

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

ROBERT LARK	:	CIVIL ACTION
	:	
v.	:	
	:	
JEFFREY BEARD, et al.	:	No. 01-1252

MEMORANDUM

Padova, J.

May 23, 2006

Before the Court is Robert Lark’s Motion for an Evidentiary Hearing and Discovery regarding his Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (the “Petition”), and the response filed by Respondents Jeffrey Beard, Conner Blaine, and Joseph P. Mazurkiewicz (collectively, the “Commonwealth”). Oral argument was held on this Motion on December 22, 2005. For the reasons that follow, the Court grants Lark’s request for an evidentiary hearing and dismisses his request for discovery as moot.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Robert Lark was convicted of first degree murder, possession of an instrument of crime, terroristic threats, and kidnapping in the Court of Common Pleas of Philadelphia County in June 1985 and was subsequently sentenced to death. The facts underlying the conviction are as follows.¹ Lark was charged with the December 1978 robbery of storeowner Tae Bong Cho. On February 22, 1979, while working at his store, Mr. Cho was shot in the head at close range by a man wearing a ski mask. Mr. Cho had been scheduled to testify at the preliminary hearing on the robbery charges the next day. The robbery prosecution continued notwithstanding the death of the principal

¹These facts are taken from the opinion of the Pennsylvania Supreme Court on direct appeal from the judgment. See Commonwealth v. Lark, 543 A.2d 491 (Pa. 1988) (Lark II).

witness. Although Lark was present at the rescheduled preliminary hearing and at the trial one week later, he did not return to trial after the conclusion of the Commonwealth's case-in-chief and was a fugitive from justice for several months. During that period, Lark threatened the prosecutor, Assistant District Attorney Charles Cunningham, several times. Finally, on January 9, 1980, Lark was spotted and followed by police in Philadelphia. After a high speed chase, Lark broke into the home of Ms. Sheila Morris, where he took Ms. Morris and her two children hostage. The hostage situation endured for approximately two hours before Lark voluntarily surrendered, and neither Ms. Morris nor her children were harmed.

Lark's first trial on these charges began on February 18, 1981 in the Court of Common Pleas of Philadelphia County before the Honorable Theodore Smith and ended in a mistrial. (03/04/81 N.T. at 1052-53.) Prior to retrial, Petitioner moved to dismiss the bills of information on double jeopardy grounds, which motion was denied by the trial court. Commonwealth v. Lark, Jan. Term 1980, Nos. 2012-2022, slip op. (Ct. C.P. Phila. Mar. 30, 1982). The decision was affirmed by the Pennsylvania Superior Court on interlocutory appeal. Commonwealth v. Lark, 479 A.2d 522 (Pa. Super. Ct. 1984) (Lark I). Lark was retried and, on June 28, 1985, was found guilty of first degree murder, possession of an instrument of crime, terroristic threats, and two counts of kidnapping. (06/28/85 N.T. at 2-4.) At trial, Lark was represented by Peter F. Rogers, Esq.; the Commonwealth was represented by Assistant District Attorney John Carpenter, Esq. (See, e.g., 06/05/85 N.T.) The jury returned a guilty verdict on all counts and set the penalty at death, having found no mitigating circumstances and one aggravating circumstance.² (06/29/85 N.T. at 11-12.) Lark was formally

²Specifically, the jury found that the victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceedings involving such offenses pursuant to 42 Pa.

sentenced to death on April 24, 1986. He appealed, and the Supreme Court affirmed his convictions and sentences on May 20, 1988. See Commonwealth v. Lark, 543 A.2d 491 (1988) (Lark II).

In November 1994, Petitioner unsuccessfully sought a stay of execution from the Honorable John J. Poserina, Jr., of the Court of Common Pleas for Philadelphia County, see Commonwealth v. Lark, Jan. Term 1980, Nos. 2012-2022 (Ct. C.P. Phila. Nov. 7, 1994) (unpublished order denying stay of execution), whose decision he appealed to the Pennsylvania Supreme Court. Commonwealth v. Lark, Capital Appeal No. 77 (Pa.). He then filed a pro se Motion for a Stay of Execution in the United States District Court for the Eastern District of Pennsylvania on or about November 8, 1994. Lark v. Lehman, No. Civ. A. 94-6762 (E.D. Pa.). The District Court issued a stay of execution to permit Lark to file a state post-conviction petition. Lark v. Lehman, No. Civ. A. 94-6762 (E.D. Pa. Nov. 10, 1994) (unpublished order). The Pennsylvania Supreme Court also issued a stay to permit the filing of a state post-conviction petition. See Commonwealth v. Lark, Capital Appeal No. 77 (Pa. Nov. 10, 1994) (unpublished order).

Lark had filed a pro se petition in the Philadelphia Court of Common Pleas pursuant to the Pennsylvania Post Conviction Relief Act (“PCRA”), 42 Pa. Cons. Stat. Ann. § 9541 et seq., on November 4, 1994. Pro se Motion for Post-Conviction Collateral Relief, Commonwealth v. Lark, Jan. Term 1980, Nos. 2012-2022 (Ct. C.P. Phila. Nov. 4, 1994). On February 8, 1995, he filed an amended motion for post-conviction relief pursuant to the PCRA through pro bono counsel Thomas C. Zielinski (“First PCRA Petition”). Amended Motion for Post-Conviction Collateral Relief, Commonwealth v. Lark, Jan. Term 1980, Nos. 2012-2022 (Ct. C.P. Phila. Feb. 8, 1995). The First PCRA Petition raised twenty-five claims of trial court error and ineffective assistance of counsel.

Cons. Stat. Ann. § 9711(d)(5). (See 06/29/85 N.T. at 12.)

Id. Judge Poserina ordered that Lark produce affidavits of his proposed witnesses. (03/08/95 N.T. at 8-9.) The Commonwealth moved to dismiss, and on August 2, 1995, after argument on the motion to dismiss, Judge Poserina dismissed the First PCRA Petition without an evidentiary hearing. Commonwealth v. Lark, Jan. Term 1980, Nos. 2012–2022 (Ct. C.P. Phila. Aug. 2, 1995) (unpublished order). On September 12, 1995, the dismissal order was amended by a written Order and Opinion denying post-conviction relief. Commonwealth v. Lark, Jan. Term 1980, Nos. 2012–2022, slip op. (Ct. C.P. Phila. Sept. 12, 1995) (hereinafter “First PCRA Opinion”). Petitioner appealed to the Pennsylvania Supreme Court.

In early April 1997, while the appeal was pending, the Philadelphia County District Attorney’s Office released a tape of former prosecutor Jack McMahon (the “McMahon Tape”), in which McMahon gave instructions to his prosecutorial colleagues on methods of jury selection. The instructions advocated the exclusion of venirepersons on the basis of race and gender. On July 1, 1997, Lark applied to the Supreme Court for a remand of his First PCRA Petition to permit review of post-conviction relief claims arising out of the issues raised by the McMahon Tape. The Supreme Court affirmed the denial of post-conviction relief on July 23, 1997, Commonwealth v. Lark, 698 A.2d 43 (Pa. 1997) (Lark III), and denied Lark’s application for remand on July 30, 1997, Commonwealth v. Lark, Capital Appeal No. 124 (Pa. July 30, 1997) (unpublished order).

Petitioner thereafter filed a second motion for post-conviction relief with the Court of Common Pleas (“Second PCRA Petition”). In this pleading, Lark set forth several claims based upon newly discovered factual predicates, including a claim of discriminatory jury selection based in part on the McMahon Tape. Motion for Post-Conviction Collateral Relief, Commonwealth v. Lark, Jan. Term 1980, Nos. 2012–2022 (Ct. C.P. Phila. Aug. 29, 1997). Lark amended his Second

PCRA Petition on January 9, 1998, providing additional detail and argument in support of his claim of discriminatory jury selection. Amended Motion for Post-Conviction Collateral Relief, Commonwealth v. Lark, Jan. Term 1980, Nos. 2012-2022 (Ct. C.P. Phila. Jan. 9, 1998). On June 9, 1998, Judge Poserina denied the Petition without an evidentiary hearing. (06/09/1998 N.T. at 13.) Petitioner appealed to the Pennsylvania Supreme Court, which affirmed the denial of post-conviction relief on different grounds on February 23, 2000. Commonwealth v. Lark, 746 A.2d 585 (Pa. 2000) (Lark IV).

During the pendency of the appeal of the denial of his Second PCRA Petition, Lark filed a habeas petition in this court before the Honorable Stewart Dalzell. Lark v. Horn, No. Civ. A. 98-3708 (E.D. Pa.). Lark admitted that his petition contained some unexhausted claims—those claims that were the subject of his Second PCRA Petition. Lark was concerned that the statute of limitations established by the Antiterrorism and Effective Death Penalty Act (“AEDPA”), 28 U.S.C. § 2241(d), would run on his exhausted claims before he had exhausted his state post-conviction remedies with respect to his remaining claims. The court dismissed the Petition without prejudice, ordering that any re-filed petition would relate back to the date of the initial filing. Lark v. Horn, No. Civ. A. 98-3708 (E.D. Pa. Oct. 15, 1998) (unpublished order). After the Pennsylvania Supreme Court denied Lark’s appeal from the denial of his Second PCRA Petition, Lark timely filed the instant Petition in this Court, in which he raises fifteen claims for relief from his state convictions and sentences. He now seeks an evidentiary hearing on Claims I, II, and III of his Petition, and discovery on Claims I and X.

