juror number 41. This strike was "below the line," meaning that the stricken prospective juror did not have a chance of being seated. Had the prosecutor exercised the strike to eliminate a juror "above the line," prospective juror number 33 would have been seated as a juror.

And just following up briefly on my Batson challenge, I would note for the record that because of the way [the prosecutor] exercised his challenges, he struck outside those potential jurors who could have been selected by striking Number 41, C-7, thereby making [number 33] an alternate, the only other black female that could have possibly served on this jury.

So if I go below the line on this case, Juror Number 37, he cleverly ensured that no black jurors would serve on the 12 person jury panel.

Id. at 51-52.<sup>10</sup> The judge asked for clarification, to understand "how another one would have made it anyway." Defense counsel explained:

If he had exercised a strike among the first 37 which if you take the cause challenges into effect and you each get seven pre-emptors [sic] and 14 plus 12 is 26, counting in the first cause challenges that would draw the line after 37. By him striking after 37 he caused the line to fall back, thereby knocking out juror [33] as a possible juror.

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<sup>10</sup>The reference to the "line" ending at prospective juror number 37 suggests that number 37 was the final alternate. Prospective jurors who remained up to that number would be seated either in the jury or as alternates, and those beyond number 37 would not be seated. Without knowing which prospective juror numbers remained, it is not clear where the "line" separating jurors and alternates fell.

Id. at 51-53.

The judge's ruling is found in the following exchange with defense counsel:

THE COURT: Enunciate for me how Batson says that you can then – when he struck a non-African-American below the line how that is included in a Batson challenge.

[DEFENSE COUNSEL]: Because the effect of it was to deny any black African-American juror on the 12 person jury.

THE COURT: Your objection is so noted and I would overrule your challenge in regards to that.

Id. at 53. The trial court did not discuss whether the defense had made out a prima facie case under Batson or whether the strike was discriminatory.

The trial court also addressed Batson in its post-trial opinion. In the single paragraph devoted to the issue, and after reiterating its reasons for denying the challenge to prospective juror number 5, the court noted that “Prospective juror number 33, also identified as African-American, was selected as an alternate juror. Accordingly, this Court properly ruled to deny Defendant’s Batson challenge because the Commonwealth’s conduct during jury selection does not support a finding that it improperly precluded African-Americans from being selected to the jury.” Trial Court Op. at 10.

Rhodes contends that the state courts did not adjudicate the challenge to the strike of number 41, requiring the federal court to employ de novo review. See Doc. 14 at ¶¶ 10, 16; Doc. 15 at 7-8, 12.<sup>11</sup> However, in light of its oral and written rulings, it is clear

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<sup>11</sup>See Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001) (de novo review applies where state courts did not address claim) (citing Weeks v. Angelone, 176 F.3d 249, 258

that the court did acknowledge and reject the challenge. While the adequacy of the ruling may be at issue, the record does not permit me to conclude that the state court effectively ignored the challenge, and therefore de novo review is not implicated.<sup>12</sup>

In contrast to Rhodes' position, Respondents contend that the state courts concluded on the merits that neither strike was discriminatory within the meaning of Batson and that the state courts' conclusions should be upheld as reasonable. See Doc. 18 at 3. While I have concluded that the trial court rejected Rhodes' challenge to the strike of number 41, I do not agree with Respondents that the trial court reached the question of whether the strike of number 41 was discriminatory within the meaning of Batson.

In both its oral and written rulings, the trial court rejected Rhodes' challenge without contemplating whether the peremptory strike of prospective juror number 41, which had the effect of preventing an African-American from sitting on the jury, itself presented a Batson violation. In contrast to the objection regarding prospective juror

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(4th Cir. 1999), aff'd, 528 U.S. 225 (2000)).

<sup>12</sup>Rhodes' case presents a somewhat different situation than that in Holloway v. Horn, 355 F.3d 707 (3d Cir. 2004), in which the Third Circuit applied de novo review to a Batson challenge. In Holloway, the Third Circuit concluded that the state courts did not adjudicate a Batson challenge on the merits when they relied on state precedent determined to be unconstitutional to decide that the petitioner failed to take the necessary steps to put certain facts on the record. Id. at 719 (citing Commonwealth v. Spence, 627 A.2d 1176 (Pa. 1993)). In Rhodes' case, there is no question that the state courts did adjudicate an issue on the merits -- namely whether Rhodes' objection triggered Batson -- and that adjudication is deserving of review under the appropriate AEDPA standard. But that question is distinct from the merits of the Batson challenge itself. If this court were reviewing the merits of the Batson challenge, de novo review would be in order because the state courts did not adjudicate that issue. Nevertheless, for reasons discussed below, remand rather than de novo review is the more appropriate course.

number 5, the trial court did not evaluate whether Rhodes made out a prima facie challenge under Batson in ruling on the strike of prospective juror 41, or engage in any discussion whether the strike was discriminatory. In effect, the trial court ruled as a matter of law that the “below the line” strike of a non-African-American prospective juror did not implicate Batson.

Examination of the trial court’s analysis does not end the inquiry, in light of Rhodes’ direct appeal. As to the strike of prospective juror number 5, the Superior Court deferred to the trial court’s ruling on the merits in light of the prosecutor’s race-neutral explanation for the strike. Superior Court Op. at 10-11. As “to the final peremptory strike, which was not utilized to remove an African-American, the trial court concluded that no pattern existed.” Id. at 10. The Superior Court noted that the trial court was

in the best position to make the initial determination of whether there was purposeful discrimination by the prosecution in its use of peremptory challenges. Our review of the record reveals that the trial court’s denial of Rhodes’s Batson challenge based on the absence of purposeful discrimination was not clearly erroneous. Furthermore, it cannot be concluded that any pattern of singling out members of a single race for peremptory challenges existed.

Id. at 11. This ruling suggests that, in the Superior Court’s view, the trial judge looked at the entire record of strikes, including of number 41, before deciding any Batson issue. However, that reading does not square with the trial record, which shows that the trial court rejected the Batson challenge as to the strike of number 41 as a matter of law without considering whether Rhodes established a prima facie case under Batson.

The question then is whether deference is owed to the Superior Court’s reading of

the trial judge's ruling. Under the AEDPA, federal courts need not defer to a state court adjudication that "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d)(2). Accordingly, if a state appellate court unreasonably interprets a lower court's ruling, the appellate court's conclusion is not binding in the federal habeas proceedings. See Randy Hertz and James S. Liebman, Federal Habeas Corpus Practice and Procedure § 32.4 n.10 (5th ed. 2005) (citing Hall v. Director of Corrections, 343 F.3d 976, 983 (9th Cir. 2003) (state appellate court "proceeded from an incorrect premise" and misconstrued import of state postconviction judge's factual finding, thereby producing "unreasonable determination of the facts in light of the evidence that was presented at the state court evidentiary hearing"))).

I conclude that the Superior Court's interpretation of the trial judge's ruling on the Batson challenge to prospective juror number 41 was unreasonable in light of the record. The trial court overruled the Batson challenge without any inquiry into the prosecutor's reasons for the strike, and there are two possible avenues it could have taken to do so. First, the court could have decided as a matter of law that Batson was not implicated by the challenge, without embarking on the three-step Batson analysis. Second, the court could have decided the merits of the Batson question, concluding that Rhodes did not meet his prima facie burden that the strike was discriminatory. Reading the transcript of the objection and the trial court's rejection of it, and the trial court's written opinion, it is clear that the court ruled as a matter of law and that it did not reach the merits of the

Batson claim.<sup>13</sup>

I will now turn to the two strikes at issue, to resolve the following questions: 1) as to the strike of prospective juror number 5, did the state courts reasonably conclude that the strike was not discriminatory under Batson; and 2) as to the strike of prospective juror number 41, did the trial court reasonably conclude that the strike did not implicate Batson.

