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

SHERROD HARVEY	:	CIVIL ACTION
v.	:	
	:	NO. 04-924
EDWARD KLEM, et. al.	:	

Memorandum and Order

YOHN, J. March___, 2005

Petitioner Sherrod Harvey has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Harvey is currently incarcerated in the State Correctional Institution at Mahanoy, Pennsylvania, where he is serving a life sentence for murder in the second degree. After conducting a review of Magistrate Judge Linda K. Caracappa's Report and Recommendation, and upon consideration of Harvey's objections to the report and recommendation and the Commonwealth's response thereto, Harvey's petition will be denied for the reasons stated herein.

I. Background and Procedural History

On May 9, 2000, Sherrod Harvey, along with his accomplice, Lorenzo "Smoke" Nichols, and an unidentified third man, committed an armed robbery in Philadelphia. Commonwealth's Response to Petition for Writ of Habeas Corpus ("Commonwealth's Response") at 2. On the following evening, Harvey, Nichols, and two accomplices–Dwayne Quintana, and Gerald Yee, committed two more armed robberies. *Id.* The second robbery on May 10 culminated in the fatal shooting of Nicholas Sambor. *Id.* at 2-3. Harvey was arrested on May 19, 2000 and charged with

murder, three counts of robbery, three counts of criminal conspiracy, and three counts of carrying a firearm without a license. Petition for Writ of Habeas Corpus ("Petition") at 1. His accomplices were also arrested and charged. *Id.* at 4. Shortly after their arrests, Harvey, Nichols, Quintana, and Yee all gave statements to police naming Nichols as the shooter in the third robbery. *Id.*; Commonwealth's Response at 6 n.1.

On July 26, 2000, the Commonwealth filed notice, pursuant to Rule 352 of the Pennsylvania Rules of Criminal Procedure, that it intended to seek the death penalty in the case based on the aggravating circumstance enumerated at 42 Pa.C.S. § 9711(d)(6): "The defendant committed a killing while in the perpetration of a felony." Commonwealth's Response at 6. Harvey moved to quash the aggravating circumstance on the ground that there was a lack of evidence to suggest that either he or his codefendant, Yee, had been the shooter. *Id.* In response to the motion to quash, the Commonwealth informed the court that, in the event that Harvey were to be convicted of the other two robberies with which he was charged in the case, it would seek to amend its complaint to include the § 9711(d)(9) aggravating circumstance: "The defendant has a significant history of felony convictions involving the use or threat of violence to the person." *Id.*

The court deferred deciding the motion to quash. The presiding judge in the case, Judge David Savitt, said he didn't know "what's going to turn up at trial," anticipating the possibility that one or more of the participants might change his statement about the identity of the shooter. In light of that possibility and the fact that a death-qualified jury has been held by the Supreme Court not to be a guilt-prone jury, Judge Savitt decided to delay making a determination about aggravating circumstances until after a verdict had been reached on the murder charge.

Commonwealth's Response at 7. Because the court declined to quash the aggravating circumstance before trial, the Commonwealth was permitted to death qualify the jury by striking prospective jurors who indicated that their opposition to the death penalty was so strong that it would substantially impair the performance of their duties as jurors during the sentencing phase of the trial. *Id.* (citing *Buchanan v. Kentucky*, 483 U.S. 402, 414 (1987)).

Harvey and Yee were tried together before a death-qualified jury.[1] Magistrate Judge's Report and Recommendation ("MJRR") at 1. Neither defendant testified at the trial, but the prosecution introduced into evidence inculpatory statements that each had made to police after being arrested. Petition at 17. The statements were redacted prior to trial to comply with the Supreme Court's holding in *Bruton v. United States*, 391 U.S. 123, 135-136 (1968), that a defendant's right to cross-examination is violated where "the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial."