II. REQUEST FOR AN EVIDENTIARY HEARING

Lark requests an evidentiary hearing on three of his claims: Claim I, brought pursuant to both

Batson v. Kentucky, 476 U.S. 79 (1986), and Swain v. Alabama, 380 U.S. 202 (1965), which alleges racial discrimination during the jury selection process at Lark’s trial, and a policy of racial discrimination in jury selection by the Philadelphia District Attorney’s Office (“Batson/Swain claim”); Claim II, which alleges ineffective assistance of counsel at the guilt phase of trial; and Claim III, which alleges ineffective assistance of counsel at the penalty phase. The Commonwealth argues in the first instance that these claims (or portions of them) are procedurally defaulted.³ Federal habeas review is barred if the petitioner “has defaulted his federal claim[] in state court pursuant to an independent and adequate state procedural rule.” Coleman v. Thompson, 501 U.S. 722, 750 (1991). Accordingly, the Court first considers the Commonwealth’s procedural default arguments with respect to each claim because an evidentiary hearing would be meaningless if federal

³The parties agree that the claims contained in the Petition are technically exhausted. A petitioner for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 must have exhausted the “remedies available in the courts of the state.” See 28 U.S.C. § 2254(b)(1)(A). A petitioner meets the exhaustion requirement when he has “fairly presented” his federal claim to the state courts. Picard v. Connor, 404 U.S. 270, 275 (1971). A federal court may not entertain a habeas petition that contains both exhausted and unexhausted claims. Rose v. Lundy, 455 U.S. 509, 522 (1982). Even if Petitioner has not actually presented all of his claims in the state court proceedings, the pursuit of any unexhausted claims in state court would be futile because the Pennsylvania courts have now clarified that they will not review any time-barred claims, even in death penalty cases. See Whitney v. Horn, 280 F.3d 240, 250-52 (3d Cir. 2002) (holding that review of time-barred Pennsylvania PCRA petitions is “clearly foreclosed,” and thus exhaustion of time-barred claims would be futile). Thus, the exhaustion requirement is met on all of Lark’s claims, but any claims that were not presented to the Pennsylvania courts are procedurally defaulted unless Lark can show cause and prejudice for the default. See Castille v. Peoples, 489 U.S. 346, 351 (1989) (“The requisite exhaustion may nonetheless exist, of course, if it is clear that [the habeas petitioner’s] claims are now procedurally barred under Pennsylvania law.”); Whitney, 280 F.3d at 252-53 (“[W]hen exhaustion is futile because state relief is procedurally barred, federal courts may only reach the merits if the petitioner makes the standard showing of ‘cause and prejudice’ or establishes a fundamental miscarriage of justice.” (quoting Lines v. Larkins, 208 F.3d 153, 166 (3d Cir. 2000))); McCandless v. Vaughn, 172 F. 3d 255, 260 (3d Cir. 1999) (“When a claim is not exhausted . . . but state procedural rules bar the applicant from seeking further relief in state courts, the exhaustion requirement is satisfied In such cases, however, applicants are considered to have procedurally defaulted their claims” (citations omitted)).

review is unavailable.

If the claims are not defaulted, the Commonwealth argues that Lark may not receive an evidentiary hearing because he failed to fully develop the factual basis for his claims during the state court proceedings. The AEDPA has limited the circumstances under which a federal court may grant an evidentiary hearing with respect to a habeas petition brought pursuant to § 2254:

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that . . . the claim relies on . . . a new rule of constitutional law, made retroactive to cases on collateral review . . . or . . . a factual predicate that could not have been previously discovered through the exercise of due diligence; and . . . 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.

28 U.S.C. § 2254(e)(2).

In determining whether an evidentiary hearing is barred by this provision, the court first examines *whether* the factual basis of the claim was developed in state court.⁴ Williams v. Taylor, 529 U.S. 420, 431 (2000). If it was not, “[a] failure to develop the factual basis is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner’s counsel.” Id. at 432. “Diligence for purposes of the opening clause [of § 2254(e)(2)] depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court.” Id. at 435. If the prisoner himself contributes to the absence of a full and fair adjudication in state court, the statute prohibits an evidentiary hearing in federal court in most cases. Id. at 437. In the usual case, the prisoner must have at least sought an

⁴If the state court made factual findings, they are entitled to a presumption of correctness. 28 U.S.C. § 2254(e)(1).

evidentiary hearing in state court in the manner prescribed by state law. Id.⁵

When § 2254(e)(2) is inapplicable because the insufficiency of the factual record is not attributable to the petitioner, the court has the discretion to grant an evidentiary hearing. Campbell v. Vaughn, 209 F.3d 280, 286-87 (3d Cir. 2000). That discretion is guided by the principle that an evidentiary hearing should “be meaningful, in that a new hearing would have the potential to advance the petitioner’s claim.” Id. at 287. A federal court may receive evidence where a petitioner alleges facts which, if proven, would entitle him to relief, and where those facts are in dispute. Pursell v. Horn, 187 F. Supp. 2d 260, 325-26 (W.D. Pa. 2002) (applying the pre-AEDPA standard for discretionary hearings set forth in Townsend v. Sain, 372 U.S. 293, 312-13 (1963)).

A. Violation of Equal Protection at Jury Selection (Claim I)

Claim I of Lark’s Petition alleges that the trial prosecutor committed a violation of the Equal Protection Clause when he used peremptory strikes on African American venirepersons in Lark’s trial, and that the Philadelphia District Attorney’s Office engaged in a policy of discriminatory jury selection. See Batson v. Kentucky, 476 U.S. 79 (1986); Swain v. Alabama, 380 U.S. 202 (1965).

Lark argues that he has set forth a prima facie case of intentional discrimination in jury selection, and requests an evidentiary hearing to prove that the prosecutor exercised peremptory strikes in a discriminatory fashion and to present evidence, such as statistical studies and the McMahon Tape, in support of his claim of a pattern and practice of discrimination against minority venirepersons by the District Attorney’s Office.

A review of the procedural history of this claim is helpful to the analysis of Lark’s request.

⁵Lark does not argue that the exceptions enumerated in § 2254(e)(2) are applicable to any of his claims.

Lark's trial counsel, Peter Rogers, first raised a challenge to the jury selection during the voir dire process: he attempted to preserve the records to indicate the racial composition of the jury so that he could later make a challenge to the prosecutor's exclusion of all African American venirepersons who came before the panel that afternoon. (06/07/85 N.T. at 176-77.) The prosecutor, John Carpenter, responded, "Oh. How awful." (Id. at 177.) The trial judge refused to preserve such a record, because there is "no way to determine a person's race or color." (Id. at 178.) Rogers then asked to preserve the names from the previous panel in order to later investigate and determine the venirepersons' race and gender. (Id. at 179.) The judge was unresponsive to the particular request, but instead continued to state that there was nothing on the record to indicate the race of the prospective jurors. (Id. at 179-81.)

Rogers represented Lark on direct appeal from Lark's conviction, yet failed to challenge any improprieties in jury selection based on either Swain or Batson.⁶ Many years later, Lark filed his First PCRA Petition. Lark's appeal from the denial of PCRA relief was pending when the McMahon Tape was released in April 1997. See Lark IV, 746 A.2d at 586 (summarizing the history of Lark's Batson/Swain claim). Lark filed an application to remand the petition in order to present a Batson/Swain claim based in part on the training tape. See id. On July 30, 1997, the Pennsylvania

⁶Under Swain, the prevailing law at the time of Lark's trial, the defendant "was required to show a pattern and practice of racial discrimination in jury selection across multiple prosecutions" in order to establish a violation of the Equal Protection Clause. Sistrunk v. Vaughn, 96 F.3d 666, 668 (3d Cir. 1996) (citing Swain v. Alabama, 380 U.S. 202 (1965)). The Supreme Court subsequently reduced the defendant's burden of proof in Batson, allowing the defendant to show discriminatory jury selection based on the conduct of the prosecutor during the defendant's own trial. Miller-El v. Dretke, 125 S.Ct. 2317, 2324 (2005) (citing Batson, 476 U.S. at 94). Batson was decided in April 1986; in 1987, it was applied retroactively to all cases pending on direct review. See Sistrunk, 96 F.3d at 668-69 (citing Batson, 476 U.S. at 96-98, and Griffith v. Kentucky, 479 U.S. 314 (1987)). Lark's sentence was entered on April 24, 1986, and his case was thus on direct review when Batson was decided.

Supreme Court denied his application for remand. Id. Lark subsequently raised his Batson/Swain claim in his Second PCRA Petition, in which he alleged that the prosecutor in his case exercised his peremptory strikes in a discriminatory fashion. He sought an evidentiary hearing to present proof of the race of the venirepersons in his trial, as well as the McMahon Tape. The trial court dismissed this petition without an evidentiary hearing as untimely under the effective PCRA deadlines set forth in 42 Pa. Cons. Stat. Ann. § 9545(b). Commonwealth v. Lark, Jan. Term 1980, Nos. 2012-2022, slip op. at 1 (Ct. C.P. Phila. July 21, 1998). Any petition filed under the PCRA, including a second petition, “shall be filed within one year of the date the judgment becomes final,” subject to certain exceptions. 42 Pa. Cons. Stat. Ann. § 9545(b)(1).

On appeal from the denial of PCRA relief, the Pennsylvania Supreme Court upheld the trial court’s decision, but on different grounds. It invoked an exception to the PCRA deadline to hold that the Second PCRA Petition was timely filed with respect to the portion of the claim pertaining to the McMahon Tape because the facts upon which the claim was based were not known to Lark and could not have been discovered by him on the exercise of due diligence. Lark IV, 746 A.2d at 588 (citing 42 Pa. Cons. Stat. Ann. § 9545(b)(1)(ii)). The Court held that it could not review the remainder of Petitioner’s Batson/Swain claim, because the underlying facts, including Rogers’ objections at voir dire and the statistics pertaining to the Philadelphia District Attorneys’ use of peremptory strikes against African Americans in capital cases from 1983 to 1993,⁷ were previously ascertainable and thus did not fall within any exception to the PCRA one-year deadline. Id. at 588

⁷Lark obtained these statistics from an academic study (the “Baldus Study”) published in 1998. See David Baldus, et al., “Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia” 83 Cornell L. Rev. 1638 (1998).

n.4, 589.⁸ The court denied relief on the grounds that the McMahon Tape alone could not support a Batson claim. Id. at 589.⁹ The McMahon Tape was made after the Batson decision (in either 1986 or 1987), which occurred after Petitioner’s trial. Id. The Pennsylvania Supreme Court relied on a previous holding—that the tape is not sufficient to establish a policy of discrimination in jury selection by the prosecutors in the District Attorney’s Office of Philadelphia County—to conclude that the tape could not demonstrate that discrimination occurred in Lark’s case. Id. (citing Commonwealth v. Rollins, 738 A.2d 435, 443 n.10 (Pa. 1999)).