2. Prospective Juror Number 5

As noted above, the trial judge invited the prosecutor to explain his reasons for striking prospective juror number 5, an African-American woman. N.T. 3/10/04 at 46. After the prosecutor did so, and after Rhodes' continued challenge, the judge stated that there was no pattern of discriminatory strikes, and that in any event the prosecutor provided adequate race-neutral grounds. Id. at 47; Trial Court Op. at 9. The Superior Court yielded to the trial court's determination, concluding that the trial court's conclusion was not clearly erroneous because there was no pattern of discriminatory strikes. Superior Court Op. at 11.

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<sup>13</sup>The only possible basis to conclude otherwise is the court's statement in its written opinion that it "properly ruled to deny Defendant's Batson challenge because the Commonwealth's conduct during jury selection does not support a finding that it improperly precluded African-Americans from being selected to the jury." Trial Court Op. at 10. However, this statement was made at the end of the court's single-paragraph discussion of both strikes, and in context relates to its discussion as to number 5 that no pattern of discriminatory strikes was shown. Moreover, the court's reference to the fact that prospective juror number 33 was selected as an alternate, together with its analysis on the record, clarifies that the trial judge did not consider that the strike of prospective juror number 41 triggered any independent analysis under Batson.

The state courts' determination is a reasonable determination of the facts of the case and a reasonable application of Batson and its progeny. Batson requires the court to consider all the relevant circumstances surrounding the strike and suggests that a pattern of strikes against African-American jurors in the defendant's case could be sufficient to give rise to an inference of discrimination. Batson, 476 U.S. at 97. While the pattern of strikes is not the exclusive test, there is nothing in the record to suggest that, at the time the strike of number 5 was made, the prosecutor intended to prevent African-Americans from sitting on the jury.<sup>14</sup>

Here the trial judge noted that four of the forty-five prospective jurors were African-American. N.T. 3/10/04 at 45; Trial Court Op. at 10. Two of those four were struck for cause. When the prosecutor struck prospective juror number 5, one African-American (number 33) still remained on the panel. The prosecutor proffered valid, race-neutral bases for seeking this strike. N.T. 3/10/04 at 46-46 (noting that number 5 had a shoplifting conviction and a social worker background), and the trial court rejected

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<sup>14</sup>Batson does not require that a defendant establish a "pattern" of discriminatory strikes to make out a prima facie case. Nevertheless, the trial court's (and Superior Court's) consistent reference to defendant's failure to establish a "pattern" appears to refer to Pennsylvania's so-called Spence rule. In Commonwealth v. Spence, 627 A.2d 1176, 1182-83 (Pa. 1993), the Pennsylvania Supreme Court interpreted Batson to require the defendant to make a record of the races of the jurors who served, and the potential jurors struck by each side. See Coombs v. DiGuglielmo, No. 04-1841, 2008 WL 564863, at \*1 n.5 (E.D. Pa. Feb. 29, 2008) (Rufe, J.). In January 2004, less than two months prior to Rhodes' trial, the Third Circuit concluded that the Spence rule was inconsistent with the "fluid" nature of Batson's prima facie showing and placed an unconstitutional burden on the defendant. Holloway v. Horn, 355 F.3d 707, 728-29 (3d Cir. 2004). Rhodes has not challenged the state courts' analysis on this basis.

Rhodes' challenge to the prosecutor's stated reason. Trial Court Op. at 10. The Superior Court found that the trial court's determination that there was no purposeful discrimination was not clearly erroneous. Thus, the state courts' determination is consistent with the pertinent caselaw and did not involve an unreasonable determination of the facts.

3. Prospective Juror Number 41 (Effectively Striking Number 33)

Rhodes' second challenge to the prosecutor's use of peremptory strikes presents a more interesting issue -- whether the use of a peremptory challenge "below the line," which has the direct effect of preventing an African-American from serving on the twelve-member jury, implicates Batson. The answer to this question requires an examination of the systems courts use, and that this trial court used, for the exercise of peremptory challenges.

- a. The jury selection system allowed the parties to predict where the "line" of jurors to be seated ended

Jury selection systems tend to fall into two broad categories. See generally United States v. Blouin, 666 F.2d 796, 796-97 (2d Cir. 1981); George S. Cardona & Angela J. Davis, Inside the Box, 31 L.A. Law. 25, 27-28 (Oct. 2008). In one system, often referred to as the "jury box" method, twelve potential jurors are randomly selected and subjected to examination. As members of this group are excused or struck for cause or peremptorily, others are randomly chosen to replace them and subjected to the same process. In the "struck jury" system, potential jurors are examined and parties make their cause challenges. From those remaining, a panel is chosen made up of a sufficient

number to choose a jury and alternates plus the total number of peremptory challenges the parties are entitled to exercise, and the parties then take turns making their peremptory strikes.

An important distinguishing feature between these two systems is that a struck jury system allows greater potential for the parties accurately to predict which individuals will be seated on the jury. In a struck jury system, the parties know the identities of the potential jurors in order, allowing them to locate the “line” separating potential jurors who will be seated if not struck and potential jurors who are too remote to be seated. See Blouin, 666 F.2d at 798 (“the ‘jury box’ system does not afford the opportunity, or danger, of full comparative choice, for the parties do not know ahead of time who the replacement for a challenged juror will be”).

In Pennsylvania, the procedure for conducting jury selection is governed by Pennsylvania Rule of Criminal Procedure 631. Rule 631(E) gives trial judges two options in non-capital cases -- the “individual” system and the “list” system. Under the “individual” system, prospective jurors are examined one at a time, and counsel must exercise their cause and peremptory strikes immediately after each examination. Pa. R. Crim. P. 631(E)(1).<sup>15</sup> Under the “list” system, a list is prepared containing sufficient prospective jurors to complete the selection of twelve jurors plus alternatives. The

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<sup>15</sup>Rule 631(E)(1) does not state whether, when more jurors are needed under the individual system, they are randomly selected or chosen in order from the remaining potential jurors. In either event, the Rule makes clear that at the time the parties make their cause and peremptory challenges, they do not know how many cause strikes have yet to be made, and thus cannot reliably predict where the “line” will be.

prospective jurors are then examined either collectively or individually, and challenges for cause must be exercised as soon as cause is determined, with additional prospective jurors added if the total number is insufficient to complete selection. Once all cause challenges have been exercised, the parties pass the list back and forth, exercising their peremptory challenges until all the peremptory challenges have been exhausted. Id. Rule 631(E)(2).

Pennsylvania's "individual" system appears to correspond more closely to the "jury box" system, in that they share the element that cause and peremptory strikes are exercised at the same time by the parties. In contrast, Pennsylvania's "list" system corresponds more closely to the "struck jury" system, in which potential jurors are examined and cause strikes are exercised, after which parties alternately exercise their peremptory challenges.

