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

| | | |
|---|---|---|
| **DAVID STEWARD,** | : | |
| **Petitioner,** | : | |
| **vs.** | : | **CIVIL NO. 04-3587** |
| **JAMES GRACE, et al.,** | : | |
| **Respondents.** | : | |

**RUFE, J.** **August 30, 2007**

**MEMORANDUM OPINION AND ORDER**

Before the Court is David Steward's Amended Petition for a Writ of Habeas Corpus [Doc. # 21]. Upon review of the record,[1] consideration of all filings, oral argument, and the applicable law, the Court will deny Steward's Amended Petition, for the reasons set forth below.

## BACKGROUND

### A. Facts

A summary of the facts of this case has been set out many times before by several reviewing courts, including this Court.[2] For the sake of thoroughness and completeness, however, the Court will do so again now.

In the early morning of On January 1, 1986, two burglars forcibly entered the

[1] The Court has reviewed the Amended Petition, the Commonwealth's Answer thereto [Doc. # 24], the Notes of Testimony of the Evidentiary Hearing before U.S. Magistrate Judge Caracappa [Doc. # 36], the parties' Proposed Findings of Fact and Conclusions of Law [Doc. ## 33, 34], the Magistrate Judge's Report and Recommendation ("R&R") [Doc. # 39], Steward's Objections to the R&R and his accompanying brief [Doc. ## 40, 41], the Commonwealth's Brief in Opposition to the Objections [Doc. # 42], and the parties' briefs recommending for or against adopting the R&R [Doc. ## 43, 44].

[2] Steward v. Grace, 362 F. Supp. 2d 608, 611–16 (E.D. Pa. 2005).

suburban home of Dr. Michael Groll, a prominent Philadelphia doctor. At that time, Dr. Groll, his wife, and their two daughters were all at home, sleeping. The burglars found valuables in the home which they stole, including a strand of pearls. The burglars then happened upon Dr. Groll and his wife sleeping in their bed. Dr. Groll stirred, and noticing the burglars, said: "You get out of my house!"[3] One of the burglars then pulled out a gun and shot Dr. Groll in the chest, killing him. The shooter then walked over to Mrs. Groll and took the rings from her fingers, including her wedding ring. The shooter then said, "I want everything you have, all your valuables, cash, whatever you have."[4] Mrs. Groll then went into the bathroom to get an envelope containing cash. The shooter followed Mrs. Groll into the bathroom, took the cash, and also searched her handbag, which was lying next to the bathroom sinks. After removing more cash from Mrs. Groll's handbag, the burglars left the Groll residence.

On January 15, 1986, David Steward and Christopher Briggman were arrested for the murder of Dr. Groll. Steward admitted to the police that he had killed Dr. Groll, and later that day signed a written confession to the murder. Two days later, on January 17, 1986, a police search team found a tan jacket and a pair of green trousers by a set of railroad tracks, about one-quarter of a mile from the Groll residence. The trouser legs, which were tied in knots, contained a nickel-plated .38 caliber Smith & Wesson revolver, a wooden screwdriver, a pen light, and a pair of gloves.[5]

The Commonwealth of Pennsylavnia charged Steward with murder in the first, second, and third degrees, aggravated assault, robbery, burglary, theft by unlawful taking, possessing

---

[3] N.T. 6/16/86, at 32 (trial testimony of Mary Groll).

[4] Id. at 33.

[5] Id. at 82 (trial testimony of Detective Frank C. Ciocca).

instruments of crime, criminal conspiracy, receiving stolen property, reckless endangerment, and carrying a firearm without a license. Steward pleaded not guilty and stood trial with co-defendant Briggman in June of 1986, in the Court of Common Pleas of Montgomery County. The first-degree-murder charge carried with it the possibility of the death penalty.

At trial, Mrs. Groll identified Steward as the man who had shot her husband. She testified that she saw him shoot Dr. Groll, and then "very clearly" saw his face in the "extraordinarily brightly lit" bathroom.[6] She also testified that Steward "was wearing a tan colored windbreaker style jacket that zipped up in the front."[7] Mrs. Groll then identified the tan jacket that the police had found by the railroad tracks as the jacket worn by Steward on the night of the murder. Detective John P. Durante, who investigated the crime scene, testified that on the morning of the murder, he removed a .38 caliber bullet from the pillow on Dr. Groll's side of the bed.[8] That bullet was admitted into evidence. Dr. Halbert Fillinger, who performed the autopsy on Dr. Groll's body, testified that the cause of death was a single gunshot wound, which could have been caused by a .38 caliber bullet.[9] Dr. Fillinger also testified that the bullet that had caused Dr. Groll's death had exited his body.[10] F.B.I. Agent Richard Crum, the Commonwealth's firearms-identification witness, testified that the .38 caliber revolver later found in the trousers was the same revolver that fired the bullet found in Dr. Groll's pillow.[11]

---

[6] Id. at 35.

[7] Id. at 37.

[8] Id. at 73 (trial testimony of Detective John P. Durante).

[9] N.T. 6/17/86, at 105 (trial testimony of Dr. Halbert Fillinger).

[10] Id. at 104.