1. Procedural Default

The Commonwealth argues that a portion of this claim is procedurally defaulted because the Pennsylvania Supreme Court held that it was time-barred. Lark counters that the time bar is an inadequate procedural rule and that his entire claim is properly before this Court. A federal court may not conduct habeas review of a claim if a state prisoner “has defaulted his federal claim[] in state court pursuant to an independent and adequate state procedural rule.” Coleman, 501 U.S. at 750 (1991). A state procedural rule is an inadequate ground for decision if it was not “firmly

⁸The Pennsylvania Supreme Court appeared to rely on both the PCRA deadline and the doctrine of waiver to bar this portion of Petitioner’s claim. While the Pennsylvania Supreme Court relied upon the time bar to deny review of the portions of the claim for which the factual predicate was previously available to Lark, see Lark IV, 746 A.2d at 589, it went on to state that any claims based on these facts were also waived because they were not previously raised on direct or collateral review. Id. (citing 42 Pa. Cons. Stat. Ann. § 9544(b), which states that “an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding”). It then stated that even if the waived claims were couched in terms of ineffectiveness of counsel, such claims still failed to meet the time bar. Id. The parties appear to agree that the Court applied the PCRA time bar, and not the doctrine of waiver, to refuse review of the remainder of the Batson claim. (See Commw. Mem. at 40; Pet’r Mem. at 16.)

⁹The Pennsylvania Supreme Court did not address whether Petitioner’s claim was meritorious under Swain.

established and regularly followed” by the state courts at the time it was applied. Bronshtein v. Horn, 404 F.3d 700, 707 (3d Cir. 2005) (quoting Ford v. Georgia, 498 U.S. 411, 424 (1991)).

As outlined above, the Pennsylvania Supreme Court in Lark IV held that a portion of Petitioner’s Batson claim was untimely under the PCRA. The first inquiry in determining whether the PCRA time bar is an adequate ground to support the judgment is to determine at what time the procedural bar was applied. The relevant point in time is the “moment petitioner violated the procedural rule”; that is, the date that the petitioner’s time ran out under the jurisdictional time bar. Bronshtein, 404 F.3d at 708; see also Doctor v. Walters, 96 F.3d 675, 684 (3d Cir. 1996) (holding that the relevant date for determining whether a procedural rule is firmly established and regularly applied is the date of the asserted waiver). According to the Pennsylvania Supreme Court, Lark was required to assert the portions of the Batson/Swain claim for which the factual predicate existed in a PCRA petition within one year of August 1988, when his conviction became final.¹⁰ See 42 Pa. Cons. Stat. Ann. § 9545(b)(1), (3). That court thus effectively held that Petitioner was foreclosed from bringing a portion of the Batson/Swain claim as of one year after August 1988. The relevant point in time, therefore, is August 1989.

Next, the Court must determine whether the PCRA time bar was “firmly established and regularly followed” in August 1989. The PCRA deadlines were not effective until January 16, 1996, many years after the alleged waiver. See Lark IV, 746 A.2d at 587 (noting the effective date of the time bar). A rule that did not exist at the time of its violation cannot constitute an adequate state ground for procedural default. Ford, 498 U.S. at 424-25 (holding that contemporaneous objection

¹⁰Lark’s conviction became final when his time for seeking direct review expired, that is, ninety days after the conclusion of his direct appeal on May 20, 1988. See id. § 9545(b)(3).

rule did not constitute adequate state ground to deny review of federal claim where rule was not announced until after petitioner's trial). As the PCRA time bar did not exist at the time that Lark violated the rule, it is not an adequate state ground.

Further, beginning in 1978, the Pennsylvania Supreme Court habitually reviewed constitutional claims in capital cases even when they had been waived. Bronshtein, 404 F.3d at 708-09. The relaxed waiver rule was applied “in order to prevent [the] court from being instrumental in an unconstitutional execution.” Szuchon v. Lehman, 273 F.3d 299, 326 (3d Cir. 2001) (quoting Commonwealth v. Albrecht, 720 A.2d 693, 700 (Pa. 1998)). The relaxed waiver rule applied to issues that were not preserved at trial, Szuchon, 273 F.3d at 325-26 (citing Commonwealth v. Rivera, 773 A.2d 131, 139 n.7 (Pa. 2001)), and to consideration of second or subsequent post-conviction petitions, see Banks v. Horn, 126 F.3d 206, 212 (3d Cir. 1997) (citing Commonwealth v. Beasley, 678 A.2d 773, 777 (Pa. 1996)).

Due to the relaxed waiver rule, “strict enforcement of the [PCRA time bar] did not begin immediately” in capital cases. Bronshtein, 404 F.3d at 708. In 1998, the Pennsylvania Supreme Court “announced that the relaxed waiver rule would ‘no longer [apply] in PCRA Appeals.’” Id. at 709 (quoting Albrecht, 720 A.2d at 700). The state court subsequently clarified that the PCRA time bar was not superseded by the relaxed waiver rule. See id. (citing Commonwealth v. Peterkin, 722 A.2d 638 (Pa. 1998)). According to the Third Circuit's analysis in Bronshtein, the time limit was not firmly established as applicable to capital cases until the Pennsylvania Supreme Court's holding in Commonwealth v. Banks, 726 A.2d 374 (1999). Id. Lark's alleged default thus occurred ten years

prior to the establishment of the time bar or strict enforcement of the time bar in capital cases.¹¹ The Court thus concludes that the PCRA one-year deadline which the Pennsylvania Supreme Court invoked to deny review of part of Plaintiff's Batson/Swain claim was not firmly established and regularly followed at the time it was applied. The rule cannot, therefore, form the basis for a finding of procedural default.

The Commonwealth argues that the Court may nonetheless find that the claim is barred because Lark purposefully bypassed state court review of his claim. In support of its argument, the Commonwealth relies on Szuchon v. Lehman, 273 F.3d 299 (3d Cir. 2001). In Szuchon, the state prisoner raised an Eighth Amendment claim for the first time on federal habeas review. Id. at 320. Citing concerns of comity and federalism, the Third Circuit held that the claim was procedurally defaulted, even though the respondents had waived this defense, because the petitioner had deprived the state courts of any opportunity to examine the issue. Id. at 321. By contrast, Lark presented his Batson/Swain claim to the state courts in his Second PCRA Petition. The Court concludes that Lark did not deliberately attempt to completely bypass state review of his claims.¹² Accordingly, this claim is properly before the Court for habeas review.

¹¹Even if the Lark IV court relied independently on the doctrine of waiver set forth in 42 Pa. Cons. Stat. Ann. § 9544(b), and not on the PCRA time bar, to deny relief on Petitioner's jury selection claim, the procedural rule would nonetheless be inadequate to bar federal review of the claim. The Lark IV court noted that none of the Batson claims were raised on direct or collateral review. Thus, at the latest, the alleged waiver occurred at the time the procedural rule was violated, or at the time of filing of the First PCRA Petition (February 8, 1995). In 1995, the relaxed waiver doctrine was still in place, and thus the waiver rule was not "firmly established and regularly followed" in capital cases at the time of its application.

¹²In fact, the Szuchon court also held, with respect to a separate issue, that the Pennsylvania Supreme Court's application of the waiver doctrine was not an adequate state ground on which to base procedural default because of the state's relaxed waiver doctrine. Szuchon, 273 F.3d at 325-27.

2. Evidentiary Hearing

As Lark's Batson/Swain claim is not procedurally defaulted, and the state courts have not addressed the merits of the claim,¹³ the Court's review is *de novo*. See Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001). The state courts have made no factual findings with respect to this claim. As discussed above, however, Lark is not entitled to an evidentiary hearing if the absence of a developed factual basis is due to a lack of diligence, or some worse fault, on his part or on the part of his counsel. See Williams, 529 U.S. at 431-32 (interpreting 28 U.S.C. § 2254(e)(2)). The Commonwealth argues that Lark may not receive an evidentiary hearing on this claim because he did not exhibit diligence at the state court level.

As the Third Circuit has stated,

the question whether a claim is procedurally defaulted and whether § 2254(e)(2) bars an evidentiary hearing related to that claim are analytically linked. If a petitioner requests a hearing to develop the record on a claim in state court, and if the state courts . . . deny that request on the basis of an inadequate state ground, the petitioner has not “failed to develop the factual basis of [the] claim in State court proceedings” for purposes of § 2254(e)(2).

Wilson v. Beard, 426 F.3d 653, 665 (3d Cir. 2005) (citations omitted); see also Williams, 529 U.S. at 432 (holding that ordinarily, a petitioner must have at a minimum requested a hearing in state court in the manner prescribed by state law to demonstrate diligence). Lark failed to present his Batson/Swain claim to the state courts until his Second PCRA Petition. As discussed above, the PCRA court and the Pennsylvania Supreme Court denied relief without an evidentiary hearing on

¹³The Lark IV court addressed the merits of Lark's claim as if the McMahon Tape would have been the sole support for a claim of discriminatory jury selection. The Court cannot treat this as a holding on the merits to which the Court must defer under 28 U.S.C. § 2254(d), given that the Pennsylvania Supreme Court did not rule on the bulk of the claim; that is, it did not examine any of the proffered direct evidence of discriminatory jury selection.

the basis of an inadequate state ground. Therefore, under Wilson, Lark did not “fail[] to develop the factual basis of [his] claim,” and this Court is not prohibited from holding an evidentiary hearing.¹⁴

As the strictures of § 2254(e)(2) do not apply to this case, the Court must determine whether an evidentiary hearing has the potential to advance Lark’s claim. See Campbell, 209 F.3d at 287. Under Batson and Swain, “racial discrimination by the State in jury selection offends the Equal Protection Clause.” Miller-El v. Dretke, 125 S. Ct. 2317, 2324 (2005) (quoting Georgia v. McCollum, 505 U.S. 42, 44 (1992)). Batson established a three-part burden-shifting procedure to be used in determining whether a prosecutor engaged in racially discriminatory jury selection practices. Batson, 476 U.S. at 96-98. “Once the Defendant makes a prima facie showing of racial discrimination (step one), the prosecution must articulate a race-neutral explanation for its use of peremptory challenges (step two). If it does so, the trial court must determine whether the defendant