Although a transcript of the jury selection in Rhodes' trial is not in the record, it is clear that the trial court utilized some form of the "list" system. The trial judge advised counsel that he would examine the prospective jurors collectively, which is only permissible in the list system. N.T. 3/10/04 at 41-42 (explaining that judge would tell prospective jurors to "hold up your sign if you have a yes or no answer . . . . Those hands that stay up . . . we will do individual voir dire on them"). Also, the parties' reference to the numbers of the prospective jurors is consistent with the list system, as is the fact that the parties were able to anticipate the point in the list of prospective jurors at which selection of the jury would be completed. Thus, regardless of the exact system used, the

record is clear that the parties knew exactly where the “line” ended. That is how the parties knew that, if the prosecutor exercised his last peremptory “above the line,” prospective juror number 33 would be seated on the jury, whereas if he exercised it “below the line,” number 33 would be an alternate.

Thus, this case squarely presents the question whether a strike “below the line” that predictably excludes an African-American from the twelve-person jury implicates Batson. The trial court decided that it does not. The job of the federal courts is to determine whether that decision was contrary to or involved an unreasonable application of clearly established federal law.

- b. The state court unreasonably concluded that Batson does not apply to the strike below the line to exclude an African-American from the twelve-member jury

In determining whether Batson applies, or should apply, to the circumstances here presented, I begin with a dearth of applicable caselaw.<sup>16</sup> However, I am not writing on a completely blank slate. Three federal Courts of Appeal have considered variations on this theme. In United States v. Tiggett, No. 05-3287, 219 Fed. Appx. 163 (3d Cir. 2007), the defendant raised a Batson challenge to the prosecutor’s waiver of his final two

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<sup>16</sup>Respondents offer very little by way of argument on this point. In their initial response they do not even appear to acknowledge that Rhodes raised a Batson challenge to the strike of number 41, referencing only the challenge to number 5. Doc. 6 at ¶ 16; Doc. 6 Memo. at 10. In their supplemental response, Respondents simply argue that the challenge to number 41 cannot prevail because Rhodes “has not cited any clear Supreme Court precedent for the proposition that a peremptory strike used on a non-black juror may be grounds for a Batson violation if, as a result, a black juror is placed on the jury as an alternate.” Doc. 18 at 3-4.

peremptory strikes, which effectively excluded an African-American from the jury.

Without deciding whether Batson applied in such a situation, the Third Circuit found that Tiggett had failed to establish a prima facie case of discrimination as required by Batson. Id. at 167-68 (seating of four African-American jurors and prosecutor's use of only one peremptory to directly strike an African-American weighed heavily against prima facie case). Similarly, the Third Circuit avoided the issue in Thompson v. Johnson, No. 07-3825, 291 Fed. Appx. 477 (3d Cir. 2008), finding that it need not address whether the forfeiture of a strike could be viewed as an effective strike because the claim had been waived. Thus, our Circuit Court, at the very least, has acknowledged the possibility of applying Batson in a similar circumstance.

The Ninth Circuit, facing similar circumstances, concluded that waivers of peremptories can form the basis of a Batson challenge for the precise reason that the system used to select jurors allowed the parties to predict who would be seated on the jury in light of how they exercised their peremptory strikes. "Because under [the struck jury system] waivers of peremptory strikes result in the removal of known jurors, we conclude that such waivers are best viewed as effective strikes against identifiable jurors. . . ." United States v. Esparza-Gonzalez, 422 F.3d 897, 902 (9th Cir. 2005).<sup>17</sup> On a corollary

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<sup>17</sup>The reasoning in Esparza-Gonzalez was recently rejected by the Missouri Court of Appeals. In State v. Amerson, 259 S.W.3d 91 (Mo. Ct. App. 2008), the prosecution waived its final strike, and the defense argued on appeal that the waiver was intended to prevent an African-American from sitting on the jury. Reviewing for plain error, the court noted that it was bound by a 1995 opinion that held that Batson does not require the state to "provide a race-neutral reason for removing a juror it does not, in fact, exclude by the use of a peremptory strike." Id. at 94 (quoting State v. Elder, 901 S.W.2d 87, 90 (Mo.

issue, the Eighth Circuit concluded that the use of peremptory challenges to strike an alternate juror was not a basis for habeas relief. Carter v. Kemna, 255 F.3d 589, 592 (8th Cir. 2001) (not unreasonable to conclude Batson did not apply where alternate who was struck would not have served on jury).

I turn then to the underpinnings of Batson. First and foremost, Batson reiterated that discrimination in jury selection violates the Equal Protection clause, and recounted the “efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn.” 476 U.S. at 85. It recognized that discrimination in jury selection violates the rights of the accused as well as the excluded juror and society as a whole. The Court spoke in broad terms, noting that “the Constitution prohibits all forms of purposeful racial discrimination in selection.” Id. at 88. “The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.” Id. at 87. There is nothing in the opinion that qualifies the principle that discriminatory motive in jury selection is prohibited.

The considerations voiced by the Court are no less compelling because a strike predictably and effectively eliminates an African-American from the jury rather than

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Ct. App. 1995)). The court also rejected the analysis in Esparza-Gonzalez, concluding that application of Batson to the waiver of a peremptory strike “would contravene the principle that a defendant is not entitled to a jury of any particular racial composition.” Id. at 95.

directly striking him or her. In fact, the extension of Batson to the circumstances here is perfectly consistent with the Court's "efforts to eradicate" discrimination in jury selection, and failure to apply Batson would directly undermine those efforts. In Batson, the Court recognized that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" Id. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)). To extend the Batson holding to a strike that intentionally excludes an African-American from the jury merely further attempts to level the playing field in the strategic game of jury selection, and the failure to extend Batson in circumstances consistent with the underpinnings of the case is not just wrong -- it is unreasonable and amounts to a silent endorsement of discrimination in our jury selection process.

A discriminatory strike is a discriminatory strike, and is the very harm that Batson sought to remedy. Therefore, the trial court's determination that a Batson inquiry is not triggered by a strike that predictably excludes an African-American from the jury amounts to an unreasonable application of clearly established federal law. See Williams, 529 U.S. at 407 (unreasonable application includes refusal to extend legal principle to a new context). "Certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." Yarborough v. Alvarado, 541 U.S. 642, 665 (2004). This is one of those cases.

As stated, the question on federal habeas review is whether the state courts' decision that Batson was not implicated was either contrary to or involved an

unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1). The Supreme Court has defined "clearly established Federal law, as determined by the Supreme Court of the United States," to encompass "the holdings ... of [the Supreme] Court's decisions as of the time of the relevant state-court decision." Williams, 529 U.S. at 412. The Court has also explained that the "unreasonable application" clause includes a court's failure to extend Supreme Court precedent to a new context where it should apply. Id. at 407. I find the latter principle to best describe the current situation. Certainly, the Supreme Court has not applied Batson to the factual scenario presented here. Nevertheless, given the broad basis for the Batson ruling, it would be unreasonable not to extend Batson to Rhodes' case.

Moreover, arguments against extension of Batson to Rhodes' case do not withstand scrutiny under Batson. For example, the court in Amerson was of the view that applying Batson to a prosecutor's waiver of a peremptory strike "would contravene the principle that a defendant is not entitled to a jury of any particular racial composition." 259 S.W.3d at 95. This argument misses the point. Batson provides a necessary mechanism to test whether a party's exercise of a peremptory strike was discriminatorily motivated. If it was not, Batson provides no relief. If the rationale of Amerson were followed, a prosecutor would be free to purposefully prevent the seating of a juror on admittedly illegal and discriminatory grounds. Such a conclusion cannot be reconciled with Batson.

Similarly, one might argue that peremptory strikes play an important role in our

criminal justice system, and that extension of Batson to Rhodes' case will unduly burden the parties' exercise of peremptory strikes. However, this very argument was made and rejected in Batson, and the Supreme Court's analysis applies to Rhodes' case with equal force.