[11] Id. at 143 (trial testimony of F.B.I. Agent Richard Crum).

The trial court also admitted Steward's confessions into evidence. Sergeant Daniel Rosenstein of the Philadelphia Police Department testified that after meeting Steward in the interview room on January 15, 1986, Steward "admitted to me that he murdered Doctor Groll."[12] Detective Carol Keenan of the Philadelphia Police then read Steward's written confession into the record.[13] This testimony reflects that the police read Steward his rights, which he acknowledged. The written confession is a six-page typewritten document that confirms Mrs. Groll's account of the events. Detective Keenan testified that Steward, who is college-educated, read the statement and signed each page without making any corrections.

It was in the face of this evidence that Steward's attorney, Arthur James, was charged with the task of securing Steward's acquittal. Steward entered a plea of not guilty, and asked James to argue his innocence to the jury. The record reflects that Arthur James cross-examined the Commonwealth's witnesses over three days of testimony. The record does not, however, include a transcript of James's closing argument. Because Steward raised the claim of ineffective assistance based on James's summation, this Court remanded the matter back to Judge Caracappa to conduct an evidentiary hearing and make a record of the events surrounding James's closing.[14]

At the evidentiary hearing, James testified that in his closing argument, he spontaneously changed his trial strategy and "asked the jury to find my client guilty of murder in the

---

[12] Id. at 145 (trial testimony of Daniel Rosenstein).

[13] Id. at 155–66 (trial testimony of Detective Carol Keenan).

[14] Judge Caracappa heard testimony of three witnesses at the November 4, 2005 evidentiary hearing: Arthur H. James, Esq., Petitioner David Steward, and Detective Kenneth Clark. Judge Caracappa did not enter Findings of Fact on the record after the evidentiary hearing. The testimony, however—particularly the recollection of Steward and James—does not contain any inconsistencies material to the Court's decision today. Therefore, there is no reason why the Court cannot credit the testimony of the three witnesses, and accept it as true for this decision.

second degree."[15] This is an established technique whereby a criminal defendant, in order to enhance his credibility with the jury, concedes guilt in the liability phase in order to more effectively persuade the jury to show leniency at sentencing.[16] James testified at the hearing that he remembers saying to the jury, "My client did a very dumb thing. He didn't mean to do it. He didn't want to do it. But he was using drugs and this was a dumb thing."[17] Although the jury did convict Steward of first-degree murder,[18] it imposed a sentence of life imprisonment rather than death.[19]

**B. Procedural History**

It is useful to view the procedural history in light of the two remaining issues for review. First, Steward argues that Arthur James, his trial counsel, denied him of his Sixth Amendment right to effective assistance of counsel when he spontaneously changed the trial strategy without his permission. Second, Steward argues that the Commonwealth violated the rule of Brady v. Maryland by failing to disclose the results of a hair-comparison test that revealed that a hair found on the tan jacket was not Steward's. Steward has raised both of these issues at various points throughout both the direct and the collateral review of this case.

---

[15] N.T. 11/4/05 at 12:12 (testimony of Arthur H. James, Esq.).

[16] See, e.g., Young v. Catoe, 205 F.3d 750, 757 (4th Cir. 2000) ("Toward his goal of saving Young's life, [defense counsel] decided to pursue a strategy of being straightforward with the jury during the guilt phase, attempting to thereby enhance his credibility and that of his client. [Counsel] hoped that this approach would pay dividends at the sentencing phase, persuading the jury to accept his primary argument—that Young's conduct, though reprehensible, was not so egregious as to merit a sentence of death.").

[17] N.T. 11/4/05 at 14:14.

[18] N.T. 6/21/86, at 47.

[19] Id. at 135.

1. Proceedings in State Court

As stated above, David Steward was convicted of the murder of Dr. Groll on June 23, 1986. Steward appealed his conviction. On November 18, 1987, the Superior Court of Pennsylvania dismissed his appeal for failure to file a brief.[20] On November 30, 1999, the Supreme Court of Pennsylvania reinstated Steward's direct-appeal rights,[21] based on the Court's decision in Commonwealth v. Lantzy.[22] Steward then re-filed his direct appeal with the Superior Court.

A panel of the Superior Court affirmed Steward's judgment of sentence in an opinion filed on April 25, 2001.[23] In response to Steward's argument that Arthur James had provided constitutionally ineffective assistance at the closing argument, the Court stated, "we must find this issue waived for the purposes of this direct appeal proceeding since Appellant has not provided us with a complete record of the closing arguments of trial counsel which would enable us to properly review his claim."[24] Steward did not raise the Brady issue with the Superior Court. On December 4, 2001, the Supreme Court of Pennsylvania denied Steward's petition for allowance of appeal.[25] Steward did not file a petition for a writ of certiorari with the U.S. Supreme Court, and therefore his

---

[20] Id. Ex. P.

[21] Id. Ex. HH.

[22] 736 A.2d 564 (Pa. 1999) (holding that counsel's unjustified failure to file requested direct appeal is tantamount to constitutionally ineffective assistance, justifying relief under the Pennsylvania Post Conviction Relief Act).

[23] Commw. v. Steward, 775 A.2d 819 (Pa. Super. Ct. 2001).