During opening statements, however, the prosecutor inadvertently referenced Yee's statement without first redacting Harvey's name. Describing Yee's statement, the prosecutor said: "He turns around and he's the first man to give a statement here. He wants to make sure it puts him in a light most favorable to him and he says they all made me do it; that Sherrod Harvey made me do it; that Smoke made me do it." Notes of Testimony ("N.T.") 04/24/01 at 1313. Although defense counsel did not object, Judge Savitt immediately recognized the lapse and asked Harvey's counsel after the jury had been recessed what he would have the court do. *Id.* at

[1]The trial court initially granted a motion by Harvey to sever the cases. Petition at 17. However, the severance order was rescinded based on the judge's later determination that Harvey and Yee's statements could be redacted in such a way that a joint trial would be permissible. *Id.*

1335-1336. Harvey's counsel expressed doubt as to whether a curative jury instruction could "sufficiently resolve that problem," and he declined to request such an instruction at that time. Judge Savitt stated that he would be disinclined to grant a mistrial on the basis of the error in the opening statement, to which Harvey's counsel replied that he understood, but that he "would formally make that request." *Id.* at 1338.

No mistrial was declared, and a redacted version of Yee's statement, to which the prosecutor referred in his opening statement, was admitted later in the trial. Petition at 17. In the statement that was admitted, Harvey and Yee's names were redacted and replaced with indeterminate pronouns such as "we," "one guy," "the others," and "one of the guys." *Id.* At the close of the trial, the judge instructed the jury that a statement made by one defendant may not be considered as evidence against another defendant or used against another defendant in any way. N.T. 05/02/01 at 2282-2283.

The case was submitted to the jury, and Harvey and Yee were convicted on May 3, 2001.[2] Petition at 3. Harvey was convicted of second-degree murder, three counts of robbery, and three counts of criminal conspiracy. *Id.* at 2. He was sentenced to the mandatory sentence of life in prison without parole on the murder count, and he received a combined sentence of 35-70 years on the other counts, to run concurrently with the life sentence. *Id.*

Harvey appealed to the Superior Court of Pennsylvania on May 31, 2001, raising three issues: (1) whether the trial court abused its discretion in electing not to quash the § 9711(d)(6)

---

[2]Nichols pled guilty to one count of first degree murder, three counts of robbery, three counts of conspiracy, and three counts of firearms violations. Petition at 4. Quintana pled guilty to two counts of conspiracy, one count of robbery, and one count of possession of an instrument of crime. *Id.* at 5. In exchange for Quintana's testimony at the trial of Harvey and Yee, the Commonwealth dropped the murder charge against him. *Id.*

aggravator, thereby depriving Harvey of his right to due process and an impartial jury; (2) whether the trial court erred and abused its discretion by failing to instruct the jury that a co-conspirator cannot be found to have murdered "in furtherance" of the underlying felony where the shooter acted "for his own personal reasons which are independent of the felony"; and (3) whether the trial court erred and abused its discretion by denying Harvey's motion for severance and by admitting Yee's redacted statement, in violation of Harvey's constitutional right to confrontation, at their joint trial. *See Commonwealth v. Harvey*, No.1642 Eastern District Appeal 2001, slip op. at 3-4. The Superior Court issued an unpublished memorandum opinion on October 15, 2002, affirming the judgment of sentence. MJRR at 2. Harvey then filed a request for allowance of appeal to the Supreme Court of Pennsylvania, which denied the request on March 18, 2003. *Id.* On October 6, 2003, the United States Supreme Court denied certiorari. *Id.*

On March 19, 2004, Harvey filed the instant petition. He makes two claims. First, he claims that his convictions must be vacated because they were obtained in violation of his rights to due process of law and an impartial jury from a fair cross-section of the community, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Petition at 3. Second, he claims that he is entitled to relief from his convictions because the trial court's redaction of his codefendant's statement was insufficient to prevent him from being inculpated in violation of the Supreme Court's holdings in *Bruton* and *Gray v. Maryland*, 523 U.S. 185 (1998). Petition at 16.

I referred the matter to Magistrate Judge Caracappa, who issued a report and recommendation, in which she recommended that Harvey's petition for habeas relief be denied. With respect to Harvey's first claim, she concluded that the selection of the jury did not violate

his constitutional rights, because the fair cross-section requirement applies to the entire venire and does not extend to the petit jury. MJRR at 5. She further concluded that the death qualification of the jury did not violate Harvey's right to due process of law, because the Commonwealth was legally entitled to try the case as a capital case, and even if it had not been, there was no prejudice to petitioner in having his case tried before a death-qualified jury. *Id.* With respect to Harvey's second claim, she concluded that the redaction of Harvey's codefendant's statement violated neither *Bruton* nor *Gray*, and that even if it had, Harvey's *Bruton* claim could not survive harmless error analysis. *Id.* at 7-8.