¹⁴The Commonwealth argues that Lark nonetheless demonstrated a lack of diligence by waiting until his Second PCRA Petition to raise his claim, thereby deliberately bypassing state court review. It is true, as the Lark IV court noted, that a good portion of the facts that form the basis for his jury selection claim were available to Lark prior to the filing of his Second PCRA Petition. See Williams, 529 U.S. at 438-49 (finding a lack of diligence where petitioner failed to develop his Brady claim although the allegedly exculpatory evidence was available in his court file). For example, the trial record demonstrates that trial counsel feared that the prosecutor was striking all African American venirepersons and attempted to preserve the record while voir dire was in process. Lark’s attorneys nonetheless failed to re-assert his voir dire challenge post-trial, on direct appeal, and in his First PCRA Petition. However, the release of the McMahon tape in 1997, as well as the compilation of statistics published in 1998, shed new light on the practices of the Philadelphia District Attorney’s Office and further informed a potential challenge to the jury selection process. For example, the composition of Petitioner’s jury was nine Whites and three African Americans (Petition ¶ 46), the same ratio encouraged by McMahon in the videotape. See Wilson v. Beard, 314 F. Supp. 2d 434, 448 (E.D. Pa. 2004). Lark’s failure to raise the challenge earlier in the process is excusable, as the information from the McMahon Tape was not available to Lark until April 1997. In any event, this does not change the above analysis: the state court relied on an inadequate state ground for its decision to deny review without an evidentiary hearing, and thus Lark did not demonstrate a lack of diligence.

has established purposeful discrimination (step three).” Riley v. Taylor, 277 F.3d 261, 275 (3d Cir. 2001) (citing Batson, 476 U.S. at 96-98, Simmons v. Beyer, 44 F.3d 1160, 1167 (3d Cir.1995), and Deputy v. Taylor, 19 F.3d 1485, 1492 (3d Cir.1994)).

Lark has pled a prima facie case of discrimination, which requires that the proffered facts give “rise to an inference of discriminatory purpose.” Johnson v. California, 125 S.Ct. 2410, 2416 (2005) (quoting Batson, 476 U.S. at 94). Lark is an African American male. He has alleged that at least ten, and perhaps as many as twelve, of the fifteen venirepersons excused by the prosecution were African American, that their answers to voir dire questions do not reveal any race-neutral reason for the strikes, and that Mr. Carpenter, the trial prosecutor, tacitly admitted that he was excluding African Americans from the jury by responding “how awful” to trial counsel’s objections. See Holloway v. Horn, 355 F.3d 707, 722 (3d Cir. 2004) (identifying a pattern of strikes against racial group members and questions and statements during the voir dire as relevant factors in determining whether a prima facie showing of discrimination has been made); see also McCain v. Gramley, 96 F.3d 288, 292 (7th Cir. 1996) (“Where a party uses a significant number of its total strikes on members of a certain racial group, one might infer that the party was concerned about the racial make-up of the jury and acted in a discriminatory fashion.”) (internal citation omitted). For its part, the Commonwealth disputes the number of African-American venirepersons who were released. Lark’s disputed allegations, as well as his proffered evidence of a culture of discrimination in the Philadelphia District Attorney’s Office,¹⁵ are potentially sufficient to raise an inference of

¹⁵The Commonwealth argues that the McMahon Tape is not evidence of policy and thus cannot form the basis for an equal protection challenge to jury selection in a case where Mr. McMahon himself was not the prosecutor. See Abu-Jamal v. Horn, No. Civ. A. 99-5089, 2001 WL 1609690, at *109 (E.D. Pa. Dec. 18, 2001) (denying request for evidentiary hearing on jury selection claim already examined by state court on basis that supplemental evidence of policy, including the

discriminatory purpose and to at least make out a prima facie case sufficient to shift the burden unto the Commonwealth. Thus, an evidentiary hearing is necessary to establish whether the allegations are true. Furthermore, if Lark establishes a prima facie case, the Commonwealth should have the opportunity to offer race-neutral reasons for its strikes under Batson's second step. See Hardcastle v. Horn, 368 F.3d 246, 260-61 (3d Cir. 2004) (remanding for an evidentiary hearing to allow the Commonwealth to offer bases for prosecutor's peremptory strikes despite probable difficulties in reconstructing voir dire).

Petitioner has alleged facts which would, if proven, make out a prima facie case of racially discriminatory jury selection in contravention of Batson, and those facts are disputed by the Commonwealth. Accordingly, the Court grants Petitioner's motion for an evidentiary hearing with respect to his Batson/Swain claim.

B. Ineffective Assistance of Counsel – Guilt Phase (Claim II)

Claim II of the Petition alleges that Lark's trial counsel, Peter Rogers, was ineffective during the guilt phase of his trial. Lark points to several examples of trial counsel's ineffective representation: (1) Rogers failed to timely object to improper testimony regarding a witness's polygraph test and bolstered the witness's credibility; (2) he introduced inculpatory out-of-court statements of individuals who did not testify at trial, and undermined the credibility of a key defense witness in so doing; (3) he caused the introduction of a witness's prior inconsistent inculpatory

McMahon Tape, was not relevant to claim because the tape was produced five years after petitioner's trial). The Court notes that the decision of the Supreme Court in Miller-El v. Cockrell, 537 U.S. 322 (2003), emphasized that "some weight" is due historical evidence of a "culture of discrimination" because it "casts doubt on the legitimacy of the motives underlying the State's actions." Id. at 346-347. The McMahon Tape, although produced after the Batson decision and after Lark's trial, could conceivably reflect a culture of discrimination that is relevant to the determination of Lark's Batson/Swain claim.

statement by requesting that the witness's memory be refreshed by reading the statement in the presence of a jury, by agreeing to its admission as substantive evidence, and by failing to redact hearsay within the statement; (4) he failed to investigate to uncover helpful impeachment evidence; and (5) he failed to object to the preclusion of a verdict on second degree murder, a lesser degree of homicide. The Petitioner argues that relief can be granted without an evidentiary hearing with respect to the first three (record-based) errors of counsel. However, if relief cannot be granted from the record, he requests an evidentiary hearing to elicit testimony from Rogers regarding his strategy, or lack thereof. The Commonwealth argues that the first three examples of ineffectiveness (or portions thereof) are procedurally defaulted; it also argues that Lark is ineligible for an evidentiary hearing on the claim in accordance with § 2254(e)(2).

1. Procedural Default and Exhaustion

The Commonwealth asserts procedural default defenses to the first three portions of Lark's claim.

a. Testimony Relating to Benjamin Smith's Polygraph Test

Lark argues that his trial counsel was ineffective in failing to object to certain testimony of two witnesses: Benjamin Smith and Detective Dougherty. Specifically, Lark contends that counsel failed to object to testimony of both witnesses that implied that Smith, who had given a statement to police implicating Petitioner in the offense, passed a polygraph test. He also argues that, on cross-examination of Dougherty, Rogers provided the witness with the opportunity to further bolster Smith's credibility by bringing up the polygraph test. The Commonwealth argues that the Court may not review this claim because the Supreme Court applied a procedural bar to deny relief with respect to counsel's performance regarding Benjamin Smith's cross-examination, and because the portion

of the claim pertaining to Dougherty's cross-examination was never presented to the state courts.

The Commonwealth argues that the portion of the claim that is based on Smith's testimony is procedurally defaulted due to Petitioner's failure to set forth this specific example of ineffectiveness of counsel in his "Statement of the Questions Involved" in his brief on appeal from the denial of his First PCRA Petition in the Pennsylvania Supreme Court. According to the Pennsylvania Rules of Appellate Procedure, briefs must include a statement of the questions involved, and "ordinarily no point will be considered" if it is not set forth therein, "or suggested thereby." Pa. R. App. P. 2116(a). Adherence to the rule "is to be considered in the highest degree mandatory, admitting of no exception." *Id.* The Pennsylvania courts have held that noncompliance with the rule constitutes waiver of the omitted argument. *E.g., Commonwealth v. Duden*, 473 A.2d 614, 618 (Pa. Super. Ct. 1984).

A review of the brief in question demonstrates that Lark did not cite this specific example of ineffectiveness in his "Statement of the Questions Involved." Brief of Appellant at 3-5, *Commonwealth v. Lark*, Capital Appeal No. 124 (Pa. July 24, 1996). Lark raised this claim in his First PCRA Petition, and he argued the issue in the body of his appellate brief under the heading of "Counsel Was Constitutionally Ineffective During the Guilt Phase." *See id.* at 35, 37-38. The Commonwealth responded to this argument in its own appellate brief. *See* Brief of Appellee at 47-50, *Commonwealth v. Lark*, Capital Appeal No. 124, (Pa. Oct. 22, 1996). The Supreme Court did not, however, address the issue in its opinion. *See Lark III*, 698 A.2d at 48-52. According to the Commonwealth, this is because the issue was waived for noncompliance with Rule 2116.

Lark contends that he has not defaulted the portion of the claim pertaining to Smith's testimony because the Pennsylvania Supreme Court did not explicitly apply Rule 2116 to hold that

the issue was waived. According to Lark, even if the procedural bar is hypothetically applicable to the situation, it cannot preclude federal habeas review if the state court did not actually rely on the procedural bar. Lark is partially correct; if a state court declines to invoke an applicable procedural bar but instead rules on the federal claim on its merits, federal court review is not precluded. Klein v. Harris, 667 F.2d 274, 286 (2d Cir. 1981). In this case, however, the failure of the Pennsylvania Supreme Court to resolve this particular issue is unexplained.