[24] Id. at 833.

[25] Commw. v. Steward, 792 A.2d 1253 (Pa. 2001).

conviction became final on March 4, 2002.[26]

On May 14, 2002, Steward filed a pro se petition for relief under the Pennsylvania Post Conviction Relief Act ("PCRA").[27] In the petition, Steward raised both the Brady issue[28] and the ineffective-assistance issue.[29] Steward also raised the related issue of whether Arthur James's closing argument constituted a constructive denial of counsel.[30] Because no transcript of Arthur James's closing argument was available, Steward included with his PCRA petition a Statement in Absence of Transcript, under the Pennsylvania Rules of Appellate Procedure.[31] This Statement included Steward's own recollection of the events, newspaper accounts of the trial, and testimony of Assistant District Attorney Patricia Coonahan, who served as a prosecuting attorney at Steward's trial.[32] Steward also filed various other motions, including a motion for appointment of counsel.

---

[26] For the purposes of habeas corpus analysis, a conviction becomes final "by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Under Supreme Court Rule 13.1, "a petition for a writ of certiorari to review a judgment in any case . . . entered by a state court of last resort . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment." Therefore, Steward's conviction became final when his opportunity to file a petition for a writ of certiorari expired.

[27] 42 Pa. C.S.A. §§ 9541–9546.

[28] The petition provides, "Commonwealth violated Brady when they failed to disclose exculpatory evidence, being test results of hair analyses tests conducted from various search warrants; specifically the one in which the Commonwealth ordered the extraction of hair from petitoner's head (DNA)." Resp't's Answer, Ex. VV, at 3.

[29] Under the heading "Eligibility for Relief," the petition provides: "Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." Id. at 2.

[30] The petition provides, "Petitioner was constructively denied his sixth Amendment right to the assistance of counsel during the time when trial counsel conceded to his guilt during his closing argument." Id. at 3.

[31] Under Pennsylvania Rule of Appellate Procedure 1923, "[i]f no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection."

[32] Coonahan had recounted Arthur James's closing argument on February 26, 1996, during a PCRA hearing in the case of Steward's co-defendant, Christopher Briggman. Resp't's Answer, Ex. VV.

On May 30, 2002, the PCRA court, per Judge William J. Furber, Jr., assigned Henry S. Hilles III to represent Steward. After reviewing Steward's PCRA petition, Hilles filed a motion to withdraw as counsel, as well as a "no-merit letter," dated September 23, 2002. In the no-merit letter, which was addressed to Steward, Hilles stated that his "considered conclusion . . . is that you are not entitled to any relief under the [PCRA]."[33] On October 2, 2002, the PCRA court issued an order giving notice to Steward of its "intention to dismiss the PCRA Motion without a hearing."[34] On December 16, 2002, Judge Furber entered an order dismissing Steward's PCRA Petition.[35] Steward then appealed that decision to the Superior Court.

In accordance with Pennsylvania Rule of Appellate Practice 1925(b), Judge Furber ordered Steward to file a "statement of matters complained of."[36] Steward filed his 1925(b) Statement on January 16, 2003, in which he set forth the issue of Arthur James's effectiveness,[37] but not the constructive-denial-of-counsel issue, nor the Brady issue. On April 15, 2003, the PCRA Court issued an opinion addressing the issues that Steward had set forth in his 1925(b) Statement. Applying Pennsylvania caselaw to the ineffective-assistance argument, the PCRA court held that "Counsel's strategy during the guilt phase of Steward's trial did not constitute ineffective assistance

---

[33] Id. Ex. ZZ, at 3.

[34] Id. Ex. XX.

[35] The Court has not found a copy of this order in the five exhibit volumes provided by the Commonwealth. The Court notices, however, that the order is referred to in several other court documents issued by the PCRA court. See, e.g., id. Ex. FFF, at 1; id. Ex. GGG, at 1.

[36] Under Pennsylvania Rule of Appellate Procedure 1925(b), "[t]he lower court forthwith may enter an order directing the appellant to file of record in the lower court . . . a concise statement of the matters complained of on the appeal."

[37] The 1925(b) statement asks, "Was not trial counsel, Arthur H. James, Esquire, ineffective in essentially pleading defendant "guilty" to murder in his closing summation to the jury, without ever discussing same approach with defendant, nor gaining his consent?" Resp't's Answer, Ex. DDD, at 2.

because the strategy he employed was reasonable under the circumstances and in light of the uncontroverted evidence supporting Steward's guilt such tactics did not prejudice Steward."[38] The court further held that "Steward has failed to meet the burden of proof for showing that any possible alternative strategy would have offered a potential for success substantially greater than the tactics chosen by trial counsel."[39]

The PCRA court also decided that because James's strategy to plead guilty was not constitutionally ineffective, that James did not need Steward's consent to make the closing argument. The court concluded—without any citation to authority—that "[h]aving previously found that trial counsel was not ineffective for employing this particular strategy during closing argument, we find as a corollary to that conclusion that trial counsel did not need to garner his client's consent to employ said strategy."[40] It appears too that the PCRA court doubted Steward's claim that James had not in fact consulted with him about the closing-argument strategy. The court noted that although Steward mentioned in his brief that James had not consulted with him about the change in strategy, Steward did not include in his 1923 statement "any mention or reconstructed memory . . . alluding to the failure of Attorney James to confer with Steward about the tactics used during argument."[41]

Steward appealed the PCRA court's December 16, 2002 dismissal pro se to the Superior Court. Steward again raised both the ineffective-assistance-of-counsel issue[42] and the

---

[38] Id. Ex. FFF, at 16.