While we recognize . . . that the peremptory challenge occupies an important position in our trial procedures, we do not agree that our decision today will undermine the contribution the challenge generally makes to the administration of justice. . . . By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice.

476 U.S. at 98-99. The Court also rejected the relevance of anticipated difficulties in administering its rule. Id. at 99.

It is important to note that I do not reach the question whether Rhodes made out a prima facie case of a Batson violation, as I will discuss further. Rather, the sole legal question is whether it is reasonable to conclude that a strike "below the line," if it was exercised with the knowledge that the strike would prevent the seating of an African-American on the jury, does not require inquiry under Batson. Given the very clear underpinnings and language of Batson, I conclude that it is not.

- c. Application of the Batson three-step analysis is for the state courts in the first instance

Rhodes argues that the prosecution's strike was improper because it violated his right to Equal Protection under the Fourteenth Amendment. Doc. 15 at 8. Putting this argument into its correct procedural context, Rhodes essentially contends that he met his

prima facie burden under Batson with respect to the peremptory strike of prospective juror number 41, and that his conviction should be reversed because the state courts failed to require the prosecution to provide a race neutral reason for the strike. In the alternative, Rhodes argues that counsel in the state courts were ineffective for failing to insist on such a showing and failing to develop a record of the discriminatory nature of the prosecution's strikes. Id. at 11-12.

Rhodes' primary argument presupposes a substantive Batson violation, an inquiry the state courts did not undertake, as previously discussed. It is difficult to see how the federal courts are in a position to make an initial inquiry whether Rhodes met his prima facie burden under the first step of the Batson analysis. The record discloses certain facts supportive of a prima facie case, namely that the prosecutor's last two peremptory strikes resulted in there being no African-Americans on the jury.<sup>18</sup> However, the Supreme Court

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<sup>18</sup>Given the relatively light burden to establish a prima facie case, this may be sufficient. "The defendant's burden at the initial stage is to show merely that jurors of his race have been struck and that the strikes are indicative of an improper motive." Holloway, 355 F.3d at 728. Recently, the Supreme Court explained:

We did not intend the first step to be so onerous that a defendant would have to persuade the judge . . . that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

Johnson v. California, 545 U.S. 162, 170 (2005). Moreover, at the first step of the Batson analysis, the defendant is "entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" Batson, 476 U.S. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

Although the Supreme Court has rejected any bright-line rule to govern the prima

has held that the trial judge is in the best position to consider whether a prima facie case of discrimination exists.

During jury selection, the entire *res gestae* take place in front of the trial judge. Because the judge has before him the entire venire, he is well situated to detect whether a challenge to the seating of one juror is part of a “pattern” of singling out members of a single race for peremptory challenges. He is in a position to discern whether a challenge to a black juror has evidentiary significance; the significance may differ if the venire consists mostly of blacks or of whites.

United States v. Armstrong, 517 U.S. 456, 467-68 (1996) (internal citation omitted).

Thus, this court should not determine whether there was a Batson violation in the first instance, particularly on the basis of the partial record before this court of the jury selection in Rhodes’ case.

Additionally, the prima facie inquiry involves a review of the entire record, not all

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facie inquiry, our Circuit Court has recognized that a single strike can support an inference of discrimination. See Clemons, 843 F.3d at 747; Deputy v. Taylor, 19 F.3d 1485, 1492 (3d Cir. 1994); Holloway, 355 F.3d at 728 (single strike plus prosecutor’s statements sufficient to make out prima facie case); Harrison v. Ryan, 909 F.2d 84, 88 (3d Cir. 1990) (single strike for racial reasons is constitutionally repugnant); see also United States v. Small, 2009 WL 154378, at \*2 (3d Cir. Jan. 23, 2009) (finding no Batson error in strike of only African-American from the juror, but proceeding to second step of Batson to make determination). Additionally, the Supreme Court has recognized that the significance of a strike may differ depending on the racial composition of the venire. United States v. Armstrong, 517 U.S. 546, 469 (1996). Finally, the Third Circuit has noted that “it may be easier to establish a prima facie case when all blacks are excluded from a jury.” Clemons, 843 F.2d at 748. Thus, unlike in Tiggett, where the Third Circuit avoided reaching the question whether Batson was implicated by the waiver of a peremptory strike, it is not possible to conclude as a matter of law that Rhodes failed to state a prima facie claim under Batson. See Tiggett, 219 Fed. Appx. at 167-68 (seating of four African-American jurors and prosecutor’s use of only one peremptory to directly strike an African-American weighed heavily against prima facie case).

of which has either been presented to or argued to this court. In Batson, the Supreme Court suggested two examples of factors to be considered: (1) a pattern of strikes against potential African-American jurors and (2) the prosecutors questions and statements during voir dire. Id. at 97. Batson's progeny have identified other factors relevant to the inquiry of the prima facie case of discrimination, including the race of the victims, see Simmons, 44 F.3d at 1167 (murder and robbery of elderly Caucasian by a young African-American "contribute significantly" to prima facie case), the race of the witnesses, see Holloway v. Horn, 355 F.3d 707, 723 (3d Cir. 2004) (race of crucial witness relevant); United States ex rel. Evans v. Briley, No. 99 C 7828, 2003 WL 22081381, at \*11 (N.D. Ill. Sept. 9, 2003) ("there is no advantage to a prosecutor in excluding blacks from a jury where the State's primary witnesses are black"), and the ultimate racial makeup of the jury, see Rollins v. Horn, 2005 WL 1806504, at \*32 (E.D. Pa. Jul 26, 2005) ("while the racial composition of the jury is by no means determinative, it is certainly one of the 'relevant circumstances' that might give rise to an inference of purposeful discrimination").

In this case, the questioning of the panel and the exercise of cause and peremptory strikes were not transcribed, and thus the record before this court does not include this information. However, the court has been advised by Respondents that the tape recording of the voir dire and jury selection exists and can be transcribed. Similarly, although the record in this court does not disclose the race of the victim and witnesses, certainly the parties to the state-court proceedings have access to such information. This information

will allow the state courts, together with the rest of the record and whatever other evidence the state courts determine is necessary, to attempt to undertake the Batson inquiry. Moreover, the trial judge continues to serve on the Montgomery County Court of Common Pleas, and his review of the proceedings may be aided by his own recollection of the events.

It is equally difficult to see how, without the state courts first determining whether Rhodes' counsel stated a prima facie Batson challenge and any related issues, whether counsel was ineffective in making and preserving that challenge. Should the state courts conclude that a prima facie case was made out, they can proceed to address the matter consistent with the requirements of Batson and applicable procedural rules, and to fashion relief should a violation be found. If the state courts conclude no prima facie claim was made out, Rhodes will then have a ruling on that issue that he can elect to pursue on ineffectiveness and substantive grounds, consistent with the confines of state appeal and post-conviction procedures and, if necessary, federal habeas procedures.<sup>19</sup>

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<sup>19</sup>In the event the District Court disagrees with my conclusion that the Batson analysis should be conducted by the trial court in the first instance, an evidentiary hearing would be appropriate in this case. Although the AEDPA limits the circumstances under which the federal court can develop a factual record in a habeas case, see 28 U.S.C. § 2254(e)(2), this claim falls into an exception. In Siehl v. Grace, the Third Circuit remanded a habeas case to the District Court to conduct an evidentiary hearing, finding that the petitioner had “diligently sought to develop the factual basis of the claim for habeas relief, but had been denied the opportunity to do so by the state court.” \_\_ F.3d \_\_, No. 07-1568, 2009 WL 764538, at \*7 (3d Cir. Mar. 25, 2009) (quoting Campbell v. Vaughn, 209 F.3d 280, 286-87 (3d Cir. 2000)). Here, Rhodes' trial counsel pursued the Batson challenge immediately following jury selection, but the trial court failed to conduct the Batson inquiry. Rhodes' direct appellate counsel pursued the claim on appeal to no avail. Obviously, Rhodes has attempted to focus the state courts' attention on the

**B. Identifications by Mr. Qawasmy**

Rhodes raises two challenges to the identification evidence presented at trial.