On August 30, Harvey submitted objections to the report and recommendation in which he challenged the magistrate judge's conclusions with respect to the legality of both the Commonwealth's decision to try the matter as a capital case and the trial court's decision to allow the case to proceed as such. Objections at 2-3. He also requested a *de novo* review of his *Bruton* claim, though he raised no specific objection to anything in the magistrate judge's report and recommendation concerning that issue. *Id.* at 8.

On September 21, 2004, the Commonwealth filed a response to Harvey's objections, urging that state judicial precedents including *Commonwealth v. Beasley*, 479 A.2d 460 (Pa. 1984), *Commonwealth v. Reid*, 642 A.2d 453 (Pa. 1994) and *Commonwealth v. Buck*, 709 A.2d 892 (Pa. 1998), and federal judicial precedents including *Lockhart v. McCree*, 476 U.S. 162 (1986), *Bruton*, and *Gray* require that Harvey's petition for federal relief be denied as to both claims. Response to Objections at 1-6.

II. Discussion

A. AEDPA Standards

Harvey's petition for a writ of habeas corpus is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under the AEDPA, a federal court may not disturb a state court's resolution of the merits of a constitutional issue unless the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or 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) and (2).

A state court decision is considered "contrary to clearly established federal law" where "the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law." *Williams v. Taylor*, 529 U.S. 362, 405 (2000). Alternatively, a state court decision is considered "contrary to clearly established federal law" where "the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the Supreme Court's]." *Id.* A state court decision is considered to involve an "unreasonable application of clearly established federal law" if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407-408.

Habeas relief will also be granted under the AEDPA where a state court decision is based on an unreasonable determination of the facts. The Supreme Court has interpreted § 2254(d)(2) to mean that "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Factual determinations by state courts are presumed correct absent clear and convincing

evidence to the contrary. *Id.* (citing § 2254(e)(1)).

B. Death Qualification of the Jury

Harvey argues that "the Commonwealth and the Court of Common Pleas unlawfully impaneled a death qualified jury in a non-capital case where there was no evidence of any aggravating circumstance as required by law." Objections to MJRR at 2. He asserts that the § 9711(d)(6) aggravating circumstance should have been quashed because there was ample evidence that Harvey was not the shooter, and that the Commonwealth should not have been permitted to death qualify the jury based on its announced intention to amend its Rule 352 notice after verdict to include the § 9711(d)(9) aggravating circumstance.[3] *Id.* Harvey maintains that the unwarranted death qualification of the jury violated his right to an impartial jury drawn from a fair cross-section of the community and his right to due process of law.

The Superior Court held that Harvey's constitutional rights were not violated by the death qualification of the jury, and that Harvey suffered no prejudice as a result of the

[3]Harvey's arguments about the applicability of aggravating circumstances in his case are founded in state law, and federal courts reviewing habeas claims cannot reexamine state court determinations of state-law questions. *Priester v. Vaughn*, 382 F.3d 394, 402 (3d Cir. 2004) (internal citation omitted). Federal habeas review of a state court decision does not extend to claims alleging "that the state court simply misapplied its own aggravating circumstance[s] to the facts" in the case. *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). Review in such a case "is limited, at most, to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process...violation." *Id.* A state court's finding of an aggravating circumstance in a particular case is arbitrary or capricious if and only if no rational trier of fact could have so found. *Id.* at 783 (invoking the standard established in *Jackson v. Virginia*, 443 U.S. 307 (1979)). Although Harvey does not cite the relevant federal case law or argue expressly that Judge Savitt's decision to defer deciding the motion to quash the aggravators was so arbitrary or capricious as to constitute an independent due process violation, I infer that his challenge concerning the motion to quash is one under 28 U.S.C. § 2254(d)(2) to the reasonableness of the judge's determination of the sufficiency of the facts supporting the aggravating circumstances asserted by the Commonwealth.