[39] Id.

[40] Id. at 18.

[41] Id. at 17.

[42] In his appellate brief, Steward frames the issue: "Was not trial counsel, Arthur H. James, Esquire, ineffective in essentially pleading Defendant 'guilty' to murder in his closing summation to the jury, without ever discussing same approach with Defendant, nor gaining his consent?" Resp't's Answer, Ex. GGG, at 17.

Brady issue.[43] Steward did not set out a separate argument on constructive denial of counsel. On October 20, 2003, the Superior Court affirmed the PCRA court's dismissal, stating: "After a careful review of the briefs and record before us, we agree with the PCRA court that the issues now raised by appellant either have been previously litigated or are without merit. In support of our conclusion, we rely on the 21-page, well-reasoned Opinion of the PCRA court, a copy of which is attached hereto."[44] The state-court collateral-review process ended on May 11, 2004, when the Supreme Court of Pennsylvania denied Steward's Petition for Allowance of Appeal.

2. Proceedings in Federal Court

On July 29, 2004, Steward filed a pro se Petition for Writ of Habeas Corpus in this Court under 28 U.S.C. § 2254. Steward set forth four grounds for relief, including the Brady and ineffective-assistance-of counsel issues. Steward also filed a Motion for Discovery. Under its random-assignment system for habeas corpus cases, the Court referred the matter to U.S. Magistrate Judge Linda K. Caracappa for a Report and Recommendation. The Commonwealth then answered Steward's Petition, and filed with the Court a five-volume record of the state-court proceedings. On March 30, 2005, after reviewing the parties' briefs, the state-court record, Judge Caracappa's Report and Recommendation, and Steward's pro se Objections thereto, the Court dismissed Steward's Petition on all grounds except for the Brady and ineffective-assistance issues.[45]

The Court also ruled on Steward's Motion for Discovery. The Court granted only

---

[43] Under a heading entitled "Issues I want addressed on Appeal," Steward states: "5) Did prosecutor violate Brady rules? . . . Failure to disclose test results from fingerprints, fiber analysis and hair comparison." Id. at 23.

[44] Resp't's Answer, Ex. NNN (attachment).

[45] Steward v. Grace, 362 F. Supp. 2d 608, 623 (E.D. Pa. 2005).

Steward's request for a "Search Warrant along with Probable Cause issued . . . prior to trial, for the extraction of head hair from Petitioner to be compared with unknown hair found on perpetrator's clothing recovered at the crime scene."[46] The Court then reassigned the matter to Judge Caracappa for an evidentiary hearing and another Report and Recommendation on two issues: first, "[w]hether the prosecution, in violation of Brady v. Maryland, . . . suppressed evidence of comparison tests finding that Petitioner's hair did not match hair found on the jacket worn by the perpetrator;"[47] and second, "[w]hether Petitioner's trial counsel's closing argument constituted ineffective assistance of counsel, entitling Petitioner to habeas relief."[48] The Court also assigned counsel to Steward, and granted him leave to amend his Petition.[49]

On July 11, 2005, Steward filed, through appointed counsel, his Amended Petition for Writ of Habeas Corpus. The Amended Petition conforms to the Court's March 30, 2005 Order by setting out the two remaining grounds for relief.

Judge Caracappa held the evidentiary hearing on November 4, 2005. Both Steward and his trial counsel, Arthur James, confirmed through their testimony that Steward had not consented to James's decision to concede Steward's guilt at the closing argument. James testified: "Right before the closing argument in the case Mr. Steward indicated to me that he wanted me to inform and advise the jury that he was not the perpetrator of the crime."[50] Likewise, upon being

---

[46] Pet'r's Mot. for Discovery [Doc. # 2], ¶ 4.

[47] Steward v. Grace, 362 F. Supp. 2d at 623.

[48] Id.

[49] The Court granted Steward leave to file an Amended Petition "addressing only the two issues that will be the subject of the evidentiary hearing." Steward, 362 F. Supp. 2d at 623.

[50] N.T. 11/4/05, at 10:20.

asked by his habeas lawyer what result he sought at trial, Steward responded: "A non-guilty verdict."[51] Steward's lawyer then asked, "do you recall Mr. James saying to you at any time that he thought—that he thought he should argue something else to the jury—jury short of not guilty?"[52] To that Steward responded: "We never talked of any other strategy, no lesser degree or—conceding to guilt or any other charges or anything."[53]

When asked to explain his shift in strategy, James said:

> I was very, very afraid that Mr. Steward was going to get the electric chair. I had tried death cases before. No one had ever died on me and I didn't want Mr. Steward to be the first. My primary focus and my primary attention [sic] was to save Mr. Steward's life and I'm not sorry about what I did and I would do it again if I had the opportunity.[54]

It is important to note that although Steward did not approve of James's change in trial strategy, he also did not register his objection to it at the trial. He testifies that he was "shocked and stunned"[55] by James's closing, but did not testify that he displayed his dismay verbally—by, for example, upbraiding trial counsel during or after the summation.

