RECORD NO. 15-2807

In The
United States Court of Appeals
For The Third Circuit

ALONZO PRICE,

Appellant,

v.

CHARLES WARREN; ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, JEFFREY S. CHIESA,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF OF APPELLANT AND JOINT APPENDIX VOLUME I OF II (Pages 1 – 72)

Sean E. Andrussier
DUKE UNIVERSITY SCHOOL OF LAW
210 Science Drive
Box 90360
Durham, North Carolina 27708
(919) 613-7280

Counsel for Appellant

On the Brief:
Chase Harrington
Kathleen Perkins
Laura Revolinski
Christine Umeh
Wenbo Zhang

Students, Duke University School of Law

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISION

STATUTES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

Alonzo Price, a New Jersey state prisoner, filed a petition for a writ of habeas corpus. The district court had jurisdiction under 28 U.S.C. § 2241 and § 2254 and denied the petition on June 30, 2015. A4.[1] From that final judgment, Price timely filed a notice of appeal dated July 21, 2015, which was docketed on July 24, 2015. A1. This Court has jurisdiction under 28 U.S.C. § 1291 and § 2253.

STATEMENT OF THE ISSUE

Price was convicted after a trial in which the State argued that his DNA was on a cigarette butt recovered from a crime scene. Regarding that DNA evidence, this Court granted a certificate of appealability on "the issue of whether trial counsel was ineffective for failing to request suppression or otherwise challenge the chain of custody of the cigarette butt that was admitted into evidence." A71; *see* A416 (habeas petition); A50–59 (district court opinion); Dkt. No. 9, pp. 57–64, 67–68 (State's answer).

[1] References to the Joint Appendix are cited as "A" (A#), and transcript pages within are cited as "Tr." References to the district court's docket entries are cited as "Dkt. No." By order dated December 20, 2016, this Court granted a consent motion to modify the record to include additional materials that Price's PCR counsel filed in state court. We cite the modified record as "3d Cir. Dec. 20, 2016 Modified Record," unless excerpts from that record are in the Joint Appendix.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court. Counsel is not aware of any other case or proceeding that is in any way related, completed, pending or about to be presented before this Court or any other court or agency.

STATEMENT OF THE CASE

I. Introduction

Alonzo Price lived in Woodbine, N.J. A147–49 (Tr. 38–42). He worked at a Municipal Utilities Authority recycling center. A219–20 (Tr. 70–71).

While Price was at work on the afternoon of June 29, 2000, he was arrested by two New Jersey state police detectives—William Scull and Karl Ulbrich. *See* A265 (Tr. 100); A219–20 (Tr. 70–71); Dkt. 17, p. 7. As the State has conceded, Scull and Ulbrich used an arrest warrant that was invalid. *See* Dkt. No. 28, p.1; *see also* Dkt. 9-15, p. 11 (PCR counsel maintaining that the warrant must have been generated on June 29 and was not signed by a judicial officer). Although the warrant purportedly arose out of a past traffic matter in municipal court, Scull and Ulbrich took Price into custody for the purpose of questioning him about two then-recent burglaries in Woodbine. *See* Dkt. 10-3, p.16.

The second burglary had occurred that morning on June 29. *See* A168–69 (Tr. 125–26). The victim was Mary Perez, and the incident (discussed below) occurred at her apartment, which was on the second floor above a drug store where

she worked. A96 (Tr. 80); A207 (Tr. 40). The burglar entered her apartment through a window after ascending the roof above the store's entrance; the roof is about 11 feet from the ground and measures about 8 by 25 feet. A275 (Tr. 120); A290 (Tr. 50).

While Price remained jailed following his arrest, Perez returned to her apartment after 7:30 p.m. on June 29, accompanied by her friend Carmen Pierce. A133–34 (Tr. 9–11). While in Perez's living room, Pierce looked out the window where the burglar had entered and saw on the roof, in plain view, a piece of a filterless cigarette, i.e., a filterless cigarette butt. A134 (Tr. 11). Pierce stepped out onto the roof and retrieved the butt. A135–36 (Tr. 13–14). Perez then called the police station and spoke to Scull, A269 (Tr. 108), who already held a "firm belief" that Price was guilty of the crimes. A348.