Where a state court decision affirms a lower court judgment without disclosing its reasoning, the Court must look to the last explained judgment on the claim. See Ylst v. Nunnemaker, 501 U.S. 797, 802-03 (1991). If the last reasoned judgment is based on the merits of the federal claim, as it is in this case,¹⁶ there is a presumption “that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place.” Id. at 803. The presumption is rebuttable on a strong showing that the later decision is based on an intervening procedural default. Id. at 804 (noting that the presumption could be rebutted by a showing that a later appeal was untimely and that the state court usually did not waive the time bar without saying so); see also Hull v. Freeman, 991 F.2d 86, 90-91 (3d Cir. 1993) (applying the presumption where petitioner’s appeal was untimely and the state court did not usually waive the deadline without saying so). In this case, therefore, there must be a showing that Lark actually violated Rule 2116 and that the Pennsylvania Supreme Court normally did not waive the Rule 2116 requirement without noting such waiver. The Commonwealth has not made such a showing. It relies solely on the opinions of the Pennsylvania Superior Court, and does not discuss Pennsylvania Supreme Court

¹⁶The PCRA Court ruled on the merits of this claim. Commonwealth v. Lark, First PCRA Opinion, at 2, 9.

practice with respect to Rule 2116. Both sides on the appeal in the PCRA proceedings argued this issue on its merits; at that time, the Commonwealth did not assert that the claim was waived. There is, consequently, little evidence that the procedural bar was applied in this case.

Moreover, the procedural rule must be an adequate state ground for default in order to bar federal habeas review. A procedural rule is inadequate if it is not “consistently or regularly applied.” Banks v. Horn, 126 F.3d 206, 211 (3d Cir. 1997) (quoting Johnson v. Mississippi, 486 U.S. 578, 588-89 (1988)). The Third Circuit has articulated the test for adequacy as follows:

A state rule provides an independent and adequate basis for precluding federal review of a state prisoner’s habeas claims only if: (1) the state procedural rule speaks in unmistakable terms; (2) all state appellate courts refused to review the petitioner’s claims on the merits; and (3) the state courts’ refusal in this instance is consistent with other decisions.

Doctor v. Walters, 96 F.3d 675, 683-84 (3d Cir. 1996). “Nevertheless, . . . if a state supreme court faithfully has applied a procedural rule in ‘the vast majority’ of cases, its willingness in a few cases to overlook the rule and address a claim on the merits does not mean that it does not apply the procedural rule regularly or consistently.” Banks, 126 F.3d at 211 (citing Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989)).

Rule 2116 speaks in clear terms. However, the application of the rule as effecting a waiver of the omitted claim is inconsistent. The rule states that compliance is “mandatory,” but the Pennsylvania courts have used their discretion to address issues that were not raised in the Statement of the Questions Involved. See, e.g., Commonwealth v. Mayfield, 832 A.2d 418, 423 n.5 (Pa. 2003) (“The Commonwealth did not raise the overbreadth issue in its brief to this Court, and ordinarily this omission would constitute a waiver of that issue. See Pa. R. App. P. 2116(a). This Court will not

depend on the parties to preserve those issues upon which the trial court expressly relied in holding the statute unconstitutional.”); Commonwealth v. Overby, 809 A.2d 295, 300 n.12 (Pa. 2002) (addressing the question of whether the trial court erred in admitting hearsay statements despite the fact that the question was not specifically raised in that form in the Statement of Questions Involved); Joshi v. Nair, 614 A.2d 722, 723 n.1 (Pa. Super. Ct. 1992) (declining to apply waiver doctrine to a claim that was not included in the statement of questions where brief contained argument on the issue). The Court thus concludes that the state has not met its burden of showing that the rule was consistently applied such that it forms an adequate state ground for decision on the claim. See Insyxiengmay v. Morgan, 403 F.3d 657, 666 (9th Cir. 2005) (“[T]he ultimate burden is on the State, not the petitioner, to show that a procedural state bar was clear, consistently applied, and well-established at the time the party contesting its use failed to comply with the rule in question.” (citing Bennett v. Mueller, 322 F.3d 573, 583 (9th Cir. 2003))); Hooks v. Ward, 184 F.3d 1206, 1217 (10th Cir. 1999) (“[T]he state bears the burden of proving the adequacy of a state procedural bar in order to preclude federal habeas review.”). Accordingly, the portion of Lark’s ineffective assistance of counsel claim pertaining to Benjamin Smith’s testimony is not defaulted and is properly before this court.

The Commonwealth next contends that federal review of the portion of the claim pertaining to Detective Dougherty’s testimony is procedurally barred for failure to exhaust because it was not presented to the Pennsylvania courts. Where a claim is not exhausted, but is now procedurally defaulted in the state courts, the Court may only consider the claim if the procedural default is excused by a demonstration of “cause and prejudice” or a “fundamental miscarriage of justice.” McCandless, 172 F.3d at 265. Lark has not attempted to demonstrate that either of these exceptions

apply, but states that this claim is properly before this Court because he presented the substantial equivalent of the claim to the state courts in his First PCRA Petition.

Exhaustion of state remedies requires a fair presentation of the claim to the state courts. Picard v. Connor, 404 U.S. 270, 275 (1971). “To ‘fairly present’ a claim, a petitioner must present a federal claim’s factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted.” McCandless, 172 F.3d at 261 (citing Anderson v. Harless, 459 U.S. 4, 6 (1982), and Picard, 404 U.S. at 277-78). The claim brought in federal court must be “the substantial equivalent of that presented to the state courts.” Gibson v. Scheidemantel, 805 F.2d 135, 138 (3d Cir. 1986) (citing Picard, 404 U.S. at 277, and Santana v. Fenton, 685 F.2d 71, 74 (3d Cir. 1982)). The presentation of additional facts to support a claim does not evade the exhaustion requirement “when the prisoner has presented the substance of his claim to the state courts.” Vasquez v. Hillery, 474 U.S. 254, 257-58 (1986). If the claim is not “fundamentally alter[ed],” expanding the record to include new facts does not render the claim unexhausted. Id. at 260. However, “[m]ere reliance . . . on the same constitutional provision does not render . . . two claims substantially equivalent.” Gibson, 805 F.2d at 138.

Whether the addition of facts fundamentally alters a claim such that it presents a new issue is a close question, especially in the context of evaluating the effectiveness of counsel. “A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.” Strickland, 466 U.S. at 690. The nature of a claim of ineffective assistance is such that a state prisoner must present the specific error to the state courts; where the additional facts cited in support of a claim consist of identification of different errors of counsel, the claim is altered. See Gibson, 805 F.2d at 139

(holding that a claim that counsel was ineffective for instructing his client to plead guilty and inadequately explaining the plea bargain and sentencing consequences is not the substantial equivalent of a claim that counsel was ineffective for failing to protect his client's juvenile status); Landano v. Rafferty, 897 F.2d 661, 671 n.13 (3d Cir. 1996) (noting that the prevailing view in the circuits is that claims of ineffectiveness of counsel or unfair trial, which “encompass an almost limitless range of possible errors,” should not be considered exhausted if the prisoner bases the claim on different factual predicates in federal court than he or she did in state court (quoting Lanigan v. Maloney, 853 F.2d 40, 45 (1st Cir. 1988))). In this case, Petitioner has claimed that counsel erred in his questioning of Detective Dougherty—which is a distinct, although related, error to counsel's alleged ineffectiveness in his questioning of Smith and his failure to object to the introduction of the testimony pertaining to the polygraph at that time. The two claims are not substantially equivalent because the factual predicates differ. Accordingly, the portion of Lark's subclaim pertaining to the examination of Dougherty was not fairly presented to the Pennsylvania courts.

Lark nonetheless argues that this claim was exhausted by operation of law because the Pennsylvania Supreme Court is obligated to examine the record for constitutional error on direct appeal. On direct appeal from a conviction resulting in a sentence of death, the Pennsylvania Supreme Court is required by 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(i) to review the record to determine if the death sentence was “the product of passion, prejudice, or any other arbitrary factor.” See Commonwealth v. Appel, 539 A.2d 780, 781 (Pa. 1988). Although Lark argues that such review satisfies the exhaustion requirement for all of his record-based claims, the Third Circuit has rejected this interpretation of Pennsylvania law. See Bronshtein, 404 F.3d at 726-28. The petitioner in

Bronshtein asserted claims based on the exclusion of testimony by a private investigator and the admission of his confession, resulting in a denial of his rights to a fair trial, to present a defense, to due process, and to confront witnesses. Id. at 725. The Third Circuit examined the statute, the practice of the Supreme Court, the Pennsylvania scheme of post-conviction review, and the federal habeas scheme, and concluded that these record-based claims could not be exhausted by operation of the mandatory review process. See id. at 726-28. The state supreme court is not expected “to assess every federal constitutional argument that might possibly be made on behalf of a capital defendant,” but is charged with a much more limited obligation to ensure that a sentence of death is not the product of passion, prejudice, or other arbitrary factor. Id. at 726. Bronshtein does not identify what type of claims, if any, might be deemed exhausted by the limited mandatory review. This Court concludes that Lark’s claim of ineffectiveness based on the bolstering of a witness’s credibility does not implicate the grounds for relief set forth in § 9711(h)(3)(i). See Laird v. Horn, 159 F. Supp. 2d 58, 73 (E.D. Pa. 2001) (“[T]he Pennsylvania mandatory appellate review pursuant to § 9711(h)(3) does not exhaust all possible constitutional claims, but only those claims of fundamental constitutional error that implicate the grounds for relief set forth in § 9711(h)(3)—(1) that the verdict was the product of passion, prejudice or any other arbitrary factor; or (2) that the evidence fails to support the finding of at least one aggravating circumstance.”). Missteps at the guilt phase regarding evidentiary issues and examination of witnesses are similar to the claims raised by the petitioner in Bronshtein in that they would not put the reviewing court on notice that the sentence was the result of one of these factors. Accordingly, the Court concludes that the portion of Lark’s ineffective assistance of counsel claim pertaining to the examination of Detective Dougherty has not been exhausted and is procedurally defaulted because review is now clearly foreclosed.

b. Introduction of Incriminating Hearsay Statements

Lark argues that his trial counsel was ineffective in introducing certain hearsay statements of persons not called by the prosecution to testify at trial. Specifically, Lark argues that counsel was ineffective in his questioning of Detective William Shelton by asking Shelton about a statement implicating Lark which was made by Roosevelt Purvis, who had not testified for the Commonwealth. The prosecutor was thus able to introduce other portions of Mr. Purvis's statement, including an incriminating statement allegedly made by Charlene Wiggins to Mr. Purvis. Next, during his cross-examination of Carolyn Purvis, a Commonwealth witness, Rogers read into evidence an out-of-court statement that Ms. Purvis had given to the police in which she recounted information which had been told to her by Muriel Jackson, who did not testify at trial. Jackson told Ms. Purvis that she and Charlene Wiggins saw the shooting and identified Lark as the offender. This statement thus discredited Charlene Wiggins, a key defense witness. Finally, counsel called a witness to read a newspaper article that indicated that police believed that Lark had committed the murder.