The parties filed their post-hearing briefs, and Judge Caracappa filed a second Report and Recommendation on May 31, 2006, in which she recommended to the Court that Steward's Petition be dismissed on the two remaining grounds. She also recommended that the Court not grant Steward a certificate of appealability.

---

[51] Id. at 35:9.

[52] Id. at 35:10.

[53] Id. at 35:13.

[54] Id. at 12:23.

[55] Id. at 36:16.

Steward filed Objections to Judge Caracappa's R&R, and the parties filed additional briefs addressing whether the Court should adopt Judge Caracappa's R&R. The Court also heard oral argument on these issues. After reviewing all of the parties briefs filed in this Court, Judge Caracappa's R&R, the state-court record, and the applicable law, the Court will now address the merits of Steward's Amended Petition.

## II. DISCUSSION

### A. Standard of Review

Steward brings his Amended Petition under 28 U.S.C. § 2254—the statute that grants the federal courts jurisdiction to entertain a habeas petition from a person in custody under a state-court judgment.[56] In 1996 Congress amended § 2254 by enacting the Antiterrorism and Effective Death Penalty Act ("AEDPA"),[57] which considerably narrowed the scope of the federal courts' habeas review. Under § 2254(d), the federal court may grant habeas relief on only two bases: first, "if the state court's decision was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,'" and second, if the state court's decision was "'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'"[58]

Preliminarily, the Court notes that Steward has not identified which of the state-court

---

[56] 28 U.S.C. § 2254(a).

[57] Pub. L. No. 104-132, 110 Stat. 1214 (1996) (amending, inter alia, 28 U.S.C. §§ 2244, 2253–55).

[58] Chadwick v. Janecka, 312 F.3d 597, 606–07 (3d Cir. 2002) (quoting 28 U.S.C. § 2254(d)(1)). Steward's challenges to the state court's decisions are legal, not factual. Thus, the Court need not explore whether the state-court decisions are based on an unreasonable determination of the facts.

decisions he is challenging. Nevertheless, to determine whether the state court's decision was contrary to, or involved an unreasonable application of clearly established federal law, the Court must review U.S. Supreme Court precedent "as of the time of the relevant state-court decision."[59] The state-court record contains numerous decisions of the Pennsylvania courts—from both direct and collateral review. In the absence of Steward's identification of a specific state-court decision to challenge, the Court will consider U.S. Supreme Court precedent until October 20, 2003—the date that the Superior Court affirmed the PCRA court's dismissal of Steward's PCRA petition. In its order affirming the PCRA court, the Superior Court explicitly relies on Judge Furber's 21-page opinion.[60] Although this is merely the penultimate decision in Steward's collateral-review process, the final decision—the Pennsylvania Supreme Court's denial of Steward's Petition for Allowance of Appeal—is not an adjudication on the merits. Therefore, because § 2254(d) applies only to claims adjudicated on the merits in state court, the Court will review Judge Furber's opinion to determine whether it "resulted in a decision that was contrary to, or involved an unreasonable application of," decisions of the U.S. Supreme Court that were rendered on or before October 20, 2003.

---

[59] Williams v. Taylor, 529 U.S. 362, 412 (2000) (O'Connor, J., concurring) (controlling opinion).

[60] Resp't's Answer, Ex. NNN (attachment).

**B. Did Judge Furber's Opinion Result in a Decision that was Contrary to or Involved an Unreasonable Application of the Supreme Court's Ineffective-Assistance-of-Counsel Jurisprudence?[61]**

1. Adjudication on the Merits

A threshold requirement under AEDPA is that the state-court decision be a "claim that was adjudicated on the merits."[62] Under Third Circuit precedent, this means simply that the decision must "finally resolv[e] the parties' claims, with res judicata effect, . . . based on the substance of the claim advanced, rather than on a procedural, or other, ground."[63] Accordingly, a state court makes an adjudication on the merits "regardless of the length, comprehensiveness, or quality of the state court's discussion"[64]—indeed, even when "a claim is rejected without explanation."[65] Applying this rule, it is clear that because the Superior Court reviewed and approved Judge Furber's substantive opinion, it made an adjudication on the merits with respect to Steward's claim for ineffective assistance.

2. The Law of Ineffective-Assistance on October 23, 2003

Under the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." There is no dispute that this command is binding on the Pennsylvania courts. Of course, "[i]t has long been recognized that the

---

[61] Steward brings his challenge to the ineffective-assistance analysis of the R&R as Objection 1.

[62] 28 U.S.C. § 2254(d).

[63] Rompilla v. Horn, 355 F.3d 233, 247 (3d Cir. 2004), rev'd on other grounds sub nom. Rompilla v. Beard, 545 U.S. 374 (2005) (internal quotation and citation omitted).

[64] Id.

