

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

FLORENCIO ROLAN,	:	CIVIL ACTION
Petitioner	:	
v.	:	
	:	
DONALD T. VAUGHN, et al.,	:	NO. 01-81
Respondents.	:	

MEMORANDUM AND ORDER

Schiller, J.

October 12, 2004

Petitioner Florencio Rolan seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. At trial, the Commonwealth advanced the theory that Rolan shot and killed Paulino Santiago on May 13, 1983 during an attempted robbery. A jury convicted Rolan of first degree murder and possession of an instrument of crime. Following the penalty phase of the proceedings, the jury imposed a death sentence. In 1997, the state post-conviction court vacated the death sentence upon finding that Rolan’s right to effective assistance of counsel was violated during the penalty phase of his trial. After a re-sentencing hearing in May 2003, a jury unanimously voted to sentence Rolan to life imprisonment.

In this habeas petition, Rolan claims that his Sixth and Fourteenth Amendment rights were violated because he received ineffective assistance of counsel during the guilt phase of his trial. Rolan claims that his trial counsel, Melvin Goldstein, was ineffective because Goldstein failed to conduct any pretrial investigation. According to Rolan, this failure to investigate prejudiced his case by negatively impacting counsel’s strategic decisions, specifically, by preventing Goldstein from pursuing a claim of self-defense. In support of his petition, Rolan raises three instances of deficient performance that he suggests would not have occurred had Goldstein conducted some investigation and pursued a viable self-defense strategy: (1) failure to present the testimony of two witnesses,

Daniel Vargas and Robert Aponte; (2) interference with Rolan's efforts to testify; and (3) failure to adequately cross-examine the prosecution's key witness, Francisco Santiago, regarding his deal with the Commonwealth. Petitioner argues that any of these individual instances of inadequate performance and/or counsel's overarching failure to investigate and pursue a claim of self-defense constitute ineffective assistance of counsel. Following oral argument on April 8, 2004, an evidentiary hearing on May 10, 2004, and for the reasons discussed below, I grant Rolan's petition finding that the ineffectiveness of Rolan's trial counsel necessitates a new trial.

I. FACTUAL BACKGROUND

A. Pre-Trial

Melvin Goldstein represented Rolan at his May 1984 trial.¹ Goldstein's first contact with Rolan occurred on February 22, 1984, when they met briefly in the courtroom before Rolan's preliminary hearing. (Post Conviction Relief Act ("PCRA") Hearing R. at 4-5 (July 18, 1996).) Rolan claims that he informed Goldstein of two witnesses, Daniel Vargas and Robert Aponte, who would support his claim of self-defense. (*Id.* at 5-7.) On April 19, 1984, approximately one month before trial, Goldstein saw Rolan for the second time at a pretrial status conference. (Status Hearing R. at 4 (Apr. 19, 1984).) Several days after this meeting, Goldstein sent a letter to Rolan inquiring as to whether Rolan knew of any witnesses who should be called on his behalf. (Pet.'s Mem. of Law App. A at 187 (Letter of Apr. 23, 1984).) In this letter, Goldstein stated that he needed the names

¹ As Melvin Goldstein died while the direct appeal of Rolan's conviction was pending, the information regarding his representation of Rolan is gleaned from Rolan's testimony at the Post Conviction Relief Act ("PCRA") hearing, correspondence between Goldstein and the District Attorney's office, and the trial transcript.

and addresses of the witnesses in order to conduct interviews. (*Id.*) Rolan’s mother responded to Goldstein and gave him Vargas’s and Aponte’s names once again. (PCRA Hearing R. at 9 (July 18, 1996).) After receiving the names of Daniel Vargas and Robert Aponte, Goldstein reported those names to the District Attorney’s office as “alibi witnesses.”² (Pet.’s Mem. of Law App. A at 188 (Letter of May 4, 1984).) Rolan disputes having referred to these witnesses as “alibi witnesses.” (PCRA Hearing R. at 11 (July 18, 1996).) Regardless, there is no indication that Goldstein ever attempted to contact Vargas or Aponte. (Trial R. at 5-6 (May 16, 1984); PCRA Hearing R. at 180 (July 2, 1996).)

B. Trial

The third time Goldstein saw Rolan was on the first day of jury selection for Rolan’s trial. (PCRA Hearing R. at 7 (July 18, 1996).) At the outset of trial, Goldstein informed the court that he had given the names of two witnesses to the prosecutor and again described the two witnesses as “allegedly some type of alibi witnesses.” (Trial R. at 4 (May 16, 1984).) The prosecutor informed the court that a detective had interviewed Vargas and that Vargas “knew absolutely nothing about Florencio Rolan, and he knew nothing about the incident and he certainly was not an alibi witness.” (*Id.* at 6.) The prosecutor also stated that Aponte had been released from prison and could not be located.³ (*Id.*)

² The name appearing in the May 4, 1984 letter is “Daniel Burgo.” In the record before this Court, it is unclear whether this is a nickname or an alternative spelling. Regardless, the record indicates that this apparent misnomer did not prevent the District Attorney’s office from contacting Vargas.

³ Despite this representation, the prosecution had in fact located and interviewed Aponte on the previous day. (Pet.’s Mem. of Law App. A (Investigation Interview Record).) On May 17, 1984, at the close of his case, the prosecutor indicated that Aponte had been located but that “he is not an alibi witness, and that he doesn’t know anything about this.” (Trial R. at 38 (May

The prosecution's case consisted of two main witnesses, Francisco Santiago and Edwin Rosado. Francisco, the victim's brother, testified that on May 13, 1983, at approximately 8:30 p.m., he and his brother Paulino were on the corner of 17th and Wallace Streets when Paulino and Rolan began arguing over money. (Trial R. at 40-42 (May 16, 1984).) Once the argument was over, Rolan went to a friend's house and Francisco went into an abandoned house to relieve himself. (*Id.* at 42.) Paulino then joined Francisco in the abandoned house and, shortly thereafter, Rolan burst in carrying a rifle and demanding that Paulino give him money. (*Id.* at 47-48.) Immediately after demanding money, Rolan fired a single shot which killed Paulino. (*Id.* at 49.) Rolan then ran directly out of the back of the house without taking any money from Paulino or Francisco. (*Id.* at 67, 75.) Francisco pulled Paulino out of the house and onto the street. (*Id.* at 50.)

The Commonwealth offered Francisco a deal in exchange for his testimony at Rolan's trial. Under the terms of the deal, which were presented to the trial judge out of the presence of the jury, Francisco received immunity from prosecution for any of the drug activities referenced in his testimony and from any other charges arising from his brother's murder. (*Id.* at 7-8.) When the prosecutor elicited the terms of the deal on direct examination, however, he asked: "In fact, the only thing the District Attorney's Office has said to you is that if you testify, that we would write a letter to the prisons and the Parole Board, possibly, to let them know that you cooperated; is that correct?"⁴ (*Id.* at 51.) Francisco indicated that this was correct and that he hadn't received any other promises in exchange for his testimony. (*Id.* at 52.) As the prosecutor clearly stated on the record earlier that

17, 1984.)