The Commonwealth objects to federal habeas review of this component of Lark's ineffectiveness of counsel claim on the basis of procedural default. Specifically, they cite Lark's noncompliance with Rule 2116 on appeal from the denial of his First PCRA Petition as an independent and adequate state procedural rule regarding waiver of the claim. These examples of ineffectiveness were not enumerated in Lark's "Statement of the Questions Involved" in his appellate brief for his First PCRA Petition, and the Pennsylvania Supreme Court did not address them in its opinion. See Lark III, 698 A.2d at 48-52. However, Lark argued in his First PCRA Petition and in his briefs to the PCRA Court and the Pennsylvania Supreme Court that counsel's introduction of out-of-court statements made by Roosevelt Purvis, Charlene Wiggins, Muriel Jackson, and Carolyn

Purvis was ineffective. See Memorandum of Law in Support of Defendant’s Amended Motion for Post-Conviction Collateral Relief at 28-29, Commonwealth v. Lark, Jan. Term 1980, Nos. 2012-2022 (Ct. C.P. Phila. Feb. 8, 1995); Brief of Appellant at 35-36, Commonwealth v. Lark, Capital Appeal No. 124 (Pa. July 24, 1996). Indeed, the claim made by Lark with respect to these statements is identical to the one raised in the present Petition. The Court concludes that these claims are not procedurally defaulted because the PCRA Court ruled on the merits of these claims, and because there is no showing that the Pennsylvania Supreme Court relied on a procedural default to deny review of these claims. See Ylst, 501 U.S. at 802-04. Lark’s claim that trial counsel was ineffective for introducing these statements is, accordingly, properly before this Court.

Lark did not, however, present any claim of ineffectiveness based on trial counsel’s introduction of the newspaper article to the state courts. In his submissions before this Court, Lark does not dispute the Commonwealth’s contention that this example of trial counsel’s ineffective assistance was not presented to the state courts. He maintains that this record-based claim, like his claim regarding his counsel’s questioning of Detective Dougherty, was implicitly exhausted by operation of state law because of the statutorily mandated review of the case on direct appeal. As the Court concluded with respect to the questioning of Dougherty, counsel’s alleged error in introducing the newspaper article is not an error that would alert a reviewing court to the possibility that the death sentence was imposed as a result of passion, prejudice, or other arbitrary factor. See Laird, 159 F. Supp. 2d at 87. This portion of Lark’s ineffectiveness of counsel claim is thus not exhausted, and is procedurally defaulted because review is now clearly foreclosed.

c. Michael Johnson’s Prior Statement

Lark argues that his trial counsel was ineffective in his handling of the admission of a prior

incriminating statement made by witness Michael Johnson. The Commonwealth argues that this claim is procedurally defaulted because the state court rested its judgment on this claim on the independent and adequate state rule that a claim that is “previously litigated” may not be collaterally reviewed under the PCRA. See 42 Pa. Cons. Stat. Ann. § 9543(a)(3). The Commonwealth contends that the admissibility of Michael Johnson’s statement was confirmed on direct appeal, see Lark II, 543 A.2d at 501, and that, under state law, Petitioner could not revisit the issue by arguing that counsel was ineffective in allowing its admission.

To raise a claim under the PCRA, a petitioner must plead and prove that the allegation of error has not been previously litigated. 42 Pa. Cons. Stat. Ann. § 9543(a)(3). An issue has been previously litigated if “the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue.” 42 Pa. Cons. Stat. Ann. § 9544(a)(2); see also Commonwealth v. Senk, 437 A.2d 1218, 1220 (Pa. 1981) (“An issue may not be relitigated merely because a new or different theory is posited as a basis for reexamining an issue that has already been decided.” (citing Commonwealth v. Jones, 412 A.2d 503 (1980))).

Contrary to the position taken by the Commonwealth, when the Pennsylvania Supreme Court examined this issue in its review of the appeal from the denial of Lark’s First PCRA Petition, it did not hold that this aspect of his ineffective assistance claim was “previously litigated.” Instead, it held that, since the question of the admissibility of Johnson’s testimony had been “finally litigated and found to have been properly admitted,” Lark’s trial counsel could not “be found ineffective for failing to object” to its admission. Lark III, 698 A.2d at 48 (citing Lark II, 543 A.2d at 501). A Pennsylvania court will not find that counsel was ineffective if the underlying claim (in this case, the admissibility of Michael Johnson’s statement) is meritless. See Lark III, 698 A.2d at 47 (citing

Commonwealth v Douglas, 645 A.2d 226, 230 (1994)). Thus, although the state-law evidence claim had been finally litigated on direct appeal,¹⁷ the federal ineffectiveness claim had not been, and the court entertained it on the merits. A state court decision on the merits does not preclude federal habeas review. Johnson v. Pinchak, 392 F.3d 551, 557 (3d Cir. 2004). Accordingly, the Court concludes that this aspect of Lark's ineffectiveness of counsel claim is not procedurally defaulted.

Based on the foregoing, the Court concludes that the following aspects of Lark's claim of ineffectiveness of counsel at the guilt phase are properly before this Court: (1) trial counsel improperly handled the suggestion of the polygraph test during Benjamin Smith's testimony; (2) he introduced incriminating out-of-court statements made by Roosevelt Purvis, Charlene Wiggins, Carolyn Purvis, and Muriel Jackson; (3) he requested that Michael Johnson's memory be refreshed by reading his prior inconsistent statement in the presence of the jury, agreed to its admission as substantive evidence, and failed to redact hearsay within the statement; (4) he failed to investigate to uncover helpful impeachment evidence showing that Lark was in North Carolina in August 1979 (the time period when he was alleged to have told people in Philadelphia that he committed the murder); and (5) he failed to object to the preclusion of a verdict on second degree murder, a lesser degree of homicide.¹⁸ The aspects of Lark's claim pertaining to trial counsel's questioning of Detective Dougherty and his introduction of a prejudicial newspaper article are procedurally

¹⁷Lark also argues that the admissibility of the statement was not, in fact, finally litigated on direct appeal. The Court need not address that argument at this time.

¹⁸The Commonwealth did not raise procedural default defenses to the latter two portions of Lark's ineffectiveness of counsel claim.

defaulted and are not properly before this Court.¹⁹

2. Evidentiary Hearing

Lark maintains that he is entitled to relief without a hearing on the first three aspects of his claim of ineffective assistance of counsel at the guilt phase, but that, at a minimum, he is entitled to an evidentiary hearing on all aspects of his guilt phase claim to elaborate trial counsel's actual thought processes and to present the testimony of witnesses whom trial counsel failed to question. The Commonwealth argues that, to the extent that such an inquiry is appropriate, the Court may not hold an evidentiary hearing on this claim because Lark failed to develop the claim in state court.

The Court must first determine whether § 2254(e)(2) bars an evidentiary hearing. As discussed in detail above, § 2254(e)(2) prohibits an evidentiary hearing where a petitioner has failed to develop the factual record by demonstrating a lack of diligence at the state court level. Williams,

¹⁹The Commonwealth argues that Lark's claim of cumulative prejudice resulting from all of counsel's errors is procedurally defaulted because Lark did not present the claim to the state courts. Lark argues that consideration of the cumulative prejudice from the various examples of counsel's ineffective assistance during the guilt phase is constitutionally mandated; such consideration emanates from all of his claims, and is not a separate claim of error.

Claims for ineffectiveness are evaluated under the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under this standard, "a petitioner must establish that (1) counsel's performance fell well below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defendant, resulting in an unreliable or fundamentally unfair outcome of the proceeding." Brand v. Gillis, 210 F. Supp. 2d 677, 683 (citing Strickland, 466 U.S. at 687. A proper inquiry under Strickland is to determine whether the specific claims of error satisfy the performance prong, and then determine the cumulative prejudicial effect of those errors. Marshall v. Hendricks, 307 F.3d 36, 94 (3d Cir. 2002) (recognizing the approach of evaluating prejudice in light of combined errors); Lindstat v. Keane, 239 F.3d 191, 199 (2d Cir. 2001) (considering counsel's errors in the aggregate to determine prejudice); Berryman v. Morton, 100 F.3d 1089, 1097-1102 (3d Cir. 1996) (evaluating the reasonableness of trial counsel's strategy with respect to each alleged error, then determining whether the combined errors constituted prejudice). Cumulative prejudice is not a separate claim; it is an application of the constitutional standard for ineffectiveness of counsel. Accordingly, Lark's claim of cumulative prejudice is not procedurally defaulted.

529 U.S. at 432. Diligence normally requires, at a minimum, that the petitioner requested an evidentiary hearing in state court pursuant to the law of that state. Id. at 437. The record demonstrates that PCRA counsel requested an evidentiary hearing with respect to Lark's First PCRA Petition, in which he raised the substantial equivalent of this claim. The PCRA court denied relief without an evidentiary hearing, holding that a hearing was unnecessary because all of Lark's claims were meritless and frivolous. Commonwealth v. Lark, First PCRA Opinion, at 18-19. Lark argued on appeal to the Pennsylvania Supreme Court that the PCRA court erred in denying him an evidentiary hearing on his claims of ineffective assistance of counsel. Brief of Appellant at 18-22, Commonwealth v. Lark, Capital Appeal No. 124 (Pa. July 24, 1996). The Pennsylvania Supreme Court held that Lark was not entitled to an evidentiary hearing because he did not meet his burden of offering to prove facts which would have entitled him to relief. Lark III, 698 A.2d at 52. Lark had submitted at least two affidavits relevant to this claim to the PCRA Court, including one from his trial counsel, Peter Rogers, attesting to his lack of strategy during trial. He had also submitted a list of witnesses to the PCRA court. Based on these submissions, the Court concludes that the alleged need for further factual development is not due to a lack of diligence on the part of Lark or his counsel.