[65] Chadwick, 312 F.3d at 606.

right to counsel is the right to the effective assistance of counsel."[66]

On October 20, 2003, the two principal decisions of the Supreme Court that defined the contours of the doctrine of ineffective assistance were United States v. Cronic[67] and Strickland v. Washington,[68] both rendered on the same day in 1984. Together, these two cases establish the framework for the review of claims for ineffective assistance. Strickland provides the basic two-part test for individual errors of counsel, requiring the error to prejudice the outcome. Cronic provides an exception to this requirement in cases where the adversarial process structurally breaks down, and does not require a showing of prejudice.

In Cronic, the Court examined a mail-fraud conviction that the government obtained against Harrison Cronic after a four-day jury trial, for which defense counsel had been given only 25 days to prepare. The trial court appointed defense counsel, a real-estate lawyer with no criminal experience, to defend Cronic against a case that the government had years to assemble. On direct review, the court of appeals reversed the conviction, concluding that counsel's lack of both experience and preparation time had violated Cronic's right to effective assistance of counsel.

The Supreme Court reversed the appellate court's judgment, holding that the court of appeals' test would have required reversal "even if the lawyer's actual performance was flawless."[69] In other words, the Court concluded that although Cronic's representation may not have been ideal, that his counsel's lack of experience and time to prepare did not in itself amount to an

---

[66] McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

[67] 466 U.S. 648 (1984).

[68] 466 U.S. 668 (1984).

[69] Cronic, 466 U.S. at 652.

actual or constructive denial of counsel. The Court did, however, in dicta, outline three areas in which the adversarial process is so compromised that a presumption of prejudice would obtain, such that the accused must receive a new trial.

The first situation is when the accused is "denied counsel at a critical stage of his trial."[70] Second, prejudice is presumed when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing."[71] And third, prejudice is presumed "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not."[72] Under these limited circumstances, in which an "actual breakdown of the adversarial process"[73] occurs, ineffectiveness is "properly presumed without inquiry into actual performance at trial."[74]

Aside from these extreme circumstances, however, "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt."[75] The Court's follow-up decision in Strickland established the framework for reviewing such discrete trial errors. In Strickland, the defendant had pleaded guilty to three stabbing murders, and faced the death penalty at his sentencing. In mitigation, defense counsel decided at sentencing to argue that his client was suffering from extreme emotional distress, rather than introduce favorable character evidence. The defendant received the death penalty. The Supreme Court, reviewing defendant's federal habeas proceedings, held that defense

---

[70] Id. at 659.

[71] Id.

[72] Bell v. Cone, 535 U.S. 685, 696 (2002) (citing Cronic, 466 U.S. at 659–62).

[73] Cronic, 466 U.S. at 658.

[74] Id. at 661.

[75] 659 n.26 (citing Strickland v. Washington, 466 U.S. 668, 693–96 (1984)).

counsel's strategic decisions at sentencing were "the result of reasonable professional judgment," and that in any event, "there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances, and hence, the sentence imposed."[76]

In so ruling, the Court announced the now well-known rule that governs claims of ineffective assistance:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[77]

Thus, the Supreme Court established a framework that requires reviewing courts to defer to the decisions of trial counsel, unless those decisions are both unreasonably poor and also harm the defendant's outcome.[78] Only under the exceptions outlined in Cronic, where an actual breakdown of the adversarial process occurs, will a reviewing court reverse a conviction without determining whether the alleged errors actually affected the reliability of the trial's outcome.

As stated previously, at the time of the Superior Court's decision, a range of views existed among the federal and state appellate courts as to whether the Cronic exception applies to ineffective-assistance claims arising out of counsel's unauthorized concession of guilt.[79] Although

---

[76] Strickland, 466 U.S. at 700.

[77] Id.

[78] Id. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential.").

[79] Steward v. Grace, 362 F. Supp. 2d 608, 618 n.24 (E.D. Pa. 2005).

the application of the Cronic exception to such scenarios was not entirely clear on October 23, 2003, what is clear is that the Pennsylvania Superior Court did not have the benefit of the U.S. Supreme Court's decision in Florida v. Nixon,[80] in which the Court reviewed counsel's decision to concede guilt in a capital case. Thus, that decision cannot control this Court's review.

3. Contrary to or Unreasonable Application

The Court now looks to see whether the state court's decision was contrary to, or involved an unreasonable application of the Sixth Amendment framework described above.

*i. Contrary To*

The Supreme Court has held that "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts."[81]

---

[80] 543 U.S. 175 (2004). In Nixon, the Court held that defense counsel's concession of guilt in a capital case should be reviewed under Strickland, reasoning that although counsel had not received express permission from his client to concede guilt, counsel had attempted to get such permission but was met with silence. Both parties, as well as Judge Caracappa, have relied on this decision in their analysis. But because the Supreme Court rendered its decision in this case on December 13, 2004, after Steward's PCRA proceedings were over, the Court is not permitted to consider it on federal habeas review under § 2254(d).