First, Rhodes claims that the state court erred in failing to suppress the photographic array identification and subsequent in-court identification of Rhodes made by Sam Qawasmy.

Mr. Qawasmy first identified Rhodes when he was asked by Sergeant Sobeck to come to a location near the Colonial Motel because the police believed they “got” the suspect.

N.T. 3/10/04 at 108. Mr. Qawasmy saw Rhodes sitting on the street with police around him, and recognized him as the robber. Id. at 110-11. Approximately one hour later, Mr. Qawasmy chose Rhodes’ picture from a photographic array he was shown at the Norristown Police Station. Id. at 11-12, 118-19. Additionally, Mr. Qawasmy identified Rhodes in court. Id. at 111. Rhodes argues that, under the circumstances (having just identified Rhodes at a show-up), the photographic array was unduly suggestive, creating an irreparable risk of misidentification. He thus argues that the array identification should not have been admitted at trial, and that any in-court identification should also have been precluded as tainted by the earlier suggestive identification procedure. Doc. 15 at 5-7.

Respondents argue that this claim is procedurally defaulted because Rhodes failed to put the state courts on notice that the claim was of a constitutional dimension when he presented the claim in the state courts. As previously stated, in order to comply with the

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need to conduct a Batson analysis. The fact that he has been unsuccessful at the state level should not bar the federal court from employing the proper analysis. In the District Court’s discretion, the matter could be recommitted to the undersigned to conduct such hearing.

exhaustion requirement of section 2254(b)(1)(A), the petitioner must fairly present his claims to the state courts. This requires the petitioner to present both the legal theory and the facts supporting a federal claim to the state courts. Landano v. Rafferty, 897 F.2d 661, 669-670 (3d Cir. 1990). This ensures "that the same method of legal analysis that is used by the federal court in resolving the petitioner's claim was also readily available to the state court when it adjudicated the claim." Id. To decide whether a claim has been fairly presented to the state court, the federal court should examine both the state court decisions, as well as the briefs submitted to the state courts. Gonce v. Redman, 780 F.2d 333, 336 (3d Cir. 1985).

Here, although direct appellate counsel specifically argued that the "identification procedure . . . was unduly suggestive under Pennsylvania law . . .," it is clear that both the trial court (Trial Court Op. at 6-7) and the Superior Court (Superior Court Op. at 5-6) applied the same standard as is applied on federal constitutional review -- whether, under the totality of the circumstances, the identification was reliable. See Manson v. Brathwaite, 432 U.S. 98, 114 (1977) ("reliability is the lynchpin in determining the admissibility of identification testimony"); Neil v. Biggers, 409 U.S. 188, 199 (1972) (noting that totality of the circumstances must be considered in determining reliability of identification). Because the state courts applied the same standard in evaluating this claim as is required under the United States Constitution, I conclude that it is exhausted for purposes of habeas review and will address the claim on its merits. See Duncan v. Henry, 513 U.S. 364, 365 (1995) ("it is not necessary to invoke the talismanic phrase due

process of law or cite book and verse on the federal constitution" to fairly present a due process claim).

An identification procedure which is both unnecessarily suggestive and creates a substantial risk of misidentification violates due process. United States v. Brownlee, 454 F.3d 131, 137 (3d Cir. 2006) (citing Manson, 432 U.S. at 107). Whether there is a substantial risk of misidentification is determined by the “totality of the circumstances,” with particular attention paid to such relevant factors as the quality of the witnesses’ original opportunity to view the criminal, their degree of attention, their level of certainty when confronted with the suspect or his image, and the length of time between the crime and the confrontation. Id. (citing Neil, 409 U.S. at 199-200). In addition, in order to warrant habeas relief, the petitioner must also establish that the suggestiveness “created ‘a very substantial likelihood of misidentification.’” United States v. Dowling, 855 F.2d 114, 117 (3d Cir. 1988) (quoting Neil, 409 U.S. at 198).

The identification by Mr. Qawasmy began with a “show-up,” which is relevant because the Supreme Court has recognized that a “show-up” is inherently suggestive.<sup>20</sup> Brownlee, 454 F.3d at 138 (citing Stovall v. Denno, 388 U.S. 293, 302 (1967)).

However, a show-up, in and of itself, does not violate due process. Neil, 409 U.S. at 198.

In considering this claim on direct appeal, the Pennsylvania Superior Court found

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<sup>20</sup>A “show-up” is an identification procedure where “a single individual arguably fitting a witness's description is presented to that witness for identification.” Brownlee, 454 F.3d at 138.

that the identification procedures did not undermine the reliability of Mr. Qawasmy's identification.

Upon our review of the record, we conclude that, under the totality of the circumstances, any suggestiveness in the identification process did not affect the reliability of the identification evidence. Here, Qawasmy had ample opportunity to observe Rhodes prior to, during, and after the robbery. Having been robbed on prior occasions, Qawasmy paid particular attention to Rhodes's appearance.

Superior Court Op. at 6. Furthermore, in recounting the evidence, the Superior Court concluded that the show-up did not impair the reliability of the identification.

At trial, Qawasmy testified that he observed Rhodes walk up to the store, look through the window, and return to his vehicle. This made Qawasmy suspicious of Rhodes. Qawasmy was attending to another customer when he first observed Rhodes. After that customer left, Qawasmy emptied the cash from his register and went to the window to observe Rhodes. Rhodes entered the store with the hood of his sweatshirt over his head. Rhodes demanded money while he stood across the counter from Qawasmy. During the robbery, Rhodes stood approximately three feet from Qawasmy. After Rhodes exited the store, Qawasmy went outside to see which direction Rhodes went.

Furthermore, Qawasmy identified Rhodes on the Johnson Highway 7-11 store surveillance video prior to the police officers' identification of Rhodes by name. The evidence also established that several hours after the robbery, Fahim notified Qawasmy that he believed that Rhodes had entered Johnson Highway 7-11 store around 5:10 a.m. Qawasmy went to the Johnson Highway 7-11 store and viewed the surveillance videotape with Officer Sobeck. Upon review of the surveillance video, Qawasmy identified Rhodes as the individual who had robbed the West Norristown 7-11 store. Officer Sobeck then left the Johnson Highway 7-11 store. Shortly thereafter, Offer [sic] Sobeck returned to the Johnson Highway 7-11 store with Officers Leeds and Parsley. At that time, Officers Sobeck, Leeds and

Parsley viewed the surveillance video together with Qawasmy. While viewing the surveillance video, Officers Leeds and Parsley immediately blurted out that the individual on the video was Nathaniel Rhodes. The evidence further established that when Qawasmy viewed Rhodes, in person, at approximately 7:00 a.m. that morning, he immediately stated, “That’s the one that robbed me.” At the time, Rhodes was standing on the sidewalk with several police officers. Rhodes was not placed in handcuffs nor into a police vehicle until after he was identified by Qawasmy.