Commonwealth's decision to try the case as capital. *See Commonwealth v. Harvey*, No. 1642 Eastern District Appeal 2001, slip op. at 4-5. Magistrate Judge Caracappa concluded that the Superior Court's holding in the case was not contrary to, or an unreasonable application of, clearly established federal law or based on an unreasonable determination of the facts. *See* MJRR at 5-6.

I agree. Applying the deferential standard of review articulated by the Supreme Court in *Lewis*, *see supra* n.3, I conclude that neither the trial court nor the Superior Court made any arbitrary or capricious (or even unreasonable) factual determination relating to the aggravating circumstances in this case. *See Lewis*, 497 U.S. at 780, 782 (stating that respect for a state court's findings of fact and application of its own law counsels against *de novo* review of a claim challenging the finding of a constitutionally adequate aggravating circumstance and limiting review in such cases to the "rational factfinder" standard established in *Jackson*). Harvey's constitutional right to due process was therefore not violated.

Even if it were permissible for this court to review the state court's decision on the state law issues in this case, I would conclude that the trial court and the Superior Court did not err in their application of Pennsylvania law to the evidence in Harvey's case. It is the law in Pennsylvania that a trial court has no power to direct the prosecutor to designate a case as capital or non-capital before trial begins. *Commonwealth v. Buck*, 709 A.2d 892, 895 (Pa. 1998) (citing *Commonwealth v. Tomoney*, 412 A.2d 531 (1980)). The court's inquiry is limited to whether the Commonwealth abused its discretion in designating the case as capital. *Id.* at 897. An abuse of discretion will not be found "[i]f evidence exists to support *any* aggravating factor." *Id.* (emphasis in original).

Harvey argues that the prosecution should not have been allowed to designate his case as capital because neither the § 9711(d)(6) aggravator nor the § 9711(d)(9) aggravator was factually justified. He correctly asserts that the § 9711(d)(6) aggravator applies only to the gunman in a case where a killing is committed with a gun. *Commonwealth v. Lassiter*, 722 A.2d 657, 661 (Pa. 1998). He also correctly asserts that there was corroborated and uncontroverted evidence in the pre-trial record that Nichols had been the gunman in the murder with which Harvey was charged.

On the basis of that evidence, Harvey would have me conclude that no reasonable jurist could have found facts sufficient to support § 9711(d)(6) aggravator. I cannot so conclude, however, considering the very real possibility contemplated by Judge Savitt at the outset of the trial that one or more of Harvey's accomplices might change his story about the identity of the shooter. Even if Judge Savitt had been objectively unreasonable in finding that the factual predicate for the 9611(d)(6) aggravator might arise during the trial, the trial court can be said to have erred in allowing the jury to be death-qualified only if there was no evidentiary basis for any other aggravating circumstance. *Buck*, 709 A.2d at 897.

There was, in actuality, also a reasonable factual basis for concluding that the § 9711(d)(9) aggravator would apply at the time of Harvey's sentencing for murder, because the prosecution's case against Harvey with respect to the other two robberies charged in the case was strong. As Magistrate Judge Caracappa pointed out in her report and recommendation, Harvey had already confessed to one of the two robberies. MJRR at 6. And as hindsight verifies, the evidence the Commonwealth had gathered against him on the two robbery counts was anything but scant: there was sufficiently overwhelming evidence for a jury to find him guilty beyond a reasonable doubt on both counts.

Harvey maintains that the two robberies with which he was charged in addition to the first-degree murder of Mr. Sambor should not have been considered "prior convictions" under Pennsylvania law for purposes of determining the applicability of § 9711(d)(9). Objections to MJRR at 4-5. The robberies are not "prior," he contends, because, in the event of his simultaneous conviction by the jury on all three counts, judgments of sentence for the robberies would not yet have been entered at the time of the verdicts, and verdicts are not convictions under Pennsylvania law until sentences have been imposed. *Id.* at 5. Harvey asks this court to hold that guilty verdicts on their own may not be considered "convictions" for purposes of § 9711(d)(9). *Id.*