When Perez placed that call about finding a cigarette butt, Scull and Ulbrich were aware that 12 or so hours earlier, on the morning of June 29, about a half dozen officers, including Scull and Ulbrich, had been in Perez's apartment and they did not see a cigarette butt on the roof. *See* A200–01 (Tr. 18–20); A206–07 (Tr. 37–40); A288 (Tr. 43). Scull and Ulbrich also knew that an experienced Crime Scene Investigation (CSI) detective, Gregory Coffin, went onto the roof that morning looking for evidence and did not find a cigarette butt. *See* A199 (Tr. 13–14); A332 (Tr. 14); 3d Cir. Dec. 20, 2016 Modified Record, p. 234.

After receiving the call, Scull went to Perez's apartment to collect the cigarette butt that Pierce had retrieved. A269–72 (Tr. 108–12). Scull took no notes, and he did not go onto the roof. A290–92 (Tr. 49–51, 54); A294 (Tr. 57). Nor did he take any photos of the roof or of the cigarette butt. A292–94 (Tr. 54, 56–57). Scull did not complete a Crime Scene Evidence Log for the cigarette butt, even though such a log had been completed for other items recovered from Perez's crime scene and from the location of the other burglary tried in this case. *See* A366–67. A Crime Scene Evidence Log memorializes information about the collection and transfer of each item of evidence collected. *See id.*

Scull collected that filterless cigarette butt from Perez's apartment shortly after 8:00 p.m. on June 29, 2000. A365. Perez testified that she saw Scull place the item in a plastic bag, A112 (Tr. 127); Scull said he placed the item in an envelope, A271 (Tr. 112). What happened with the cigarette butt immediately thereafter is not clear from this record.

The record does show, however, that within a few hours after Scull collected the filterless cigarette butt from Perez's apartment (and while Price remained jailed), Scull and Ulbrich and another officer executed a search warrant in the room that Price was renting in a boarding house. A355 (room entry 10:52 p.m.). And in Price's room they encountered his ashtray containing filterless cigarette butts. A187 (Tr. 166).

After searching Price's room, Scull and Ulbrich returned to the station. A269 (Tr. 107–08). One week later, on July 6, 2000, various items of evidence were sent to the lab, including a cigarette butt. *See* 3d Cir. Dec. 20, 2016 Modified Record, p. 213; *see also id.* at 168, 170.

On October 26, 2000, four months after Pierce found the cigarette butt on the roof, Scull returned to Perez's apartment to photograph the roof and depict, with a paint can lid, the location where Pierce had retrieved the butt. A272–74 (Tr. 114–17); *see also* A368–69 (Scull's photos). Scull said he "figured it[] [was] going to be an important issue as to where that was" and deemed it an "oversight" that he did not photograph the area on June 29. A273 (Tr. 116).

In a supplemental investigation report dated October 26, 2000, Scull addressed the cigarette butt that he had collected at Perez's apartment on June 29. A364–65. He wrote that the butt was "turned over to Detective Ulbrich." A365. But Ulbrich's investigation report never mentioned receiving that item. *See generally* 3d Cir. Dec. 20, 2016 Modified Record at pp. 129–71 (Ulbrich's report). Elsewhere in his report, Ulbrich recorded every piece of evidence that he handled and noted that these items were secured in the station's temporary evidence locker; a cigarette butt was not among them. *See* A353, 356–60. This record contains no log establishing that the butt from the roof was secured in the evidence locker before Scull and Ulbrich encountered the ashtray in Price's room.

Items collected by Coffin at the Perez crime scene underwent DNA testing by forensic scientist Evelyn Moses. A318, A320–23 (Tr. 135, 143–47, 151). For example, the State tested a torn pillow sham from Perez's bedroom, because Ulbrich theorized that the assailant may have held it in his teeth as he tore it. *See* A211–13 (Tr. 49–53). The torn sham did have saliva, but the lab excluded Price as a contributor to that saliva. A320 (Tr. 143–44); A324 (Tr. 154).