⁴ The jury was aware that Francisco was in prison for a prior theft offense and that, ostensibly, such a letter could help him receive favorable consideration for early release.

same day, however, the letter of recommendation was in fact not “the only thing” offered by the Commonwealth. Neither the Commonwealth nor Rolan’s counsel corrected Francisco’s incomplete recitation of the terms of the deal.⁵ (*Id.* at 51-52); *Commonwealth v. Rolan*, No. 4591 Phila. 1997, slip. op. at 12-13 (Pa. Super. Ct. June 9, 1999) [hereinafter *Superior Court Opinion*].

The prosecution’s other main witness, Edwin Rosado, testified that he was on the corner of 17th and Wallace Streets and heard Paulino and Rolan arguing over a woman. In contrast to Francisco, Rosado testified that, after the fight, Rolan entered the abandoned house before Paulino and that Rolan did not have a weapon at the time. (Trial R. at 99-100 (May 16, 1984).) While Paulino and Rolan were in the house, Rosado heard a single shot and then saw Paulino come outside “struggling.” (*Id.* at 100.) Rosado testified that Francisco was not inside the house when the shot was fired, (*id.* at 83-84), but rather, came to his brother’s aid once Paulino came outside.

At trial, Rolan pressed for Vargas and Aponte to be called as witnesses on his behalf. At the close of the prosecution’s case, Goldstein announced that he had no witnesses to call and Rolan blurted out on the record, “Yes, I have two other witnesses who are willing to come and testify .” (Trial R. at 46-48 (May 17, 1984).) Nonetheless, Goldstein ignored Rolan’s request, explaining to the trial court that Rolan was referring to Vargas and Aponte, whom the prosecutor had interviewed and established were not alibi witnesses.⁶ Rolan’s counsel did not put on any witnesses in his

⁵ Rolan’s counsel also failed to cross-examine Francisco regarding his statement to the responding officer on the day of the shooting that he had no knowledge of the events that resulted in Paulino’s death. (Pet.’s Mem. of Law App. A at 195 (Investigation Interview Record).)

⁶ The relevant exchange is contained in the following excerpt from the trial record:

Mr. Di Donato: Judge, can we determine at this point, and once again, I am thinking of somewhere down the road. I don’t want the defendant to claim he had other witnesses that he has told Mr. Goldstein about that haven’t made an appearance. I would like to

defense. On May 18, 1984, Rolan was found guilty of first-degree murder. He was sentenced to death on May 21, 1984. Rolan's sentence was later upheld on direct appeal. *Commonwealth v. Rolan*, 549 A.2d 553 (1988).

C. Post-Conviction Proceedings

1. PCRA Court

Following his conviction and sentence, the Pennsylvania Supreme Court granted a stay of Rolan's execution so that Rolan's new counsel could file a Post Conviction Relief Act ("PCRA") petition. In July 1996, the Honorable James A. Lineburger of the Philadelphia Court of Common Pleas held an evidentiary hearing on Rolan's PCRA petition. On February 20, 1997, the PCRA Court found that Goldstein was constitutionally ineffective during the penalty phase of Rolan's trial and vacated the death sentence. However, the PCRA Court found that Rolan had waived his claims regarding the guilt phase of his trial by failing to raise them on direct appeal and held that Rolan was

know does he want anyone called as a witness.

...

Mr. Goldstein: I have no other witnesses.

The Court: All right. That's the answer.

By Mr. Goldstein: Now, do you [Rolan] have any other witnesses?

A: Yes, I have two other witnesses who are willing to come and testify.

Mr. Di Donato: This goes on all the time.

Mr. Goldstein: That never happened.

The Defendant: I made you aware.

The Court: No, no, you can't talk to the Court. Tell your lawyer. If you have to have people, we will bring them in.

Mr. Goldstein: He is referring, Your Honor, to these two witnesses.

The Court: Sir, explain it to him.

Mr. Goldstein: I did.

The Court: Explain it to him again.

...

Mr. Di Donato: Judge, I assume then, we are at the closing argument stage.
(Trial R. at 45-48 (May 17, 1984).)

not entitled to a new trial. *Commonwealth v. Rolan*, Nos. 2893-2896, slip op. at 2-3 (C.P. Phila. Feb. 4, 1998) [hereinafter *PCRA Opinion*]. Nonetheless, “[i]n order to provide the appellate courts with a complete record,” the PCRA Court addressed several of Rolan’s guilt phase claims. *Id.* at 3.

Of the guilt phase claims addressed by the PCRA Court, three are important for purposes of the instant petition. First, the PCRA Court addressed Rolan’s claim that his rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), were violated because the Commonwealth did not elicit the full extent of the prosecution’s deal with Francisco Santiago. The Court held that the Commonwealth had not violated the requirements of *Brady* and *Giglio* because the prosecutor had fully informed Rolan’s trial counsel of the deal. *PCRA Opinion* at 3. Furthermore, the Court noted that even though Santiago’s testimony was incomplete, Rolan was not entitled to relief because “the defendant⁷ [sic] could not be prosecuted for the drug offense mentioned” anyway.⁸ *Id.* at 3. Second, the Court addressed Rolan’s claim that he had been denied the opportunity to testify on his own behalf. The Court found that Rolan’s colloquy with the trial court was adequate and that he voluntarily indicated that he did not wish to testify. *Id.* at 4. Furthermore, the Court noted that Rolan’s numerous previous encounters with the criminal justice system bolstered its finding that Rolan had voluntarily waived his right to testify. *Id.* Third, the PCRA Court concluded with a perfunctory analysis of Rolan’s ineffectiveness claim. Specifically, the Court stated that Rolan was not entitled to a new trial on the basis of ineffectiveness because “none of the defendant’s [previously addressed] claims possess arguable merit. Consequently, even

⁷ It seems the PCRA Court intended to refer to the witness Francisco Santiago here.

⁸ It is not clear from the opinion why the PCRA Court believed that Francisco could not have been prosecuted for the drug offense or why that was relevant to the *Brady* and *Giglio* analysis.

had the defendant not waived these issues, relief would not have been forthcoming.” *Id.* at 10. Notably, the Court did not address nor even mention Rolan’s claim that counsel was ineffective for failing to contact Vargas or Aponte or for failing to investigate a claim of self-defense.