Even if I could entertain a challenge to the Superior Court's application of Pennsylvania law, Harvey's position is contrary to the holding of the Supreme Court of Pennsylvania in *Commonwealth v. Beasley*, 479 A.2d 460 (Pa. 1984). In *Beasley*, the court held that "verdicts of guilt for which judgments of sentence have not yet been imposed [may] be considered by the jury as part of a defendant's history of felony convictions involving the use or threat of violence to the person." *Id.* at 464. The purpose of the penalty phase, the court reasoned in *Beasley*, is to focus on aspects of the defendant's character, and "[c]haracter is reflected in verdicts of guilt, regardless of whether judgments of sentence have yet been entered." *Id.* Although Harvey would have this court conclude otherwise, the law in Pennsylvania is clear that guilty verdicts, by themselves, count as "prior convictions" for purposes of § 9711(d)(9).[4]

[4]Harvey relies on both *Commonwealth v. Minnich*, 95 A. 565 (Pa. 1915), and rules of statutory construction to support his argument that "conviction" for purposes of § 9711(d)(9) requires both a verdict of guilt and the entry of judgment of sentence. As the Commonwealth points out, however, *Minnich* was not the Supreme Court of Pennsylvania's last word on the subject. *Beasley*, the much more recent case, speaks directly and unequivocally to question of

Harvey also challenges the legality of the Commonwealth's proposal to amend its Rule 352 notice after the verdict to capture the two robbery convictions for purposes of establishing the § 9711(d)(9) aggravating circumstance. Objections to MJRR at 4. Again, he challenges an application of state, not federal, law. Moreover, the Commonwealth's strategy is permissible in the eyes of the Supreme Court of Pennsylvania, which has read Rule 352 to allow amendment of a notice of aggravating circumstances if the Commonwealth subsequently acquires evidence in support of an aggravating factor not included in the initial notice. *See Buck*, 709 A.2d at 898 n.10 (asserting that the Commonwealth would be permitted to amend its Rule 352 notice at the time of conviction to reflect felony charges of which the defendant had not yet been convicted at the time of the initial Rule 352 notice).

Given the strong likelihood, based on the pre-trial evidence, that Harvey would be convicted on the two robbery counts, there was a reasonable basis in fact for concluding that the § 9711(d)(9) aggravating circumstance would be applicable at the time of Harvey's sentencing for murder. *See Reid*, 642 A.2d at 458 (holding that the term "significant history" for purposes of § 9711(d)(9) refers to the defendant's status at the time of sentencing, not at the time that he committed the crime for which he is being sentenced). Given that *some* evidence of *any* aggravating circumstance is all that Pennsylvania law requires, the prosecution cannot be said to have abused its discretion in proceeding with Harvey's case as a capital case. Absent abuse of prosecutorial discretion, the trial court was not only permitted but was required under Pennsylvania law to defer to the Commonwealth's decision to pursue the case as capital. *See*

---

what "conviction" means in the context of § 9711(d)(9), even though it may mean something very different in other contexts.

Buck, 709 A.2d at 897 (holding that the court may not engage in pre-trial fact-finding or weighing of the evidence of a proposed aggravating factor). Thus, the trial court's decision to allow the case to proceed as capital was neither arbitrary nor capricious, and I cannot conclude that there was any unreasonable determination of the facts made by the trial court or upheld by the Superior Court under 28 U.S.C. § 2254(d)(2).

Even if the Superior Court had upheld an objectively unreasonable trial court determination regarding the sufficiency of the facts underlying the capital designation, and this could be said to be constitutional error, the death qualification of the jury could not have compromised Harvey's right to an impartial jury derived from a representative cross-section of the community or his right to due process. As the Superior Court pointed out, the United States Supreme Court held in *Lockhart v. McCree*, 476 U.S. 162, 177 (1986), that death qualification of a jury does not violate the fair-cross-section requirement. Moreover, the Court said in *Lockhart* that death qualification is a legitimate tool of the prosecution for "obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial." *Id.* at 175-176.