The Court notes in passing, however, that were the Court permitted to review this case de novo, Nixon might have played a role in today's decision. Although the Supreme Court in Nixon held that trial counsel's concession of guilt was a Strickland case, and not a Cronic case, the Nixon facts are distinguishable from this case on a key point: Arthur James conceded Steward's guilt without even consulting with Steward. Thus, unlike the defendant in Nixon, Steward did not have the opportunity to voice his opinion about James's change in trial strategy until after closing argument began. The Nixon Court held: "*When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest* and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent." 543 U.S. at 192 (emphasis added). Therefore, while Nixon would not command reversal if it applied to this case, neither would it preclude reversal due to its distinguishing facts.

[81] Williams, 529 U.S. at 412–13 (O'Connor, J., concurring) (controlling opinion).

The Superior Court approved the PCRA court's decision to analyze Arthur James's unauthorized concession of Steward's guilt under a Strickland-type analysis. Although Judge Furber cited solely Pennsylvania law,[82] he called James's summation "a reasonable tactical decision given the uncontroverted evidence that easily supported a verdict of first-degree murder,"[83] and decided that James was "successful in having argued to the Jury to spare Steward's life with a sentence of life imprisonment."[84] Thus, Judge Furber addressed both the performance and prejudice prongs of the Strickland test. Judge Furber also rejected a Cronic-style analysis, stating: "Having previously found that trial counsel was not ineffective for employing this particular strategy during closing argument, we find as a corollary to that conclusion that trial counsel did not need to garner his client's consent to employ said strategy."[85]

Under this deferential standard of review, this court may not develop its own opinion as to whether Arthur James's unauthorized concession of Steward's guilt falls under Strickland or the Cronic exception. The Court may say only that Judge Furber's decision to analyze James's actions under Strickland is not contrary to Supreme Court precedent. The Supreme Court, reading "contrary to" to mean "'diametrically different,' 'opposite in character or nature,' or 'mutually opposed,'"[86] held that a state-court decision is contrary to law only if it "contradicts the governing

---

[82] Judge Furber's failure to cite cases of the U.S. Supreme Court is not problematic for the Commonwealth. See Sellan v. Kuhlman, 261 F.3d 303, 312 (2d Cir. 2001) ("[A] federal habeas court must defer in the manner prescribed by 28 U.S.C. § 2254(d)(1) to the state court's decision on the federal claim—even if the state court does not explicitly refer to either the federal claim or relevant federal case law.").

[83] Resp't's Answer, Ex. FFF, at 15.

[84] Id.

[85] Id. at 18.

[86] Williams, 529 U.S. at 405 (citing Webster's Third New International Dictionary).

law set forth in our cases."[87] Although another reviewing court may have found that James's unauthorized concession of guilt constituted a complete denial of counsel at a critical stage, thus bringing it under Cronic, analyzing James's performance under a more deferential Strickland analysis does not contradict Cronic, and therefore, Judge Furber did not contradict Supreme Court precedent.

Furthermore, this case does not present a set of materially indistinguishable facts from another decision of the U.S. Supreme Court. Therefore, the second method of establishing a decision "contrary to" federal law is unavailable to Steward.

*ii. Unreasonable Application*

The Supreme Court states: "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case."[88] Moreover, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."[89]

Without deciding whether Judge Furber's decision was incorrect or erroneous, the Court does not view his application of the law as unreasonable. Arthur James mounted a vigorous defense for Steward throughout the capital trial, and made a tactical decision at the trial's conclusion to change positions in order to save his client's life. Although the Court strongly disapproves of

---

[87] Id. at 406.

[88] Id. at 413.

[89] Id. at 411.

James's decision to concede guilt without first consulting with Steward, the Court cannot say that the state court's decision not to construe this as a complete denial of counsel is unreasonable. James, an experienced criminal trial lawyer, was at all times advocating for Steward's best interests, and conceded guilt only when he determined in his professional judgment that it was the only way to avoid the death penalty. It should also be noted that James's strategy succeeded. Therefore, it was not unreasonable to anaylze this as a Strickland problem, and not as a Cronic problem.

The Court must note its disapproval of Arthur James's trial tactics, which—effective as they may have been—undermined the sanctity of the attorney-client relationship. Although James's strategy may have saved Steward's life, he also flouted the axiomatic principle that the accused has the power to direct his own defense,[90] while the attorney has the power to choose the means to achieve those ends. By conflating the roles of client and advocate, James took the unwarranted risk that the trial might not reliably reach a just outcome.

The Court also registers its strong disapproval of defense tactics that tend to manufacture trial errors in order to set up grounds for a postconviction challenge. While Arthur James's motives for conceding Steward's guilt were not addressed in the R&R, the Court presumes that he was motivated solely by his obligation to prevent Steward from receiving the death penalty. The Court, however, recognizes that any attempt to subvert a just verdict in the name of achieving a better eventual result for a client is improper. While this plays no role in the Court's decision today, such attorney conduct is strongly condemned.

---

[90] See, e.g., Jones v. Barnes, 463 U.S. 745, 751 (1983) ("A defendant . . . has the ultimate authority to determine whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.") (internal quotations and citations omitted).