2. *Superior Court*

Rolan appealed the PCRA Court’s denial of his request for a new trial to the Superior Court of Pennsylvania. On June 9, 1999, the Superior Court held that the PCRA Court had erred in finding that Rolan’s claims for ineffective assistance were waived. Thus, the Superior Court proceeded to address the merits of Rolan’s ineffectiveness claims: that trial counsel was ineffective for (1) failing to present available defense witnesses; and (2) interfering with Rolan’s right to testify.⁹ *Superior Court Opinion* at 3-4. In considering these two claims, the Superior Court began its analysis with the prejudice prong of the ineffectiveness inquiry, which it found to be dispositive. *Id.* at 5 (*citing Commonwealth v. Abu-Jamal*, 720 A.2d 79, 88 (Pa. 1998) (“[I]f, upon review, it is clear that Appellant has failed to meet the prejudice prong, the claim may be dismissed on that basis alone without determination of whether the first and second prongs of the ineffectiveness standard have been met.”)). The Court concluded that Rolan was not prejudiced by trial counsel’s failure to present Vargas or Aponte as defense witnesses because the Court “cannot conclude that Vargas was willing to appear on Rolan’s behalf at trial,” *id.* at 7, and Aponte’s statement to Commonwealth investigators “was not relevant” to Rolan’s self-defense claim, *id.* at 8. The Superior Court also found that trial counsel had not improperly interfered with Rolan’s right to testify and that the PCRA Court’s

⁹ Although the ineffectiveness section of Rolan’s brief to the Superior Court is divided into two sections corresponding to these two claims, the brief also argues that Goldstein “failed to conduct any investigation or prepare a strategy for the defense of his client.” (Pet.’s Mem. of Law. App. A at 226 (Appellant’s Br.).)

conclusion that Rolan knowingly declined to testify was amply supported by the evidence in the record and the testimony at the PCRA hearing. *Id.* at 9.

In addition, the Superior Court addressed Rolan’s claim that he was entitled to a new trial because the prosecutor withheld evidence of Francisco’s deal with the Commonwealth. The Superior Court found that although the Commonwealth had a duty pursuant to *Brady* and *Giglio* to supplement Santiago’s incomplete account of his deal, Rolan was not entitled to relief because the Court could not conclude “that the Commonwealth’s failure to expose the full extent of Santiago’s ‘deal’ as a source of potential bias so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.” *Id.* at 13 (internal quotation omitted). The state post-conviction process concluded when the Superior Court affirmed the PCRA Court’s order denying Rolan’s request for a new trial.

II. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act (“AEDPA”) circumscribes a federal court’s authority to grant relief when a state court has previously considered and rejected a petitioner’s federal constitutional claims on the merits. Section 2254, as amended by AEDPA, governs Rolan’s habeas petition and provides, in relevant part:

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

28 U.S.C. § 2254 (2003).

A separate provision of AEDPA provides strict guidelines for consideration of a state court's factual findings:

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

28 U.S.C. § 2254(e)(1).

When a petitioner's legal claims were properly presented but not addressed by the state courts, the heightened standard set forth in § 2254(d) does not apply and courts undertake de novo consideration. *See Everett v. Beard*, 290 F.3d 500, 507-08 (3d Cir. 2002) (holding that heightened standard of review does not apply “unless it is clear from the face of the state court decision that the merits of the petitioner's constitutional claims were examined in light of federal law as established by the Supreme Court of the United States”), *cert. denied*, 123 S. Ct. 877 (2003); *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001) (“It follows that when, although properly preserved by the defendant, the state court has not reached the merits of a claim thereafter presented to a federal habeas court, the deferential standards provided by AEDPA . . . do not apply.”)

The appropriate standard of review for Rolan's petition is a matter of considerable dispute between the parties. Rolan argues that he is entitled to de novo review of his overarching claim that Goldstein was ineffective for failing to investigate because this claim was never addressed by the PCRA Court or the Superior Court. The Commonwealth responds that Rolan's claims were addressed by the Superior Court and that Rolan's petition is therefore governed by § 2254(d). Resolution of this dispute requires evaluation of the Superior Court opinion. Rolan is correct that

the Superior Court analyzed his ineffectiveness claim by focusing on the two strategic choices counsel made at trial—counsel’s failure to call Vargas and Aponte and counsel’s alleged interference with Rolan’s right to testify—rather than on counsel’s antecedent decision not to conduct any investigation. The Superior Court’s mode of analysis, however, was driven by the decision to analyze the prejudice prong first, which is a permissible approach to the analysis of ineffectiveness claims. *See Commonwealth v. Abu-Jamal*, 720 A.2d 79, 88 (Pa. 1998). By concluding that Rolan was not prejudiced by counsel’s failure to call Vargas and Aponte and that counsel did not inappropriately interfere with Rolan’s right to testify—the very choices which Rolan claims counsel would have made differently had he investigated properly—the Superior Court, in essence, has ruled that Rolan is not entitled to relief because his counsel’s failure to investigate was harmless. *See United States v. Gray*, 878 F.2d 702, 712 (3d Cir. 1989) (noting that, in failure to investigate claim, petitioner must satisfy prejudice analysis under *Strickland* not by mere speculation, but by demonstrating what witnesses would have said); *see also Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (“§ 2254(d)’s highly deferential standard for evaluating state-court rulings . . . demands that . . . state-court decisions must be given the benefit of the doubt”) (internal citations and quotation omitted). Thus, de novo review of Rolan’s failure to investigate claim is not warranted ¹⁰

¹⁰ Rolan also asserts that he is entitled to de novo review of his claim that trial counsel was ineffective for failing to elicit the full extent of the prosecution’s deal with Francisco on cross-examination. Rolan claims that this claim was also never addressed by the PCRA Court or the Superior Court. The Government responds that Rolan’s ineffectiveness claim arising out of the deal was addressed in the Superior Court opinion because the resolution of the *Brady/Giglio* claim on the merits is dispositive of the derivative ineffective assistance claim. *See Marshall v. Hendricks*, 307 F.3d 36, 52 (3d Cir. 2002) (noting that *Strickland*’s prejudice prong and *Brady*’s materiality prong are identical).