Harvey asserts, citing *Vasquez v. Hillery*, 474 U.S. 254 (1986), *Batson v. Kentucky*, 476 U.S. 79 (1986), *J.E.B v. Alabama*, 511 U.S. 127 (1994), *Adams v. Texas*, 448 U.S. 38 (1980), and *Davis v. Georgia*, 429 U.S. 122 (1976), that "when qualified members of a venire are improperly excluded from jury service," the subsequent proceedings are fatally, structurally flawed and necessarily entail a denial of due process. Petition at 12-13. The statement may be correct as far as it goes. But it does not apply in Harvey's case, because prospective jurors for his trial were not "improperly excluded" in any of the ways contemplated in the cases he cites.

In *Batson*, *J.E.B.*, and *Vasquez*, jurors were "improperly excluded" on the basis of immutable characteristics such as race or sex. In this case, by contrast, jurors were excluded not on the basis of any immutable characteristic, but on the basis of their admitted inability to set aside their own personal beliefs about the death penalty in order to follow the law.[5] Excluding jurors who disclose that they cannot decide the case solely on the evidence before them is neither improper nor unfair. *See Lockhart*, 476 U.S. at 178 ("Due process means a jury capable and willing to decide the case solely on the evidence before it."(quoting Smith v. Phillips, 455 U.S. 209, 217 (1982)). For purposes of due process, the Court in Lockhart distinguished between death qualification of jurors and the wholesale exclusion of blacks, women, and ethnic minorities. *Id.* at 175-176. While the latter creates an undeniable "appearance of unfairness," the Court reasoned, the former does not. *Id.* at 176.

Two of the Supreme Court cases Harvey cites, *Adams v. Texas*, 448 U.S. 38 (1980), and *Davis v. Georgia*, 429 U.S. 122 (1976) are more closely analogous to his, in that they are cases involving the exclusion of jurors based on the possible consequences of their views concerning the death penalty. These cases, too, however, are easily distinguishable. In *Adams*, prospective jurors were excluded when they indicated that they could not be sure whether their opposition to the death penalty would impact their deliberations concerning the facts necessary to support the imposition of the death penalty under Texas law. *See Adams*, 448 U.S. at 40. *Davis*, similarly, was a case in which a juror was excluded for expressing scruples about the death penalty and uncertainty about his willingness to impose it, even if the facts of the case warranted. *See Davis*,

[5]The excluded jurors at issue in this case were those who answered "yes" when asked if their beliefs concerning the death penalty were such that they could vote to impose it "under no condition," even if the law and the facts of the case required it. *See* Petition at 9-10.

429 U.S. at 122.

Harvey does not contend that exclusions of this nature occurred in his case. The prospective jurors to whose exclusion Harvey objects were those who answered in the affirmative, without qualification, when asked by Judge Savitt if their opposition to the death penalty was such that they could vote to impose it under no circumstances. *See* Petition at 9-10. In this regard, *Adams* and *Davis* are crucially different from this case.[6] In *Adams* and *Davis*, the jurors were held to have been improperly excluded based on the fact that they had expressed mere uncertainty about their ability to carry out their charge. Here, no such uncertainty was evident; the jurors excluded were sure they would be unable to carry out their charge if that meant sentencing the defendant to death. Harvey's trial cannot have been unfairly prejudiced in violation of his due process rights by the exclusion of jurors who expressed a firm unwillingness to do what the law might require of them.[7]

Federal law does not entitle a defendant to a jury that is balanced in terms of its attitudes toward the death penalty; rather, it entitles a defendant to a jury whose members "will conscientiously apply the law and find the facts." *Id.* at 177-178. Harvey has provided this court with no reason to believe that the jury in his case did anything else. A death-qualified jury under *Lockart* is not considered to be inherently partial or "slanted" toward conviction. *Id.* at 177. The

---

[6]Harvey's case can be further distinguished from *Adams* in that Harvey was not actually sentenced to death by the death-qualified jury in his case. The judgment in *Adams* was ordered to be set aside only insofar as it sustained the jury's imposition of the death penalty. The petitioner's conviction of the crimes charged was not affected.

[7]The stronger argument by half is that the government's case would have been unfairly prejudiced if it had been required to seat those jurors.

Superior Court's conclusion that Harvey's constitutional rights were not violated by the death qualification of the jury because death-qualified juries are not conviction prone was thus entirely consistent with clearly established federal law.