Id. at 6-8 (citations to transcript omitted).<sup>21</sup>

Guided by the factors set forth in Neil, I find no error in the state court’s analysis.

Mr. Qawasmy had ample opportunity to view the perpetrator. In fact, he was on alert because he thought the perpetrator was acting suspiciously and he had been the victim of prior robberies. Mr. Qawasmy’s identification of Rhodes was emphatic and occurred only a few hours after the robbery.<sup>22</sup> Although the show-up was perhaps not the ideal identification mechanism under the circumstances,<sup>23</sup> there was not a substantial likelihood of misidentification. Therefore, I conclude that Rhodes is not entitled to relief as to this

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<sup>21</sup>In his direct appeal, Rhodes also argued that Mr. Qawasmy’s identification was further tainted by the officers’ identification of the perpetrator on the video surveillance tape. Commonwealth v. Rhodes, 1971 EDA 2004, Brief for Appellant, at 7-8. Rhodes does not pursue this argument here.

<sup>22</sup>Moreover, as will be discussed later in this Report, Mr. Qawasmy testified that the perpetrator had a distinctive eye, making his identification even more compelling. See infra, at 42.

<sup>23</sup>A show-up has been approved of when the victim of a crime is in critical condition in the hospital and the police took the suspect to the hospital for identification. See Stovall, 388 U.S. at 301-02. No such exigent circumstances existed here. The police could have omitted the show-up and proceeded with a more neutral identification procedure.

claim.

**C. Failure to Preclude Identification Testimony by Kimo Fahim**

Rhodes also challenges the identification evidence of Mr. Fahim, the clerk at the second 7-11 store on Johnson Highway. Mr. Fahim identified Rhodes as the suspicious man who came into the store early in the morning on November 22, 2003, prompting his call to the police. N.T. 3/11/04 at 35-38. Rhodes contends that his trial counsel was ineffective for failing to seek a pretrial line-up, identification by photographic array, or otherwise preclude Mr. Fahim's identification testimony.

Claims alleging ineffective assistance of counsel are governed by Strickland v. Washington, 466 U.S. 668 (1984):

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. 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. Additionally, the Court has cautioned that strategic choices made by counsel are presumed reasonable. "Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected . . . if they are based on professional judgment. Id. at 681.

The PCRA court held an evidentiary hearing on this claim, and concluded that Rhodes suffered no prejudice from counsel's failure to request a line-up or photographic array and that counsel had a strategic reason for not requesting any additional

identification opportunities. The court reasoned that, because any identification by Mr. Fahim necessarily relied upon Mr. Qawasmy's description, the defense risked further emphasis of Mr. Qawasmy's many identifications.

[A] physical line-up at trial would not have helped [Rhodes'] case. At the September 20, 2006 PCRA hearing, Trial Counsel testified that he felt such a maneuver might serve to prejudice Defendant because it would have provided the Commonwealth with a *fourth* manner of identification by Mr. Qawasmy, and there was already overwhelming identification evidence in the case. N.T. 9/20/06 at 30. One striking characteristic of [Rhodes] is his unusual right eye; such an odd characteristic would have made [Rhodes] easily identifiable to Mr. Qawasmy and Mr. Fahim, since both men had testified at [Rhodes'] preliminary hearing. Id. at 30-31, 34, 36.

PCRA Op. at 6.

I conclude that the state courts' conclusion is consistent with Strickland and a reasonable determination of the facts. First, other identification evidence, including the eyewitness testimony of the robbery victim, Mr. Qawasmy, was overwhelming. Moreover, as counsel explained at the PCRA hearing, he feared that a line-up would only give the Commonwealth another piece of identification evidence. N.T. 9/20/06 at 30. Both Mr. Qawasmy and defense counsel noted that Rhodes has a distinctive right eye. N.T. 3/10/04 at 97; 9/20/06 at 30-31, 34, 36.<sup>24</sup> Considering this distinctive feature, it was

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<sup>24</sup>Mr. Qawasmy described the eye as looking "half closed." N.T. 3/10/04 at 97. This trait is not evident in the picture of Rhodes included in the photographic array presented to Mr. Qawasmy and included in the state court record. See N.T. 3/9/04 (photographic array attached to testimony).

sound strategy for trial counsel to avoid any additional identification opportunities.<sup>25</sup>

To the extent Rhodes argues that counsel should have sought to preclude Mr. Fahim's testimony for other unspecified grounds, I can find no basis to support the preclusion. There is nothing about Mr. Fahim's testimony that causes the court to question the reliability of his identification. Mr. Fahim testified that Rhodes was about twelve to fifteen feet from him while he was in the 7-11 store, and then about three to four feet from him at the counter, at which time he got a clear look at his face. N.T. 3/11/04 at 38-40. Thus, Rhodes has failed to establish any basis to preclude Mr. Fahim's testimony and he is not entitled to relief on this ineffectiveness claim.

**D. Failure to call Sergeant Sobeck**

Rhodes next argues that his trial counsel was ineffective for failing to call Sergeant Robert Sobeck as a witness for the defense. Sergeant Sobeck did not testify at trial. However, he did testify at the suppression hearing, where defense counsel pointed out a discrepancy between the description of the perpetrator contained in Sergeant Sobeck's report and the clothing that Rhodes was wearing. In his report, Sergeant Sobeck noted that another officer reported that Rhodes was wearing a tan hooded sweatshirt, whereas Rhodes was actually wearing a gray hooded sweatshirt, described by Sergeant Sobeck as

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<sup>25</sup>Rhodes' habeas counsel suggests that rather than sound trial strategy, the failure to use the fact that Rhodes had a distinctive eye to undermine the Commonwealth's case was, itself, ineffective. Pet. Br. at 15. Counsel argues that trial counsel could have undermined the Commonwealth's case by showing that none of the police reports or descriptions of the perpetrator mentioned any deformity of the eye. However, considering Mr. Qawasmy's unequivocal identification of Rhodes, this oversight holds little weight.

a “strange color . . . sort of gray but . . . a beige color.” N.T. 3/9/04 at 52-54, 55.<sup>26</sup>

The state courts concluded that “testimony from Sergeant Sobeck would have provided no help at trial to [Rhodes’] case, and would have only served as another witness to the identification of [Rhodes] as the robber.” PCRA Op. at 7. Again, this conclusion is consistent with Strickland and a reasonable interpretation of the facts.

At the PCRA hearing, trial counsel explained his decision not to call Sergeant Sobeck to testify about the discrepancy in the description of the sweatshirt.

I didn’t see any need for him to testify at that time. . . . Well, the gray sweatshirt, I think some people can describe that as tan. I didn’t see what could be gained by that. It was an off-colored shirt, and there’s nothing -- if anything, I thought Sobeck could possibly hurt me on cross examination, and I didn’t see the -- any point to him testifying about what someone else had told him, because he did not have any direct knowledge of what the robber wore; he only, I believe heard that from Qawasmy. So I didn’t see any point of bringing that in through him.

N.T. 9/20/06 at 22.

Again, considering the strength of the identifications by Mr. Qawasmy and Mr. Fahim, the relatively minor difference between Rhodes’ clothing and the description given over the radio is inconsequential, and the decision not to call Sergeant Sobeck for

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<sup>26</sup>Habeas counsel also notes that Sergeant Sobeck’s report states that the Rhodes was wearing jeans, Doc. 15 at 16, whereas Sergeant Sobeck testified at the suppression hearing that Rhodes was wearing khakis. N.T. 3/9/04 at 24, 39, 48. The light-colored jeans Rhodes was wearing at the time of his arrest were admitted into evidence and identified by both Mr. Qawasmy, N.T. 3/10/04 at 101, and by Mr. Fahim. N.T. 3/11/04 at 41.

this purpose cannot be considered ineffective or prejudicial.