This Court need not resolve this dispute. Even if this Court were to grant de novo review of this specific claim, Rolan would not be entitled to relief because it is clear that the omission of this impeachment material would not meet the prejudice requirement under the *Strickland*

At oral argument on April 8, 2004, this Court specifically requested counsel to direct their arguments toward § 2254(d)(2). Before discussing the merits of Rolan’s claims under § 2254(d)(2), however, it is necessary to address the interplay between § 2254(d)(2) and § 2254(e)(1). The relationship between § 2254(d)(2)’s reference to an “unreasonable determination of the facts” and § 2254(e)(1)’s “presumption of correctness” is not clear from the text of the statute and has caused some consternation within the courts. *See Stevens v. Horn*, 319 F. Supp. 2d 592, 599 n.4 (W.D. Pa. 2004) (“[T]he relationship between § 2254(d)(2) and § 2254(e)(1) is not entirely clear, and the question of how to harmonize these two provisions has troubled some courts and commentators alike. . . .”). The Supreme Court shed some light on this debate in the recent decision of *Miller-El v. Cockrell*, 537 U.S. 322 (2003). In *Miller-El*, the Supreme Court rejected the Fifth Circuit’s position that, in order to be entitled to relief under § 2254(d)(2), a petitioner must “prove that the state-court decision was objectively unreasonable by clear and convincing evidence.” *Id.* at 341. The Supreme Court called this standard “too demanding . . . on more than one level,” *id.* at 341, and described the relationship between § 2254(d)(2) and § 2254(e)(1) as follows: “The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions.” *Id.* at 341-42. Thus, in order to grant relief under § 2254(d)(2), this Court must find that the state court’s decision was based on an

standard for ineffective assistance of counsel claims. *Strickland v. Washington*, 466 U.S. 668 (1984). While it is true that Francisco was the only prosecution witness who supported the theory that Rolan acted intentionally, the jury had ample reason to doubt the veracity of Francisco’s testimony. The jury knew that Francisco Santiago was on parole for a theft, was offered favorable treatment by the Commonwealth in the form of a promise to inform the Parole Board of his cooperation, was the brother of the deceased, and had been drinking that night. (Trial R. at 40, 51-52 (May 16, 1984).) The value of the additional impeachment evidence that was omitted was only incremental and this Court cannot conclude that it impacted the reliability of the verdict.

unreasonable determination of the facts in light of the evidence presented. However, the state court's *decision* is not subject to the clear and convincing evidence standard; Rolan must only show that the decision was unreasonable in light of the evidence. On the other hand, any factual findings by the state courts shall be presumed correct unless rebutted by clear and convincing evidence.¹¹

IV. DISCUSSION

The Superior Court's decision that Rolan was not prejudiced by Goldstein's failure to investigate and present Vargas as a witness because the Court "cannot conclude that Vargas was willing to appear on Rolan's behalf at trial," *Superior Court Opinion* at 7, was based on an unreasonable determination of the facts in light of the evidence presented. Furthermore, at an evidentiary hearing held on May 10, 2004, Rolan established by clear and convincing evidence that Vargas would have testified on his behalf at his 1984 trial if Goldstein had contacted him. *See Stevens*, 319 F. Supp. 2d at 599 n.4.

A. State PCRA Process

As this Court's analysis is dependent upon findings made in the state proceedings, a brief review of the state post-conviction process is necessary. The Post Conviction Relief Act ("PCRA") provides the sole means by which a person convicted of a crime under the laws of the

¹¹ It should be noted that in this case, as in *Stevens v. Horn*, explication of the precise relationship between § 2254(d)(2) and § 2254(e)(1) is not essential because, as will become evident, the state court's factual determination is both incorrect by "clear and convincing evidence" and represents an unreasonable determination of the facts in light of the evidence presented. *See Stevens*, 319 F. Supp. 2d at 599 n.4 ("Moreover, I need not determine the exact contours of the relationship between § 2254(d)(2) and (e)(1) because the state court's factual determination has been shown to be incorrect by 'clear and convincing evidence' and reflects an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.").

Commonwealth of Pennsylvania may obtain collateral relief in the state system. 42 PA. CONS. STAT. ANN. § 9542 (2004). The Pennsylvania Court of Common Pleas has original jurisdiction over PCRA proceedings. *Id.* § 9545. If necessary for the disposition of the petition, the PCRA court may hold an evidentiary hearing regarding petitioner’s claims. *Id.* § 9545(d), § 9575(a); *see Commonwealth v. Khalifah*, 852 A.2d 1238, 1240 (Pa. Super. Ct. 2004) (PCRA court may refuse evidentiary hearing if claim is “patently frivolous and has no support either in the record or other evidence”); *Commonwealth v. Jordan*, 772 A.2d 1011, 1014 (Pa. Super. Ct. 2001) (holding right to evidentiary hearing on post-conviction petition not absolute, but rather within PCRA court’s discretion).

A petitioner may appeal the PCRA court’s ruling to the Pennsylvania Superior Court. The Superior Court’s review of the PCRA court’s denial of relief is limited to examining whether the lower court’s findings are supported by the record and the order is otherwise free of legal error. *Commonwealth v. Jermyn*, 709 A.2d 849, 856 (Pa. 1998); *Commonwealth v. Lambert*, 765 A.2d 306, 323 (Pa. Super. Ct. 2000); *Commonwealth v. Stokes*, 440 A.2d 591, 595 (Pa. Super. Ct. 1982) (“[O]ur task is not to engage in a de novo evaluation of the testimony presented.”). The PCRA court’s credibility determinations are binding on the reviewing court where there is support in the record for those determinations. *Commonwealth v. White*, 734 A.2d 374, 381 (1999) (*citing Abu-Jamal*, 720 A.2d at 93); *Commonwealth v. Howard*, 749 A.2d 941, 946 (Pa. Super. Ct. 2000).

Accordingly, when the Superior Court’s review is contingent upon a factual finding that was never made, either because the PCRA court failed to hold an evidentiary hearing at all, or failed to make the specific finding at issue, the common practice is to remand to the PCRA court for the necessary findings. *See Commonwealth v. Williams*, 782 A.2d 517, 522-23 (Pa. 2001) (noting that “appropriate course is to remand the present case for the preparation of an adequate opinion by the

PCRA court”); *Commonwealth v. Basemore*, 744 A.2d 717, 737-38 (Pa. 2000) (remanding because, despite evidentiary hearing, no finding was made on key issue); *Khalifah*, 852 A.2d at 1240 (remanding to PCRA court for hearing to evaluate credibility of witness).

B. Petitioner’s PCRA Process

Having reviewed the general state post-conviction process, the Court now addresses Rolan’s PCRA proceedings to determine whether the state court adjudication of Rolan’s ineffectiveness claims resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented. The Superior Court found that the PCRA court’s conclusion that Rolan knowingly declined to testify at trial following a colloquy with the trial court was amply supported by the record. *Superior Court Opinion* at 9 (finding that Rolan declined to testify because he “refused to accept legal constraints on his ability to speak directly with the jury”). The Superior Court also held that Rolan was not prejudiced by trial counsel’s failure to present available defense witnesses or by his interference with Rolan’s right to testify. *Id.* at 3. The Superior Court found that Rolan was not prejudiced by counsel’s failure to present Vargas or Aponte as defense witnesses because the Court “cannot conclude that Vargas was willing to appear on Rolan’s behalf at trial,” *id.* at 7, and because Aponte’s statement to Commonwealth investigators “was not relevant” to Rolan’s self-defense claim, *id.* at 8.