Therefore, an evidentiary hearing should be granted if Lark has alleged facts, which, if proven, would entitle him to relief, and if those facts are in dispute. See Pursell, 187 F. Supp. 2d at 325-36 (citing Townsend, 372 U.S. at 312-13); see also Campbell, 209 F.3d at 287 (“[C]ourts focus on whether a new evidentiary hearing would be meaningful, in that a new hearing would have the potential to advance the petitioner’s claim.”) A court may refuse to grant an evidentiary hearing where the petitioner fails ‘to forecast any evidence beyond that already contained in the record’ that

would otherwise help his cause, ‘or otherwise explain how his claim would be advanced by an evidentiary hearing.’ Id. (quoting Cardwell v. Greene, 152 F.3d 331, 338 (4th Cir. 1998), overruled on other grounds by Bell v. Jarvis, 26 F.3d 149, 160 (4th Cir. 2000)).

Under Strickland v. Washington, 466 U.S. 668 (1994), “a petitioner must establish that (1) counsel’s performance fell well below an objective standard of reasonableness, and (2) counsel’s deficient performance prejudiced the defendant, resulting in an unreliable or fundamentally unfair outcome of the proceeding.” Brand v. Gillis, 210 F. Supp. 2d 677, 683 (E.D. Pa. 2002) (citing Strickland, 466 U.S. at 687). Lark argues that trial counsel’s testimony would be helpful in establishing that his performance was substandard under the first prong of the Strickland test.

Counsel’s state of mind is relevant to the performance prong. Although an attorney is presumed to be competent, a petitioner may “rebut the presumption by proving that his attorney’s representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy.” Kimmelman v. Morrison, 477 U.S. 365, 384 (1986) (citing Strickland, 466 U.S. at 688-89). The court should evaluate counsel’s performance “from counsel’s perspective at the time of the alleged error and in light of all the circumstances.” Id. (quoting Strickland, 466 U.S. at 689). “The reviewing court’s reasoning under the first prong needs to be made with an understanding of counsel’s thought process” Marshall v. Hendricks, 307 F.3d 36, 115 (3d Cir. 2002). Lark has alleged that trial counsel had no reasonable theory of defense. The Commonwealth, on the other hand, argues that trial counsel’s performance was not objectively unreasonable and has posited various hypothetical reasons for his decisions. Lark has alleged facts regarding counsel’s reasons for his actions (or lack thereof), which are disputed by the Commonwealth, that may advance his claim under Strickland if he also shows that he was prejudiced by counsel’s performance by

demonstrating 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. The Court concludes that an evidentiary hearing would have the potential to advance Lark’s claim by ascertaining whether any sound trial strategy lay behind the alleged errors. Accordingly, the Court grants an evidentiary hearing to elicit trial counsel’s testimony.

Lark also asserts that an evidentiary hearing is required to determine the extent of trial counsel’s failure to investigate the testimony of witnesses who could have impeached a key prosecution witness, Hozell Odom. To the extent that this request implies that he wishes to introduce the testimony of these witnesses, Lark has failed to sufficiently demonstrate how the statements will make a difference in the Court’s Strickland analysis. The proffered statements of Lorraine Lark and Cassandra Green are largely corroborative of Michael Floyd’s affidavit attesting to Lark’s presence in North Carolina, which is already part of the record in this matter. (See Petition ¶¶ 88-89.) Nor does Lark explain how Michael Floyd’s testimony would differ from his affidavit. (See id. ¶ 89.) Accordingly, there is no need to present such evidence at a hearing.

C. Ineffective Assistance of Counsel – Penalty Phase (Claim III)

Claim III of the Petition alleges that trial counsel was ineffective in his representation of Lark during the penalty phase of trial. Specifically, trial counsel’s investigation, preparation, and presentation during the penalty phase was so cursory, alleges Lark, that he provided almost no representation at all. Lark requests an evidentiary hearing to present trial counsel’s testimony that he did not prepare for the penalty phase, and to present the available mitigating evidence that trial counsel failed to uncover.

Lark originally raised this claim in the state courts in his First PCRA Petition. In the PCRA

court, he submitted the affidavit of trial counsel, Peter Rogers, which states that he did not prepare or investigate mitigation evidence at all, Amended Motion for Post-Conviction Collateral Relief Ex. B, Commonwealth v. Lark, Jan. Term 1980, Nos. 2012-2022 (Ct. C.P. Phila. Feb. 8, 1995); the affidavit of a psychologist, Dr. Tepper, which describes Lark’s personal history and its effect on Lark’s mental health, id. Ex. C; and the affidavits of family members Gladys Lark (Lark’s mother) and Yvonne O’Neill (Lark’s aunt), which describe his very difficult childhood, see Letter from Thomas Zielinski, Esq. to the Honorable John J. Poserina, Jr. (April 7, 1995). The PCRA court denied relief without the requested evidentiary hearing, determining that the claim underlying the allegation of error had no arguable merit, because counsel would not be deemed ineffective for failing to present “after-acquired evidence.” Commonwealth v. Lark, First PCRA Opinion at 16. On appeal, the Pennsylvania Supreme Court affirmed the denial of relief on this claim but for different reasons. Lark III, 698 A.2d at 51-52. It determined that trial counsel did investigate, and that the proffered evidence was either cumulative or unhelpful. It further held that Lark did not meet his burden of offering to prove facts that would have entitled him to relief and that it was thus not error to fail to hold an evidentiary hearing. Id. at 52.

1. Procedural Default

The Commonwealth argues that this claim is defaulted in part. It argues that Lark is attempting to “expand” his claim in federal court by proffering new mitigating evidence that was never presented to the state courts, including affidavits from family members regarding Lark’s troubled childhood, and an affidavit from an additional psychologist. The Commonwealth does not specify the legal basis for its arguments, but hints that portions of the claim were not exhausted (and are now procedurally defaulted) because Lark is attempting to add new facts to his claim. Lark

argues that he put the state court on notice of the substantial equivalent of the ineffectiveness claim presented in this Petition. The Court finds that the proposed additional evidence of mitigating circumstances is of the same type as that previously submitted and does not fundamentally alter the claim that counsel was ineffective in failing to investigate or present such evidence. See Vasquez, 474 U.S. at 257-58. Accordingly, no portion of the claim is procedurally defaulted.

2. Evidentiary Hearing

As outlined above, if the factual record is undeveloped for reasons attributable to the petitioner, an evidentiary hearing is disallowed. See 28 U.S.C. § 2254(e)(2). Lark contends that the factual record was not developed, and that the decisions of the PCRA court and the Pennsylvania Supreme Court to deny relief without an evidentiary hearing were not legally sound. The Commonwealth essentially argues that Lark was not diligent because he did not submit sufficient evidence to the state courts to warrant an evidentiary hearing on this claim, and that he is now attempting to submit new and better evidence.

If the failure to develop the factual record is attributable to the state, and not to Lark's lack of diligence, an evidentiary hearing is permissible. Campbell, 209 F.3d at 287. To the extent that the record is incomplete because no evidentiary hearing was held at the state court level, Lark is not at fault, because he requested an evidentiary hearing, submitted proffers, and his request was denied.

As explained by the Fourth Circuit,

there is a material distinction . . . between a petitioner's failure to seek or to seize an opportunity to present evidence, and an inability to persuade a state court that an evidentiary hearing is required. The lack of factual development in the second instance results not from an omission by the petitioner, but from the state court's determination that an evidentiary hearing is unnecessary.

Cardwell, 152 F.3d at 338, overruled on other grounds by Bell v. Jarvis, 26 F.3d 149, 160 (4th Cir. 2000). The factual record is undeveloped as a result of the decisions of the Pennsylvania courts, and not as a result of a lack of diligence on the part of Lark or his PCRA counsel. Accordingly, Lark did not fail to develop the factual basis for his claim within the meaning of § 2254(e)(2), and that provision does not bar an evidentiary hearing with respect to his claim for ineffective assistance at the penalty phase of his trial.

As noted above, however, an evidentiary hearing should not be held if such an exercise would not be meaningful, that is, it would not have “the potential to advance the petitioner’s claim.” Campbell, 209 F.3d at 287. A court may refuse to grant an evidentiary hearing where the petitioner fails “‘to forecast any evidence beyond that already contained in the record’ that would help his cause, ‘or otherwise explain how his claim would be advanced by an evidentiary hearing.’” Id. (quoting Cardwell, 152 F.3d at 338). In this case, the state court received affidavits and determined that the proffered evidence and arguments did not make out a claim of ineffective assistance at the penalty phase; it thus determined that further factual development was unnecessary. See Lark III, 698 A.2d at 52 (“Lark’s offers of proof were inadequate to raise any claim upon which relief could be granted.”). Lark argues that the determination that further factual development was unnecessary was based on an unreasonable review of the record. As directed by Marshall v. Hendricks, 307 F.3d 36 (3d Cir. 2002), where the state court decision is possibly based on an unreasonable application of Supreme Court precedent because of an insufficient record, or an unreasonable determination of the facts based on an insufficient record, the district courts should hold an evidentiary hearing on an ineffective assistance claim. Id. at 116-17. The Court thus examines whether the Pennsylvania Supreme Court unreasonably applied Supreme Court precedent in holding that Lark had not alleged

a claim of ineffective assistance, and whether factual development through an evidentiary hearing is warranted.