**C. Did the Pennsylvania Superior Court's Decision Result in a Decision that was Contrary to or Involved an Unreasonable Application of the Supreme Court's Brady Jurisprudence?**[91]

As stated above, Steward raised the Brady issue in his PCRA petition. And although the PCRA court did not address the issue in its opinion, because it did not dismiss the Brady issue on procedural grounds, the ruling was an adjudication on the merits under AEDPA.[92]

Under the holding of Brady v. Maryland, the due-process guarantee of the Fourteenth Amendment forbids a prosecutor from suppressing "evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[93] Although Steward admits that the Commonwealth told him at trial that the results of the hair-comparison test were inconclusive, he continues to argue that the Commonwealth violated Brady by failing to disclose the substance of the test results.

There can be no doubt that Steward knew that the Commonwealth performed the hair-comparison test. At the evidentiary hearing, Steward admitted: "I remember District Attorney Waters coming up to the defense table and telling Mr. James and myself that the test results were back and that they were inconclusive and that he wasn't going to use them for trial."[94]

The Commonwealth has also produced the search warrant under which it took Steward's head hair. The warrant's probable-cause affidavit states that after the Commonwealth turned over the tan jacket to the FBI for testing, the FBI "reported that a Negroid head hair, suitable

---

[91] Steward brings his challenge to the R&R's Brady analysis under Objection 2.

[92] Chadwick, 312 F.3d at 606 (state court renders adjudication on the merits under AEDPA even if claim is rejected without explanation, as long as it is not rejected on procedural grounds).

[93] 373 U.S. 83, 87 (1963).

[94] N.T. 11/4/05, 37:20.

for comparison, was found on the trousers; and a Negroid head hair, suitable for comparison, was found on the jacket."[95] Accordingly, the police believed "that the Negroid head hairs found in the trousers and jacket to be those of David Steward or Christopher Briggman and request[ed] this Search Warrant to obtain samples of their head hair for comparison with those found in the trousers and jacket."[96] Detective Kenneth Clark, who drafted and signed the warrant, testified: "The box is checked indicating that it was personally served on the defendant, Mr. Steward."[97] Steward acknowledged at the hearing that he had received a copy of the warrant at the time of the search, on May 28, 1986.[98]

There is no reason to believe that Steward could not have obtained the substance of the test results had he requested them. Therefore, the Court is satisfied that the PCRA court's decision was not contrary to, or an unreasonable application of the Brady doctrine.

## III. CONCLUSION

For all the reasons stated above, the Court will dismiss Steward's Amended Petition for Writ of Habeas Corpus. Judge Furber's opinion neither contradicts nor unreasonably applies U.S. Supreme Court precedent. The Court will, however, grant Steward a certificate of appealability on the single issue of whether the state court unreasonably applied clearly established federal law

---

[95] Commonwealth's Answer to Am. Pet. [Doc. # 24], Ex. 1, at 1.

[96] Id. at 3.

[97] N.T. 11/4/05, at 50:14.

[98] Id at 37:11.

in deciding that Steward had not been denied his right to counsel at the closing argument.[99]

An appropriate order follows.

[99] Steward brings his challenge to the R&R's recommendation not to grant a certificate of appealability as Objection 3.

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

| | | |
|---|---|---|
| **DAVID STEWARD,** | : | |
| **Petitioner,** | : | |
| **vs.** | : | **CIVIL NO. 04-3587** |
| **JAMES GRACE, et al.,** | : | |
| **Respondents.** | : | |

**ORDER**

**AND NOW**, this 30th day of August 2007, upon consideration of David Steward's Amended Petition for a Writ of Habeas Corpus [Doc. # 21], the Commonwealth's Answer thereto [Doc. # 24], the Notes of Testimony of the Evidentiary Hearing before Judge Caracappa [Doc. # 36], the parties' Proposed Findings of Fact and Conclusions of Law [Doc. ## 33, 34], Judge Caracappa's Report and Recommendation [Doc. # 39], Steward's Objections to the R&R and his accompanying brief [Doc. ## 40, 41], the Commonwealth's Brief in Opposition to the Objections [Doc. # 42], the parties' briefs recommending for or against adopting the R&R [Doc. ## 43, 44], oral argument from the parties, and the applicable law, it is hereby

**ORDERED**, that Petitioner's Objections [Doc. # 40] are **OVERRULED IN PART** and **SUSTAINED IN PART**. Objections 1 and 2 are **OVERRULED**, and Objection 3 is **SUSTAINED**; it is further

**ORDERED**, that Judge Caracappa's R&R [Doc. # 39] is **ADOPTED IN PART** and **REJECTED IN PART**. The Court will adopt Judge Caracappa's recommendation that the Amended Petition for Writ of Habeas Corpus be **DENIED**, without adopting the reasoning in her Report. The Court will not adopt Judge Caracappa's recommendation not to grant a certificate of

appealability; it is further

**ORDERED**, that the Amended Petition for Writ of Habeas Corpus [Doc. # 21] is **DENIED WITH PREJUDICE**; and it is further

**ORDERED**, that a Certificate of Appealability will issue on the single issue of whether the Pennsylvania Superior Court unreasonably applied Supreme Court precedent on October 23, 2003, when it decided that Arthur James's closing argument did not violate David Steward's right to counsel under the Sixth Amendment of the Constitution.

The Clerk shall **CLOSE** this case.

**BY THE COURT:**

**/s/ Cynthia M. Rufe**

**CYNTHIA M. RUFE, J.**