1. Rolan’s Failure to Testify

After considering both the trial transcript and Rolan’s testimony at the PCRA hearing, the PCRA Court concluded that Rolan knowingly and voluntarily declined to testify at trial after being colloquied by the court. *PCRA Court Opinion* at 4. The Superior Court reviewed both the trial record and the PCRA hearing and determined that the PCRA Court’s conclusion was “amply

supported” by the record, which revealed that “Rolan declined to testify because he refused to accept legal constraints on his ability to speak directly with the jury.” *Superior Court Opinion* at 9. This Court has not been presented with any evidence to overcome the PCRA Court’s conclusion, which was based on its evaluation of Rolan’s own testimony at the PCRA hearing. Therefore, this Court cannot conclude that the Superior Court’s affirmance of the PCRA decision was based on an unreasonable determination of the facts in light of the evidence presented. *See Reinert v. Larkin*, 211 F. Supp. 2d 589, 600 (E.D. Pa. 2002) (“The voluntariness of a confession is a mixed question of fact and law that is subject to independent consideration in federal habeas proceedings, but the state courts’ resolution of subsidiary factual issues on which the voluntariness decisions are based are entitled to a presumption of correctness.”)

2. *Aponte*

The Superior Court’s decision that Aponte’s testimony was irrelevant was also based upon a reasonable determination of the facts in light of the evidence presented. As Aponte was deceased by the time of the PCRA petition, he did not testify at the evidentiary hearing. Thus, the Superior Court reviewed only the brief statement Aponte gave to a detective on May 15, 1984. In his statement, Aponte recounted that, at approximately 8:50 p.m. on May 13, 1983, he was standing with his cousin Rolan and an unidentified woman on the corner. (Pet.’s Mem. of Law App. A at 192 (Investigation Interview Record).) An unidentified man pulled up in a car and “was grinning at my cousin, because he used to go with the same girl.” (*Id.*) The man proceeded to get out of the car and sat on the step next to Rolan’s radio. Rolan said “excuse me, I want my radio” and Aponte took the radio and started walking home. (*Id.*) As he was walking home, Aponte saw Rolan again and asked him “if he was alright, he didn’t stab you or anything?” (*Id.*) In the statement, Aponte does not

identify the man in the car as Paulino, whom Aponte knew from the neighborhood. Nonetheless, Rolan asserts that Aponte's expression of concern that Rolan may have been stabbed suggests that Paulino had a knife on the night of the incident. Having reviewed this statement, the Court concluded: "Any suggestion that Aponte's question establishes his awareness that [Paulino] had actually attempted to stab Rolan is entirely unsubstantiated. We conclude, accordingly, that Aponte's testimony was not relevant." *Superior Court Opinion* at 8. Although it is impossible at this time to fully assess the information that may have been gleaned from Aponte had Goldstein contacted him before trial, this Court cannot conclude that the Superior Court's conclusion was based on an unreasonable determination of the facts in light of the evidence presented. While Aponte's statement suggests that he believed the man in the car may have posed a physical danger to Rolan, it does not suggest that the man in the car was Paulino Santiago and, therefore, it does not contain any information regarding Rolan's interaction with Paulino on the night in question.

3. *Vargas*

The Superior Court also concluded that Rolan was not prejudiced by Goldstein's failure to contact Vargas because "we cannot conclude that the witness was willing to appear on Rolan's behalf at trial." *Superior Court Opinion* at 7. This conclusion was based on an unreasonable determination of the facts in light of the evidence presented. As noted earlier, the PCRA court made no factual findings regarding Vargas's willingness to testify. Despite the lack of a factual finding, the Superior Court did not remand for such finding. Rather, the Superior Court's determination was based on its review of two sources: Vargas's affidavit and the cold record of the PCRA hearing.

In his affidavit, Vargas made the following statements:

Sometime after May 13, 1983, a man came to my house. He showed me a document

that I thought was a subpoena and he said he was there to talk about Florencio Rolan. I did not and do not know who this man was. *I understood that he wanted me to testify against Florencio Rolan at his trial.* However, the man told me that I did not need to come to court or testify at all. *Since I did not want to testify against Florencio Rolan, I told this man that I did not want to testify.* I never told the man that I knew nothing about Florencio Rolan or about May 13, 1983. If I had said that, anyone who did any investigation at all would immediately have determined that it was untrue.

Other than the man described above, no one ever contacted me in connection with Florencio Rolan's trial until 1995, when I spoke with Mr. Rolan's current lawyer. Mr. Rolan's trial lawyer never called me or contacted me in any way.

If Florencio Rolan's trial lawyer had ever contacted me, I would have been willing to speak with him about what I saw, and to testify for Florencio Rolan at the trial.

(Vargas Aff. ¶¶ 12-14 (emphasis added).)

Similarly, in the eighty pages of transcript covering Vargas's testimony before the PCRA court, in response to questioning from both Rolan's counsel and the District Attorney, Vargas reiterated at least six times that the detective who came to his home in May 1984 asked him if he would testify *against* Rolan, and that he refused on that basis. (PCRA Hearing R. 179, 196-97, 217 (July 2, 1996).) According to Vargas, no one ever asked him to testify on Rolan's behalf. (*Id.* at 180.) Near the conclusion of Vargas's cross-examination, the District Attorney embarked on a line of questioning to demonstrate that Vargas did not proactively contact the police or Rolan's family to volunteer information about the incident. (*Id.* at 192-194, 218.) On re-direct, Rolan's counsel asked Vargas why he did not "go to the police station right after these events happened?" (*Id.* at 223). Vargas responded: "Because at that time I didn't want to get involved in that." (*Id.*) Counsel asked why not, and Vargas explained: "Because the families was [sic] hurt and I knew both families." (*Id.*)

Reviewing the record evidence just described, the Superior Court made the following finding:

[W]e find Vargas' testimony at the post conviction hearing markedly inconsistent on the crucial issue of his willingness to testify at trial. Vargas attested in his affidavit that he would have testified on Rolan's behalf if contacted by Rolan's counsel. Though initially, Vargas buttressed this assertion at the post conviction hearing, contending that he declined to testify because the Commonwealth's investigator asked only if he would testify against Rolan, his later testimony suggested that he was motivated to avoid controversy and hostility from the families of those involved. During redirect examination by Rolan's counsel, Vargas attested that he had not given a statement to the police because he did not want to get involved in the case. When asked by counsel for an additional reason, Vargas responded "[b]ecause the families was [sic] hurt and I knew both families." In view of Vargas' admitted motive not to get involved in the wake of the crime, we cannot conclude that the witness was willing to appear on Rolan's behalf at trial. Consequently, Rolan's assertion that trial counsel was ineffective for failing to call Vargas as a witness is without arguable merit.