C. *Bruton* Claim

Harvey argues, based on the United States Supreme Court's decisions in *Bruton* and *Gray*, that the trial court's admission of Yee's redacted statement to police concerning the crimes for which Harvey and Yee were jointly being tried violated Harvey's right to confrontation, cross examination, and a fair trial. Petition at 23. Furthermore, Harvey argues, the redaction of Yee's statement was inadequate to protect Harvey's confrontation rights in light of the fact that the prosecutor, in his opening statement, incorporated language from Yee's statement naming Harvey directly as an accomplice. *Id.* at 21.

The Superior Court held that the redaction complied with *Bruton* and *Gray*, and that Yee's statement was therefore properly admitted at trial, even in light of the remarks made by the prosecutor in the opening statement. *See Commonwealth v. Harvey*, No. 1642 Eastern District Appeal 2001, slip op. at 7-8. The magistrate judge agreed. *See* MJRR at 7-8. Based on a *de novo* review of the *Bruton* issue, I conclude that the Superior Court was correct in holding that the redacted statement complied with *Bruton*, *Gray*, and *Richardson*. Moreover, even if the prosecutor's remarks in the opening statement did somewhat compromise the sufficiency of the redaction of Yee's statement, no federal habeas relief is warranted because the error by the prosecutor involving Yee's statement was harmless given both its brief and inconspicuous nature and the overwhelming, properly admitted other evidence of Harvey's guilt.

The Supreme Court in *Bruton* held that the admission of the confession of a nontestifying

codefendant which implicates the defendant by name violates the defendant's rights under the confrontation clause. *Bruton*, 391 U.S. at 135-136. Later, in *Richardson v. Marsh*, 481 U.S. 200, 211 (1987), the Court considered the admissibility of statements in which the defendant's name is redacted, holding that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction where…the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence."

While the Court in *Richardson*, 481 U.S. at 211 n.5, expressed "no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun," the Court in *Gray*, 523 U.S. at 192, held that a "redaction that replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word 'deleted,' or a similar symbol" is not permissible. The Third Circuit in *Priester*, 382 F.3d at 399, recently held that the admission of a codefendant's redacted statement, in which the defendant's name was replaced "with [indeterminate] words such as 'the other guy,' 'someone,' 'someone else,' 'the guy,' and 'another guy,'" did not violate the defendant's Sixth Amendment rights.

In this case, Yee's statement, like the nontestifying codefendant's statement in *Priester*, was carefully redacted to comply with *Bruton* and its progeny before being introduced at trial. Although Harvey makes much of the fact that there was factually "interlocking" evidence from his accomplices which, when combined at trial with Yee's redacted statement, led powerfully to the inference that he was guilty, such inferential incrimination is not impermissible. *Richardson*, 481 U.S. at 208 (holding that confessions that are not incriminating on their face but become so only when linked inferentially to other evidence introduced at trial do not violate *Bruton*).

However, when the prosecutor, making reference to Yee's statement during his opening

remarks, directly implicated Harvey *by name*, the constitutional goal served by the careful pre-trial redaction of Yee's statement was compromised. By informing the jury that Yee had made a statement to police that placed blame squarely on Harvey (*viz.*, "Sherrod Harvey made me do it."), the Commonwealth impermissibly–even if only accidentally–broadcast the unredacted contents of Yee's statement to the jury.[8] This unredacted preview of the otherwise carefully redacted statement could have caused the statement, when it was finally introduced, to violate the protective principle of *Bruton*.

It is well established, though, that not every *Bruton* violation will lead to the reversal of a criminal conviction. *Monachelli v. Warden, SCI Graterford*, 884 F.2d 749, 753 (3d Cir. 1989) (citing *Schneble v. Florida*, 405 U.S. 427 (1972)). Reversal is inappropriate where independent, properly admitted evidence of the defendant's guilt is so overwhelming, and the prejudicial effect of the codefendant's admission so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error. *Id.* (again citing *Schneble*). The burden of proof that an error was harmless rests on the government. *Id.* (citing *Chapman v. California*, 386 U.S. 18 (1967)).