To succeed on a claim of ineffective assistance of counsel pursuant to Strickland, a petitioner must show “both deficient performance of counsel, based on an objective standard of reasonableness, and prejudice as a result of such deficiency, such that confidence in the result of the original sentencing proceeding is undermined.” Thomas v. Beard, 388 F. Supp. 2d 489, 505 (E.D. Pa. 2005) (citing Strickland, 466 U.S. at 694). In his First PCRA Petition, Lark alleged that trial counsel’s performance at the penalty phase was objectively unreasonable for his failure to investigate and present available mitigating evidence. The Pennsylvania Supreme Court, applying Pennsylvania’s three-prong test for ineffective assistance of counsel, seemingly addressed the performance prong when it stated that trial counsel was not ineffective because he vigorously defended his client during the trial. Lark III, 698 A.2d at 51. It also noted that, at the penalty phase, counsel offered a stipulation by Lark’s mother as mitigation evidence, which testified as to “Lark’s childhood history, the death of his father and brother, the time spent in foster care, and that he has a wife and three children.”²⁰ Id. The court concluded that it is “inaccurate to say that defense counsel failed to

²⁰The stipulation was the sole piece of defense evidence presented at the penalty phase. Its contents are as follows:

Mrs. Lark, if she were called, would testify that Robert Lark is her son; that she bore 9 children and Robert Lark was her first-born; that Robert Lark attended West Philadelphia High School here in the City of Philadelphia and he graduated at age 16; that Robert lark’s father, natural biological father was John Davenport; that Mister Davenport died in 1954 at the time Robert Lark was one month – one year, two months old, less than a year and a half.

That Robert is one of eight children who now survive, Robert having lost a brother Eric who was a paraplegic, committed suicide in the year 1978, that September.

That Robert Lark at age 9 or 10 spent 3 years in 2 foster

investigate and prepare the case” because Lark did not proffer any helpful evidence of mitigation that was not cumulative of this stipulation. Id. However, trial counsel admitted that he spent only ten minutes preparing for the penalty phase. See Brief of Appellant, Ex. C, Commonwealth v. Lark, Capital Appeal No. 124 (Pa. July 24, 1996). Furthermore, Lark’s offers of proof contained potentially mitigating evidence that differed in kind from the stipulation. Namely, Lark submitted an affidavit from Yvonne O’Neill, his aunt, which stated that Lark’s mother abused drugs and was unable to support her family. See Reply Brief of Appellant, Commonwealth v. Lark, Capital Appeal No. 124 (Pa. Nov. 6, 1996). He also submitted an affidavit from Dr. Tepper, a psychologist, who attested to the substantial physical and emotional deprivation that Lark experienced during his childhood. According to Dr. Tepper, Lark’s mother was often away from the family, had an ongoing problem with drug use and distribution, and was eventually sentenced to state prison; it was not uncommon for strangers to come and go from the home at all hours for the purposes of the sale and use of drugs. See id. Ex. D. Lark himself had an escalating drug problem. Id. Dr. Tepper connected this history to Lark’s impaired development and his inability to develop a stable personality. Id. These submissions showed that Lark could have presented evidence of his tumultuous and unstable childhood, which were only partially reflected in the stipulation, in support of his claim.

Both the United States Supreme Court and the Third Circuit have emphasized the importance of an attorney’s duty to investigate his client’s background for mitigating evidence. See, e.g.,

homes. That Robert Lark has a common-law wife Cassandra Green who I believe you saw in this courtroom throughout the trial at least one or 2 occasions, that Robert Lark has fathered 3 children, 2 of who you’ve seen in this courtroom, Andria, 11 years old; Tony, 6; Female Tony and Didi, age 5.

(06/28/85 N.T. at 25.)

Wiggins v. Smith, 539 U.S. 510 (2003); Marshall, 307 F.3d at 103. A failure to investigate mitigating evidence for the penalty phase of a capital trial constitutes substandard performance within the meaning of Strickland, if there is no strategic decision behind such failure. E.g., [Terry] Williams v. Taylor, 529 U.S. 362, 395 (2000) (finding ineffective performance where counsel spent a week preparing for the penalty phase and had no strategic reason for his failure to investigate petitioner’s nightmarish childhood); see also Marshall, 307 F.3d at 99 (“[The] right to present, and to have the sentencer consider, any and all mitigating evidence means little if defense counsel fails to look for mitigating evidence or fails to present a case in mitigation at the capital sentencing hearing.” (quoting Strickland, 466 U.S. at 706). “There is no bright line rule concerning the extent of the investigation” required by Strickland. Thomas, 388 F. Supp. 2d at 505. ““A court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.”” Id. (quoting Wiggins, 539 U.S. at 527). Given that Lark offered to prove that trial counsel conducted practically no investigation, that there was some evidence of a troubled childhood that recommended further investigation, and that there was no strategic reason on the record for a failure to do so, the Pennsylvania Supreme Court’s conclusion that counsel’s performance met the standards outlined above because he presented one stipulation from Lark’s mother may be an unreasonable application of Strickland. Its holding is possibly the result of an insufficient record regarding the extent of counsel’s preparation and investigation.

The Pennsylvania Supreme Court’s decision was also based on its conclusion that there simply was no meaningful, non-cumulative mitigation evidence for trial counsel to present. Although the court did not explicitly say so, this can be construed as a holding based on Lark’s

projected inability to demonstrate prejudice. Lark again argues that the court’s conclusion is based on an unreasonable review of the record and is an unreasonable application of Supreme Court precedent. He argues that his proffers demonstrated that counsel failed to introduce relevant background information and that such information was reasonably likely to alter the result of his sentencing.

Under Pennsylvania’s sentencing scheme, a jury may consider several types of mitigating circumstances, including “any . . . evidence of mitigation concerning the character and record of the defendant” 42 Pa. Cons. Stat. Ann. § 9711(e)(8). The jury in Lark’s case found one aggravating circumstance, and no mitigating circumstances, thereby guaranteeing a death sentence.²¹ If one juror had found a mitigating circumstance that was not outweighed by the aggravating factor, it may have altered the sentence. The Court finds that the failures could have resulted in prejudice to Lark at the penalty phase, if the evidence is significant enough to have led the jury to find that mitigating circumstances exist. See, e.g., Wiggins, 539 U.S. at 536-37 (finding prejudice where “powerful” evidence of an “excruciating life history” was not investigated and presented to the jury). The Pennsylvania Supreme Court’s determination that Lark was not entitled to a hearing to present this evidence for further development was based on an unreasonable reading of the offers of proof as failing to demonstrate prejudice, and is likely an unreasonable application of Supreme Court precedent. It is difficult, however, to determine the impact of the mitigating evidence based upon the less-than-developed state court record. The Court cannot, therefore, determine the prejudice to Lark without a hearing to determine the weight of such evidence and the weight of whatever

²¹If the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if it unanimously finds that the aggravating circumstance outweighs any mitigating circumstances, the verdict must be a sentence of death. 42 Pa. Cons. Stat. Ann. § 9711(c)(iv).

evidence the Commonwealth may have presented in return. See Marshall, 307 F.3d at 108.

Lark has made serious allegations regarding counsel's performance at the penalty phase, which were resolved by the Pennsylvania Supreme Court without a full evidentiary hearing. The lack of further factual development appears to have resulted in a state court decision that is an unreasonable application of Strickland or involves an unreasonable determination of the facts based on the offers of proof presented. Accordingly, and under the guidance of Marshall v. Hendricks, the Court concludes that an evidentiary hearing is necessary for a proper evaluation of the Pennsylvania Supreme Court's decision regarding Lark's claim of ineffective assistance at the penalty phase.

For the foregoing reasons, the Court grants an evidentiary hearing with respect to Claim I in its entirety; with respect to Claim II to elicit trial counsel's testimony with respect to the following aspects of Lark's claim of ineffective assistance of counsel at the guilt phase of trial: (1) trial counsel improperly handled the suggestion of the polygraph test during Benjamin Smith's testimony; (2) he introduced incriminating out-of-court statements made by Roosevelt Purvis, Charlene Wiggins, Carolyn Purvis, and Muriel Jackson; (3) he requested that Michael Johnson's memory be refreshed by reading his prior inconsistent statement in the presence of the jury, agreed to its admission as substantive evidence, and failed to redact hearsay within the statement; (4) he failed to investigate to uncover helpful impeachment evidence showing that Lark was in North Carolina in August 1979 (the time period when he was alleged to have told people in Philadelphia that he committed the murder); and (5) he failed to object to the preclusion of a verdict on second degree murder, a lesser degree of homicide; and with respect to Claim III in its entirety.

III. REQUEST FOR DISCOVERY

Lark requests discovery pursuant to Rule 6 of the Rules Governing Section 2254 Cases in

support of two of his claims: Claim I, which is described above; and Claim X, which alleges that the Philadelphia District Attorney's Office provided witnesses with economic benefits and failed to disclose the information to Lark in violation of the Sixth, Eighth, and Fourteenth Amendments. With respect to Claim I, Lark requests the trial prosecutor's notes from jury selection in support of Claim I. In light of the Commonwealth's representation at oral argument that there are no notes in the prosecutor's case file, the parties have agreed that Lark's request for discovery of the prosecutor's notes shall be dismissed as moot. With respect to Claim X, Lark requests records and documentation pertaining to the provision of housing accommodations or cash payments to any Commonwealth witness in Lark's case by any Commonwealth agent, records pertaining to security needs for the provision of such arrangements, and the names, addresses, and titles of any individual with knowledge of the information requested. In light of the Commonwealth's representation at oral argument that there is no evidence of any such payments, the parties of have agreed that this request shall also be dismissed as moot.

An appropriate order follows.

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

ROBERT LARK	:	CIVIL ACTION
	:	
v.	:	
	:	
JEFFREY BEARD, et al.	:	No. 01-1252

ORDER

AND NOW, this 23rd day of May, 2006, upon consideration of Petitioner’s Motion for an Evidentiary Hearing and Discovery (Doc. No. 37), the Commonwealth’s response thereto, and the Oral Argument held on December 22, 2005, **IT IS HEREBY ORDERED** as follows:

1. Said Motion is **GRANTED** with respect to Petitioner’s request for an evidentiary hearing. A prehearing conference will be held on June 1, 2006 at 10:00 a.m. in Chambers. An evidentiary hearing on Claims I, II, and III of the instant Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (the “Petition”) will be held on a date to be determined at the prehearing conference.
2. Said Motion is **DISMISSED** as moot with respect to Petitioner’s request for discovery on Claims I and X of his Petition.

BY THE COURT:

s/ John R. Padova
John R. Padova, J.