Superior Court Opinion at 6-7 (internal citations omitted). In sum, the Superior Court determined that it "cannot conclude" that Vargas was willing to testify on behalf of Rolan and made the resulting decision that Rolan was thereby not prejudiced by his counsel's failure to investigate Vargas's knowledge and present him as a witness.¹²

This Court finds that the Superior Court did not make a factual finding to which this Court must defer. It was the PCRA court's duty to listen to Vargas's testimony, evaluate his credibility, and determine whether he would have provided testimony at Rolan's trial. *See Campbell v. Vaughn*, 209 F.3d 280, 287-88 (3d Cir. 2000) (noting PCRA court's duty to resolve credibility disputes); *Commonwealth v. Elliott*, 466 A.2d 666, 668 (Pa. Super. Ct. 1983) (noting practice of remanding to PCRA court for credibility finding). Nonetheless, despite questioning and testimony on the issue, the PCRA court failed to make this necessary determination. On review, the Superior Court's sole role was to review the PCRA decision to determine whether it was supported. *See Campbell*, 209

¹² Despite the Superior Court's perception of an inconsistency, this Court notes that Vargas's reluctance to contact police himself does not contradict his asserted willingness to testify if contacted.

F.3d at 290 (“The PCHA¹³ court should have made its factual findings explicit, and it would have been salutary for the Superior Court to have taken the PCHA court to task for not doing so.”). Instead, the Superior Court improperly endeavored to evaluate Vargas’s testimony by reviewing the cold record of the PCRA hearing.

A similar issue arose in a recent Pennsylvania Supreme Court case, *Commonwealth v. Basemore*, 744 A.2d 717 (Pa. 2000). In *Basemore*, the PCRA court had conducted evidentiary hearings on Basemore’s claims that, inter alia, counsel was ineffective for failing to investigate and present available mitigation evidence at the penalty phase of his death penalty trial. *Id.* at 722-23. In its opinion denying the petition, the PCRA court acknowledged that there was conflicting evidence in the record regarding counsel’s efforts to garner mitigation evidence. *Id.* at 724. Specifically, there was conflicting testimony on the crucial issue of whether or not counsel had ever asked about mitigation evidence. *Id.* Nonetheless, the PCRA court did not make any specific factual findings or resolve these credibility issues before dismissing Basemore’s petition. *Id.* In its review of the PCRA court’s decision, the Pennsylvania Supreme Court noted that, “[r]ather than resolving this credibility issue, the PCRA court skirted it by merely concluding that trial counsel was not advised of the potentially mitigating evidence.” *Id.* at 735. The Supreme Court found that it could not sufficiently evaluate Basemore’s ineffectiveness claims based on the PCRA court’s findings. *Id.* at 735-36 (“In view of the evidence presented, the PCRA court was remiss in failing to make specific findings as to the adequacy of the investigation performed.”). Accordingly, the Court remanded the case to the PCRA court and directed it to make specific findings on these issues. *Id.*

¹³ Prior to 1988, the Post Conviction Relief Act was known as the Post Conviction Hearing Act. 42 PA. CONS. STAT. ANN. § 9541 (2004) (amended 1988).

at 737-38 (citing *Commonwealth v. Williams*, 732 A.2d 1167, 1189-90 (Pa. 1999)); see also *Williams*, 732 A.2d at 1181 (declining to make determination regarding impact of witness's recantation "on the cold face of the record" and remanding "because the PCRA court as factfinder is in a superior position to make the initial assessment of the importance of [the witness's] testimony to the outcome of the case").

The Commonwealth contends that the Third Circuit recently approved the state appellate court's ability to make factual findings on a cold record in *Hardcastle v. Horn*. 368 F.3d 246, 257 n.4 (3d Cir. 2004). The Commonwealth's argument, however, is unpersuasive. A closer reading of *Hardcastle* makes clear that the Third Circuit did not resolve the issue of appellate fact-finding and that *Hardcastle*'s discussion of such practices is properly limited to the specific context of the *Batson* issue being considered. See *Batson v. Kentucky*, 476 U.S. 79 (1986) (redefining defendant's evidentiary burden for challenge of peremptory strikes based on race). In *Hardcastle*, the Third Circuit was confronted with factual findings regarding petitioner's *Batson* challenge that the Pennsylvania Supreme Court made after reviewing a cold record. The Third Circuit did not hold that the Pennsylvania Supreme Court's actions were appropriate. *Hardcastle*, 368 F.3d at 257 n.4 ("However, even assuming *arguendo* that it was appropriate in this case for the Pennsylvania Supreme Court to sift through the trial record in an effort to identify unstated race-neutral bases for challenged peremptory strikes . . ."). Moreover, the Third Circuit's brief consideration of the propriety of appellate fact-finding was clearly limited to *Batson* claims due to the "uncertainty in the case law" with respect to whether a court may hypothesize unstated race-neutral bases for challenged peremptory strikes by reviewing the record. *Id.*; see also *Pemberthy v. Beyer*, 19 F.3d 857, 864-45 (3d Cir. 1994) (concluding state appellate court properly made factual findings regarding *Batson*

inquiry). Ultimately, the Third Circuit decided *Hardcastle* without resolving either the uncertainty in the *Batson* case law or whether appellate fact-finding is permissible. *Cf. Sumner v. Mata*, 449 U.S. 539, 545-46 (1981) (holding, prior to the 1996 amendments to 28 U.S.C. § 2254, that findings of state appellate court after appellate court held its own hearing were entitled to deference); *Campbell*, 209 F.3d at 288 (noting, in non-*Batson* context, “that in relying on the PCHA court’s finding, we express no opinion as to whether in this precise factual circumstance, the Superior Court could have made this finding of fact on the cold appellate record, such that we would need to defer to it pursuant to AEDPA.”)

In the absence of contrary authority, this Court concludes that the appellate court could not properly make a factual finding that Vargas would not have testified on the basis of the cold PCRA record.¹⁴ Accordingly, there is no factual finding regarding Vargas’ willingness to testify to which we must defer. Furthermore, it was unreasonable, without such a factual finding, for the Superior Court to conclude that Rolan was not prejudiced on this basis.

C. Evidentiary Hearing

Thus, a finding of historical fact regarding Vargas’s willingness to testify, which is necessary to address the substantive merits of Rolan’s claim, was never made by the state courts. *Superior*

¹⁴ Moreover, even if such appellate fact-finding were proper, the Superior Court’s finding is not entitled to deference because regardless of Vargas’s willingness to testify, Goldstein could have subpoenaed him to ensure his attendance. *See Commonwealth v. Twiggs*, 331 A.2d 440, 443 (Pa. 1975) (“If, however, counsel’s failure to seek compulsory process to obtain Gilmore’s testimony or to have his prior testimony read to the jury was the result of sloth or lack of awareness of the available alternatives, then his assistance was ineffective. In a case where virtually the only issue is the credibility of the Commonwealth’s witness versus that of the defendant, failure to explore all alternatives available to assure that the jury heard the testimony of a known witness who might be capable of casting a shadow upon the Commonwealth’s witness’s truthfulness is ineffective assistance of counsel.”).