The Commonwealth argues convincingly, and the magistrate judge correctly concluded, that any error caused by the lapse in the opening statement in conjunction with the later admission of the redacted statement was harmless in light of the strength of the prosecution's case against Harvey and the unobtrusive nature of the lapse itself. Foremost, Harvey confessed to

---

[8]Judge Savitt, in a conference with counsel outside the jury's presence, described the prosecutor's misstep in the following way: "What happened was Mr. Colihan in discussing the Yee statement made reference to what Yee said about Harvey…Which is specifically redacted and not admissible and cannot be used…These statements are redacted." N.T. 04/24/01 at 1335-1336.

the two robberies in which he participated with Yee, and his own self-inculpatory statement was properly introduced at trial as evidence against him. N.T. 04/26/01 at 1698-1710. In addition, Harvey's accomplice Quintana testified in detail at trial concerning Harvey's role in those crimes. *Id.* at 1758-1873; *see United States v. Ruff*, 717 F.2d 855, 858 (3d Cir. 1983) (harmless error in spite of *Bruton* violation where defendant confessed to the crime and where there was other evidence linking him to the crime); *Brown v. United States*, 411 U.S. 223, 231 (U.S. 1973) (harmless error despite *Bruton* violation where the testimony erroneously admitted was merely cumulative).

As for the relative significance of the lapse, it is all but impossible to imagine that the improper remark made so strong an impression on jurors that they found themselves unable to follow the court's explicit instructions not to regard speeches by the lawyers as evidence and not to regard a pretrial statement made by one defendant as evidence against another defendant.[9] N.T. 05/02/01 at 2298, 2282. *See Richardson*, 481 U.S. at 211 ("The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant."). This is true for several reasons, the first among them being that the remark was made in passing, in the context of a long and densely detailed speech.[10] In addition, the remark was made very early in the trial and was therefore remote in

---

[9]Both of these instructions were given to the jury at the close of the trial.

[10]The comment was so unobtrusive that it escaped notice by defense counsel and possibly by the prosecutor himself until the court suggested that an error had occurred and raised the issue *sua sponte* after the completion of opening statements. *See* N.T. 4/24/01 at 1335. Even when thus prompted, neither defense counsel was able to identify the error until the court explained its specifics.

time from the introduction of the redacted statement.

It is entirely conceivable that the jury, like Harvey's own attorney, failed to notice the improper disclosure when it occurred. So apparently brief and inconspicuous was the remark when it was made that Harvey's attorney did not object until he was later prompted to do so by the court. Moreover, he rejected the offer of an immediate curative instruction, not wanting to call the jury's attention to what had been, by all indications, a rather unremarkable remark. Considering these factors, it is difficult to imagine that the prosecutor's slip had any lingering or prejudicial effect on the jury, especially in light of the overall strength of the Commonwealth's case.

Given the overwhelming evidence of Harvey's guilt and the likelihood that the prosecutor's reference to the unredacted substance of Yee's statement had nothing more than a negligible effect on the jury, especially given that it was never repeated or referred to again during the course of the trial, it is clear beyond a reasonable doubt that the claimed *Bruton* violation in this case was harmless error. Yee is therefore not entitled to federal habeas relief on the basis of his *Bruton* claim.

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

SHERROD HARVEY	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 04-924
EDWARD KLEM, et. al.	:	

Order

Yohn, J.

AND NOW on this _____th day of March 2005, upon careful and independent consideration of the petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, and after review of the report and recommendation of United States Magistrate Judge Linda K. Caracappa, Harvey's objections to the report and recommendation, and the Commonwealth's response to Harvey's objections, for the reasons set forth in the foregoing memorandum, it is hereby ORDERED that:

1. Harvey's objections are OVERRULED.

2. The report and recommendation of Magistrate Judge Linda K. Caracappa is APPROVED AND ADOPTED as modified herein.

3. The petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 is DENIED.

4. The petitioner having failed to make a substantial showing of the denial of a constitutional right, there is no ground for a certificate of appealability, see 28 U.S.C. § 2253(c).

5. The Clerk shall CLOSE this case statistically.

_____
William H. Yohn, Jr., Judge