In Rhodes' pro se habeas petition, he also complains that counsel should have called Sergeant Sobeck regarding the conversation he had with Mr. Qawasmy when he asked Qawasmy to identify the perpetrator. Rhodes contends that Sergeant Sobeck's suppression hearing testimony regarding this call contradicted Mr. Qawasmy's testimony at trial.

Sergeant Sobeck testified that "I asked [Mr. Qawasmy] if he wanted to view somebody in so many words, if it would refresh his memory if he recognized the person." N.T. 3/9/04 at 58. According to Mr. Qawasmy's testimony, Sergeant Sobeck asked him "if [he] can come down and he think he got the suspect, if I could come down and come identify him." N.T. 3/10/04 at 108. Trial counsel testified at the PCRA hearing that he viewed this distinction as inconsequential.

The fact that Sobeck called [Mr. Qawasmy] down to identify a witness, I didn't see what that gained me. I mean, obviously, Mr. Qawasmy was called by the police, either by Sobeck or Bishop or Leeds, two of the other police officers, and I didn't see how that helped my case at all.

N.T. 9/20/06 at 23.

In fact, defense counsel was able to rely on Mr. Qawasmy's own testimony to argue in closing that Sergeant Sobeck had influenced Mr. Qawasmy's identification.

You heard Mr. Qawasmy testify, too. Sergeant Sobeck calls him up and says, we've got the suspect, we want you to take a look at him, we've got the suspect. . . . Now what would you think if someone said that? Thank God, they got the man who did this to me, and all I have to do is go down and point him out.

N.T. 3/12/04 at 232.

After thoroughly reviewing the trial transcript, it is clear that undermining Mr. Qawasmy's identification was essential to the defense.<sup>27</sup> Offering Sergeant Sobeck's testimony regarding his interaction with Mr. Qawasmy was not critical to the defense theory challenging that identification, but did run the risk of bolstering the identification. Thus, it was sound strategy not to offer Sergeant Sobeck's testimony.

**E. Failure to Challenge the Identification by Leeds**

In his pro se petition, Rhodes also argues that his trial counsel was ineffective for failing to object to the identification testimony offered by Officer Charles Leeds. Officer Leeds identified Rhodes from the videotape at the Johnson Highway 7-11. N.T. 3/11/04 at 80. According to Rhodes, this identification was in violation of the trial court's ruling that the jury would make the ultimate determination regarding who was depicted on the video surveillance tape. Doc. 1 at ¶ 12E.

In a motion in limine filed prior to trial, counsel sought to preclude any of the officers from testifying that Rhodes was a suspect based on their review of the videotape, Commonwealth v. Rhodes, No. 8491-03 (Mont. C.C.Pl.) Motion in Limine filed Mar. 5, 2004, and the issue was discussed at the outset of the suppression hearing. N.T. 3/9/04 at 8-13. The prosecutor stated that he intended to elicit testimony that one of the officers (Leeds) recognized Rhodes on the second videotape based on his prior contacts with

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<sup>27</sup>At the PCRA hearing, trial counsel characterized identification as "one, if not the ultimate, issue in the case." N.T. 9/20/06 at 19.

Rhodes, but that he would not elicit any opinion testimony identifying Rhodes based on a comparison of the videotapes. Id. at 10-11. In discussing the matter with counsel, the trial judge indicated that he would not permit any expert testimony, based on an analysis of the videotapes, identifying Rhodes as the perpetrator.

But [the expert is] not going to say now, ladies and gentlemen of the jury, I want you to look at this. See here, he has a cheekbone that's raised here. Are you intending to do that because that might be something different?

N.T. 3/9/04 at 12. Thus, contrary to Rhodes' view, the court did not rule that an officer, as a fact witness, could not identify Rhodes if he recognized him on the videotape.

When the court and counsel revisited the issue the following day, the court ruled that the prosecution's expert witness, who enhanced the videotapes to make them more clear, would be permitted to point out similarities between the individuals in the tapes, but could not offer the conclusion that the videos depicted the same person. N.T. 3/10/04 at 38-39. Because Officer Leeds was not qualified as an expert and was not offered as an expert to identify Rhodes, there was no basis for defense counsel to object. Officer Leeds was merely offering his testimony as an observer.

Moreover, during his instructions to the jury, the court described the difference between a lay witness and an expert witness, and explained the factors the jury should consider when considering identification testimony given by a lay witness. N.T. 3/12/04 at 269, 270-71. Thus, consistent with the judge's prior order, no expert testimony was offered regarding the identity of the person on the video. Additionally, during its deliberations, the jury asked to see and did again view the still photos from the videotape,

id. at 299-300, further undermining Rhodes' argument that the jury was not the ultimate decision-maker in determining the identity of the person in the video. Thus, counsel cannot be considered ineffective. See Johnson v. Tennis, 549 F.3d 296, 302 (3d Cir. 2008) (counsel not ineffective for failing to present meritless objection) (citing United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999)).

**F. Police Testimony of Prior Contacts with Rhodes**

Rhodes next contends that his trial counsel was ineffective for eliciting testimony from Officer Michael Bishop and Officer Leeds that they had prior contacts with Rhodes. On direct examination, Officer Leeds testified that he recognized Rhodes as the man in the video, and Officer Bishop testified that he recognized Rhodes as the man in the car outside the A-1 Minimarket. N.T. 3/11/04 at 80, 98. This testimony could have given the jury the impression that Officers Leeds and Bishop had encountered Rhodes in their official capacities, implying that Rhodes had a prior criminal record.

The trial court found, based on trial counsel's testimony at the PCRA hearing, that counsel's cross-examination was designed to minimize the risk that the jury would infer that Rhodes had a prior record.

Trial Counsel had good reason to elicit Officer Leeds' contacts with [Rhodes] on cross-examination. Officer Leeds had already testified on direct examination that he recognized Defendant as the man in the video. Trial Counsel worried that the jury would equate Officer Leeds' recognition with [Rhodes] having a prior criminal record. . . . to prevent this, Trial Counsel asked questions of Officer Leeds to clarify that Officer Leeds knew [Rhodes] from walking around Norristown and not from any prior criminal history.

PCRA Op. at 7.<sup>28</sup>

Nothing in this strategy can be considered deficient. It was proper cross-examination in response to the Commonwealth's questioning. Defense counsel was merely minimizing a very real risk that the jury might believe his client had a prior criminal record. The state courts' determination of this issue was consistent with Strickland and a reasonable determination of the facts.

**G. Evidence Submitted to the Jury**

Rhodes also claims that his trial counsel was ineffective for withdrawing his objection to certain evidence being submitted to the jury during deliberations. At the conclusion of the testimony, the court and counsel discussed what evidence would be sent out with the jury while it deliberated. Defense counsel objected to the physical evidence going out with the jury. N.T. 3/12/04 at 256. At that point, the court noted that "there is no preclusion under the Rules of Criminal Procedure as to physical evidence going back." Id. at 256. Defense counsel withdrew the objection. Id. at 257.