Court Opinion at 6 (noting that the issue of Vargas’s willingness to testify is a “crucial issue”). The Third Circuit has repeatedly recognized that federal district courts do not have authority under AEDPA to remand a habeas petition to state court for an evidentiary proceeding. *Hardcastle v. Horn*, 368 F.3d 246,261 (3d Cir. 2004). AEDPA, however, permits a federal district court to hold its own evidentiary hearing on habeas review in a limited number of circumstances, one of which is presented by the facts of this case.¹⁵ “AEDPA and uniform case law interpreting it provide that if the habeas petitioner ‘has diligently sought to develop the factual basis of a claim for habeas relief, but has been denied the opportunity to do so by the state court, § 2554(e)(2) will not preclude an evidentiary hearing in federal court.’” *Campbell*, 209 F.3d at 287 (quoting *Cardwell v. Greene*, 152 F.3d 331, 337 (4th Cir. 1998) (collecting cases)). By both affidavit and Vargas’s testimony at the PCRA hearing, Rolan developed the factual record regarding Vargas’s willingness to testify at his trial, but the PCRA court failed to make the necessary factual determination. Thereafter, the state appellate court could not properly reach the conclusion that Vargas would not have testified on the basis of the cold PCRA record alone. Thus, an evidentiary hearing was permitted in this case

¹⁵ As amended by AEDPA, 28 U.S.C. § 2254(e)(2) provides:

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

(A) the claim relies on--

(I) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

because the state courts failed to resolve the factual issue on which Rolan's habeas petition rests and the failure to develop the factual record was not Rolan's fault.

On May 10, 2004, this Court held an evidentiary hearing limited to the narrow issue of Vargas's willingness to testify on Rolan's behalf at his death penalty trial in 1984. At that hearing, Vargas testified that he would have been willing to testify on Rolan's behalf if Goldstein had asked him to do so. (Evidentiary Hearing R. at 4, 13 (May 10, 2004).) According to Vargas, the reason he refused to give a statement to the detective who contacted him was because he didn't want to testify against Rolan. (*Id.* at 10.) This Court finds Vargas credible and finds that Vargas would have testified at Rolan's trial if he had been contacted by Rolan's counsel and asked to do so.

In conclusion, the Superior Court's determination that Rolan was not prejudiced by his counsel's failure to contact Vargas was unreasonable in light of the evidence presented and the Superior Court's finding that Vargas wouldn't have testified has been rebutted by clear and convincing evidence.

IV. STRICKLAND ANALYSIS

Having found that the state court's adjudication of Rolan's ineffectiveness claim was based on an unreasonable determination of the facts in light of the evidence presented, this Court must now conduct its own analysis of his claim. In *Strickland v. Washington*, the Supreme Court articulated a two-pronged test for ineffective assistance of counsel claims. 466 U.S. 668 (1984). The defendant must show "(1) that counsel's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's error, the result would have been different." *United States v. Nino*, 878 F.2d 101, 103 (3d Cir.1989) (*citing Strickland*, 466 U.S. at

687-96).

A. First Prong: Objective Standard of Reasonableness

The “objective standard of reasonableness” announced in *Strickland* and elucidated by its progeny demonstrates the court’s reluctance to second-guess an attorney’s trial strategy and performance after a defendant has been convicted. *Id.* at 689 (“[E]very effort [must] be made to eliminate the distorting effects of hindsight.”). As stated in *Strickland*, “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” *Id.* at 690-91. Although *Strickland* provides considerable insulation to counsel’s *informed* strategic choices, the rule has important limitations, particularly when counsel’s decisions are based on inadequate investigation. As the Court in *Strickland* stated, “strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Id.*; *Wiggins v. Smith*, 123 S.Ct. 2527, 2536 (2003) (holding that scope of counsel’s investigation into defendant’s background and decision to end investigation was objectively unreasonable).

Petitioner meets this prong of *Strickland* because courts have uniformly held that failure to conduct any pretrial investigation or interview identified witnesses is objectively unreasonable. *See, e.g., United States v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989) (collecting cases), *Satterfield v. Johnson*, 322 F. Supp. 2d 613 (E.D. Pa. 2004) (granting habeas due to counsel’s failure to interview and call eyewitnesses). In this case, Rolan gave Vargas’s name to Goldstein early in the litigation. Despite Rolan’s repeated requests, Goldstein neither interviewed Vargas nor even attempted to interview him. Rather, Goldstein misidentified him as an alibi witness and turned his name over to the prosecutor. Furthermore, without having ever spoken to Vargas, Goldstein relied upon the

prosecutor's representation at trial that Vargas did not have any information about the crime. The lack of investigation underpinning Goldstein's decision not to contact or interview Vargas and the ensuing decision not to present a self-defense claim was objectively unreasonable. Goldstein's further reliance on the prosecutor's representations of the witness's knowledge of the events clearly falls below professional standards of conduct. *Strickland*, 466 U.S. at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.") As the Third Circuit explained in *United States v. Gray*, "the courts of appeals are in agreement that failure to conduct any pretrial investigation generally constitutes a clear instance of ineffectiveness." *Gray*, 878 F.2d at 711. While counsel is entitled to substantial deference with respect to strategic judgment, an attorney "can hardly be said to have made a strategic choice" without having conducted a reasonable investigation. *Id.*; *U.S. v. Kauffman*, 109 F.3d 186, 190 (3d Cir. 1997) (finding ineffectiveness due to counsel's failure to conduct any pre-trial investigation or contact potential witnesses in connection with possible insanity defense.)

B. Second Prong: Prejudice

Having determined that *Strickland's* first prong has been met, we must now determine whether Rolan was prejudiced by his counsel's inadequate performance. Under *Strickland's* second prong, a petitioner must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability has been defined as a probability "sufficient to undermine confidence in the outcome." *Id.*; *Hull v. Kyler*, 190 F.3d 88, 110 (3d Cir. 1999). "Such a showing may not be based on mere speculation about what the witnesses [counsel] failed to locate might have said." *Gray*, 878 F.2d at 712. Rather, the Court must consider the potential witness's testimony to

the habeas court. *Id.* Furthermore, in considering whether a petitioner suffered prejudice, “[t]he effect of counsel’s inadequate performance must be evaluated in light of the totality of the evidence at trial: ‘a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.’” *Id.* at 710-11 (*quoting Strickland*, 466 U.S. at 696).

This Court must first ascertain what evidence would have been uncovered and presented to the jury had counsel interviewed Vargas as part of his pretrial investigation and chosen to present him as a witness in support of Rolan’s self-defense claim. Next, the Court must determine whether this additional evidence is sufficient to render the jury’s verdict “unreliable.” *Strickland*, 466 U.S. at 687. Rolan need not demonstrate that the jury would have acquitted him, but only that there is a “reasonable probability” that, but for counsel’s failures, the jury verdict would have been different. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

According to his testimony at the PCRA hearing, Vargas arrived at the corner of Wallace and 17th Streets at approximately 6:30 p.m. on May 13, 1983. (PCRA Hearing R. 166 (July 2, 1996).) Rolan, Aponte, and brothers Francisco¹⁶ and Paulino Santiago were on the corner at the time. (*Id.* at 155.) Shortly thereafter, an unidentified man pulled up in a car and both Paulino and Aponte tossed a “nickel bag” of marijuana inside. (*Id.* at 158-59.) The man held out a five dollar bill, which Aponte snatched. (*Id.* at 159.) Paulino and Aponte then began arguing over the proceeds of the drug sale. (*Id.* at 160.) Francisco and Rolan became involved in the dispute, with Francisco arguing on behalf of his brother and Rolan siding with Aponte. (*Id.*) At some point thereafter, the group

¹⁶ Throughout his testimony, Vargas refers to Francisco as “Ephraim.”

dispersed: Francisco ran to the back of the abandoned house, where some neighborhood residents kept guns and drugs; Paulino ran around the corner; and Rolan walked down the street to a woman's house. (*Id.* at 160-63.)

A large group of people began to gather on the street anticipating a fight. (*Id.* at 167-68.) Francisco came out of the abandoned house and stood at the top of the steps as Rolan ran back down the street towards the house. (*Id.* at 168-70.) Rolan was not carrying anything except for a quart of beer. (*Id.* at 170-71.) Francisco went inside the house and Rolan followed. (*Id.* at 170.) Then, Paulino came around the corner carrying a kitchen knife. (*Id.* at 173.) Paulino started to run up the steps of the abandoned house after Rolan, screaming "I'm going to kill you, motherfucker." (*Id.*) Aponte tried to stop Paulino from entering the house, but Paulino pushed Aponte away and ran inside. (*Id.* at 174.) Vargas then heard a shot. (*Id.* at 175.) When Vargas and Aponte entered the house, they saw Paulino lying on the ground alone. (*Id.* at 175-76). Vargas saw a knife inside the house near Paulino's feet. (*Id.* at 177.) Vargas walked out of the house and saw Francisco coming around from behind the house, which was open. (*Id.* at 176.) Vargas then re-entered the house with Francisco. (*Id.*) Francisco rifled through Paulino's pockets before Vargas and Francisco carried Paulino outside. (*Id.* at 177.)

Vargas's testimony offers several key facts relevant to Rolan's defense. First, that the Santiagos were involved in a dispute with Rolan regarding whether Aponte or Paulino was entitled to the five dollar proceeds of a drug sale. Second, that Rolan entered the abandoned house *before* Paulino. Third, and most importantly, that Rolan was unarmed but that Paulino entered the house with a knife threatening to kill Rolan. These facts were crucial to refute the prosecution's theory that Rolan entered the house intending to kill Paulino during the commission of a robbery.

Furthermore, Vargas's testimony sheds light on three key contradictions in the testimony of the prosecution's main witnesses, Francisco and Rosado: (1) the order of entry into the abandoned house; (2) whether Rolan entered the house with a gun; and (3) whether Francisco was inside the house when Paulino was killed. First, although Francisco testified that Rolan followed Paulino into the house, Rosado stated that Paulino followed Rolan. This discrepancy is important because the assertion that Paulino followed Rolan into the house undermines the prosecution's theory that Rolan entered the house intending to rob Paulino. Vargas's recollection supports Rosado's testimony and contradicts Francisco's. Second, Rosado testified that Rolan was unarmed when he entered the house, while Francisco testified that Rolan was carrying a rifle. The importance of this disagreement is obvious given the prosecution's claim that Rolan intended to kill Paulino. Again, Vargas's testimony supports Rosado's recollection rather than Francisco's. Finally, with regard to Francisco's presence in the house, Vargas's testimony bolsters Francisco's claim that he was in the house when Paulino was killed, a contention that Rosado contradicted.

This Court is not unaware of the difficulties Rolan would face in mounting a self-defense claim. (Resp't's Br. at 52-53.) Nonetheless, this Court must conclude that Vargas's testimony, considered in light of the totality of the evidence elicited at trial, is sufficient to undermine confidence in the outcome of Rolan's trial. Given the internal contradictions in the prosecution's case and the obvious credibility problems of the prosecution's key witness—Francisco was the brother of the victim, admitted to drinking and arguing with Rolan that night, and received a deal from the Commonwealth in exchange for his testimony—there is “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.”

Strickland, 466 U.S. at 694.¹⁷ Thus, having reviewed the trial testimony and Vargas’s PCRA testimony, this Court finds that Vargas’s testimony renders the jury’s verdict unreliable.

V. BATSON CLAIM

Rolan also claims that his Fourteenth Amendment rights were violated by the prosecution’s discriminatory exercise of peremptory challenges to exclude African-Americans from the state-court jury. *See Batson v. Kentucky*, 476 U.S. 79 (1986). As this Court has found that Rolan is entitled to habeas relief because of ineffective assistance of counsel during the guilt phase of his trial, I need not reach this claim.

VI. CONCLUSION

Rolan’s habeas petition is granted and his conviction and sentence are vacated and set aside without prejudice to the right of the Commonwealth of Pennsylvania to grant Rolan, within 180 days, a new trial and, if he is found guilty, a new sentencing.

¹⁷ Anecdotally, this Court’s conclusion is bolstered by the outcome of Rolan’s resentencing hearing in 1997. The resentencing jury heard much of the evidence of self-defense that was not presented at Rolan’s original proceeding. In sentencing Rolan to life in prison, rather than death, one or more of the jury members specifically found that Rolan had proved by a preponderance of the evidence that “[t]he defendant acted under extreme duress . . . or acted under the substantial domination of another person.” (Pet.’s Mem. of Law App. A at 177 (Sentencing Verdict Slip).)

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

FLORENCIO ROLAN,	:	CIVIL ACTION
Petitioner,	:	
v.	:	
	:	
DONALD T. VAUGHN, et al.,	:	NO. 01-81
Respondents.	:	

ORDER

AND NOW, this 12th day of **October, 2004**, upon consideration of Florencio Rolan's Petition for Writ of Habeas Corpus, the Government's response thereto, Petitioner's reply thereon, following oral argument on April 8, 2004 and an evidentiary hearing on May 10, 2004, the Government's supplemental memorandum and Petitioner's response, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Florencio Rolan's Petition for Writ of Habeas Corpus (Document No. 16) is **GRANTED**.
2. Petitioner's conviction and sentence of are **VACATED** and **SET ASIDE**.
3. The execution of the writ of habeas corpus is **STAYED** for 180 days from the date of this Order to permit the Commonwealth of Pennsylvania sufficient time to grant Petitioner a new trial and, if Petitioner is found guilty, a new sentencing.

BY THE COURT:

Berle M. Schiller, J.