At the PCRA hearing, defense counsel testified that he had no legal basis for the objection, and the court agreed. N.T. 9/20/06 at 26; PCRA Op. at 8. Pennsylvania Rule of Criminal Procedure 646 provides that with the exception of certain items -- a transcript of trial testimony, a written or recorded confession by the defendant, a copy of the information or written jury instructions -- the jury may take with it during deliberations

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<sup>28</sup>Although the PCRA Court's discussion was limited to Officer Leeds' testimony, the same analysis applies with equal force to Officer Bishop's testimony.

any exhibit “as the trial judge deems proper.” Pa. R.Crim. P. 646. Since identification was the key to this case, it was certainly proper for the court to submit to the jury the clothes Rhodes was wearing at the time of his arrest. Having no basis for the objection, counsel cannot be considered ineffective for withdrawing it. See Johnson, 549 F.3d at 302 (counsel not ineffective for failing to file meritless motion).

#### **H. Failure to File Post Trial Motions**

Although appellate counsel filed a direct appeal, presenting four issues for appellate review, Rhodes argues that his appellate counsel was ineffective for failing to file post-sentence motions. Rhodes has failed to identify what issues should have been presented.<sup>29</sup> The Third Circuit has held that “[b]ald assertions and conclusory allegations” do not provide a basis for habeas relief. Zettlemoyer v. Fulcomer, 923 F.2d 284, 301 (3d Cir. 1991) (citing Mayberry v. Petsock, 821 F.2d 179, 185 (3d Cir. 1987)). Relying on this concept, the Third Circuit has rejected claims of ineffective assistance for failure to investigate and call witnesses when the petitioner fails to identify what favorable evidence would have been discovered and what the witnesses would have contributed to the defense. See Campbell v. Burris, 515 F.3d 172, 184 (3d Cir. 2008). Similarly, a petitioner fails to meet his burden under Strickland when he fails to identify what viable issues counsel failed to raise on appeal. See Quiles Gonzalez v. United States, Nos. 07-cv-1797, 05-cr-123-16, 2007 WL 2407288, at \*4 (E.D. Pa. Aug. 20,

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<sup>29</sup>At the PCRA evidentiary hearing, the only issue Rhodes specifically identified was a sufficiency of the evidence claim, N.T. 9/20/06 at 42, which he presents and will be discussed in the next section.

2007) (Rufe, J). Here, Rhodes has utterly failed to establish how his attorney's failure to file post-sentence motions prejudiced his defense, especially in light of appellate counsel's having presented what counsel believed to be the strongest arguments. See Jones v. Barnes, 463 U.S. 745, 751 (1983) (it is the province of appellate counsel to "winnow . . . out weaker arguments on appeal").

Additionally, at the PCRA evidentiary hearing, appellate counsel testified that he believed filing post-sentence motions "would have been a total waste of time." N.T. 9/20/06 at 9. In considering this issue on PCRA review, the trial court found that Rhodes had failed to establish that he suffered any prejudice based on counsel's failure to file post-sentence motions.

[Rhodes'] conviction in the present matter constituted his "third strike" with respect to sentencing so Appellate Counsel knew there was not much he could do regarding the length of [Rhodes'] sentence. . . . Appellate Counsel believed [Rhodes'] most legitimate and strongest argument involved a Batson error with respect to jury selection. . . . Appellate Counsel filed a timely direct appeal on August 9, 2004, raising the Batson issue as well as three other issues that Appellate Counsel believed had merit. . . . Appellate Counsel zealously represented [Rhodes] during the sentencing and appellate stage, raising every legitimate argument of error.

PCRA Op. at 8 (internal footnote omitted).

The state court's conclusion is consistent with Strickland and this claim provides no basis for habeas relief.

## **I. Failure to Challenge the Sufficiency of the Evidence on Appeal**

Finally, Rhodes argues that his appellate counsel was ineffective for failing to challenge the sufficiency of the evidence on appeal. The trial court flatly rejected this claim.

Appellate Counsel did not err by not raising a “sufficiency of the evidence” argument on direct appeal. There was an overwhelming amount of evidence presented at trial against [Rhodes], eyewitness and otherwise. Clearly, there was more than enough evidence for a jury to find [Rhodes] guilty beyond a reasonable doubt. Appellate Counsel correctly noted that raising such an argument would be frivolous and fruitless. . . . Moreover, he felt that raising such a lost issue would only serve to dilute the arguments that he believed had some legitimacy, namely the Batson issue. . . . Therefore, not only would a sufficiency of the evidence claim have no merit, but Appellate Counsel also [had] a reasonable strategic decision for not raising such a claim on direct appeal.

PCRA Op. at 9.

Again, the state court’s decision is consistent with Strickland and a reasonable determination of the facts. Counsel will not be found ineffective for failing to pursue a meritless argument. Johnson, 549 F.3d at 302. As the state court found, the evidence of Rhodes’ guilt was overwhelming, including eyewitness testimony and identification, a videotape, and other incriminating evidence, including the fact that when he was arrested, Rhodes had a package of the same brand of cigarettes that he had taken from Mr. Qawasmy’s store. N.T. 3/10/04 at 91-92; 9/20/06 at 28-29. Because a sufficiency claim would have been rejected, Rhodes’ appellate counsel cannot be found ineffective for failing to pursue the claim on appeal.

Additionally, as previously discussed, it is the province of appellate counsel to “winnow . . . out weaker arguments on appeal.” Jones, 463 U.S. at 751. This is exactly what appellate counsel did in pursuing the claims he did on appeal.

If [Rhodes had asked about pursuing a sufficiency claim], I would have certainly told him that such an issue would have been a total waste of time and would be frivolous and would basically water down the one issue that I thought was a good issue by including, you know, basically garbage issues.

N.T. 9/20/06 at 12-13. Thus, Rhodes is not entitled to habeas relief on the basis of counsel’s failure to present a sufficiency claim.

#### **IV. CONCLUSION**

For the reasons explained in Section III-A of this Report, Rhodes has established that the state court’s failure to extend Batson to the prosecutor’s exercise of a peremptory strike “below the line” that predictably and effectively prevented an African-American from sitting on the jury was an unreasonable application of clearly established federal law. On this basis he is entitled to habeas relief. In all other respects his petition lacks merit.

Based on the foregoing discussion, I make the following:

**RECOMMENDATION**

AND NOW, this 26th day of March, 2009, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be GRANTED. I further recommend that execution of the writ be STAYED for 180 days to permit the Commonwealth to conduct a proper Batson inquiry into the strike of prospective juror number 41, which resulted in the effective strike of prospective juror number 33, an African-American. The parties may file objections to this Report and Recommendation. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

/s/ ELIZABETH T. HEY

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ELIZABETH T. HEY  
UNITED STATES MAGISTRATE JUDGE

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

NATHANIEL RHODES, JR. : CIVIL ACTION  
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v :  
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DAVID A. VARANO, et al. : NO. 08-3236

**ORDER**

CYNTHIA M. RUFÉ, J.,

AND NOW, this                      day of                      , 2009, upon  
careful and independent consideration of the petition for writ of habeas corpus and the  
Petitioner's brief, the Response, and after review of the Report and Recommendation of United  
States Magistrate Judge Elizabeth T. Hey, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. The petition for a writ of habeas corpus is GRANTED.
3. Execution of the writ is STAYED for 180 days to permit the Commonwealth to conduct a proper Batson inquiry into the strike of prospective juror number 41, which resulted in the effective strike of prospective juror number 33, an African-American. If the Commonwealth does not conduct a proper Batson inquiry within the time specified, the writ shall issue, and Respondents shall release Rhodes from any incarceration or other restraint imposed by the conviction under attack in this habeas corpus petition.

BY THE COURT:

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CYNTHIA M. RUFÉ, J.