Regarding the cigarette butt that was sent to the lab, however, Moses tested saliva on the paper and reported that it had DNA matching Price's DNA within a reasonable degree of scientific certainty. *See* A320–22 (Tr. 144–47). The State used that DNA evidence against Price at trial. The State argued that Price must have smoked the cigarette on the roof right before entering Perez's window. *See* A333A (Tr. 40).

When Pierce was shown what remained of the cigarette butt at trial, she did not recognize it as the item that she had recovered. A137 (Tr. 16) ("It's different"). Due to the lab's handling of the cigarette butt, only tobacco shreds remained. A292–93 (Tr. 54–56). Pierce also testified that Scull's photo from October 2000 did not accurately depict the location where Pierce saw the butt. A139–40 (Tr. 20, 22).

The jury was unable to see what the butt from the roof looked like when it was recovered because Scull had not photographed it. A292 (Tr. 54). Scull

testified that, in his mind, the butt "appeared to be in relatively good condition" and "didn't appear to be weathered and old." A272 (Tr. 113). It had been raining around the time of the Perez incident; when detectives arrived that morning, it was drizzling and the roof was wet. A171–72 (Tr. 131–132).

In the defense's closing argument, Price's counsel told the jury that the butt that Pierce discovered on the roof was tested by the lab and bore Price's DNA—that it "was his cigarette." A333 (Tr. 31–32). Price's counsel did not challenge the chain of custody occurring (1) after Scull collected the filterless cigarette butt from Perez's and (2) before Scull and Ulbrich encountered Price's filterless cigarette butts in his room that same evening.

II. Price Was Convicted, And The Convictions Were Upheld On Appeal.

As noted, this case involved two criminal incidents in Woodbine in June 2000. The victim in the second incident was Mary Perez, and the victim in the first was Sadie Hamer. The State bundled the two incidents in a single case based on similarities between the two incidents, theorizing that although the State lacked sufficient proof from the Hamer burglary alone to convict for that crime, Perez's burglar must have also been Hamer's burglar. *See* A265 (Tr. 99); A334 (Tr. 54).

For both incidents, Price was indicted on October 24, 2000, and charged with a number of crimes. A78 (indictment).[2] He was convicted in 2001, but because of "a reversal and remand resulting from plain error as to the questioning of a discharged juror," Dkt. No. 9-8, p.2, he was retried in August 2004 in Cape May County, represented by new counsel.

The central issue at trial was whether Price was the perpetrator. The State called the following persons over five days between August 10–17, 2004: Hamer and Perez (the victims); Scull and Ulbrich; Pierce; Patricia Jones (Price's landlord); Lisa Jones (who also lived in the boarding house); Juan Perez (who claimed to have interacted with Price on the night of June 28); two troopers who first responded to the crimes (Mark Kosko and Richard Gabor); and three scientists from the State's lab (Theodore Mozer, Thomas Lesniak, and Evelyn Moses). *See generally* Dkt. Nos. 10-6 to 10-10 (trial transcript). After the State rested, defense counsel introduced a photo and recalled Pierce to the stand, and then presented a stipulation about what Coffin would have said had he testified. A329–32

An overview of the crimes follows below based on the trial testimony. Additional evidence offered against Price at trial is discussed below in part II of the argument regarding *Strickland* prejudice.

[2] This included multiple counts of burglary, robbery, theft, unlawful weapon possession, terroristic threats against the victims, and kidnapping (because the victims were confined with an enhanced risk of harm).

A. The Hamer burglary

On the morning of June 22, 2000, after 2:00 a.m., A247 (Tr. 46), a man entered Sadie Hamer's home by cutting and lifting a window screen. *See* A225 (Tr. 98); A245A (Tr. 41); A248 (Tr. 47); A253 (Tr. 61–62); A260 (Tr. 89–90). Hamer awoke to find the man seated on her bed. A235 (Tr. 19–20). Her TV was on, but the man told her not to look at him. A236 (Tr. 21–22). Hamer was on her back and the man lay directly on top of her. *Id.* He threatened her and put a sharp object against her neck; she feared for her life. A236–37 (Tr. 22–23); A241 (Tr. 32). He told her to roll over and put both hands behind her back, tied her hands using a piece of pillow sham that he tore, and put a pillow case over her head. A237–40 (Tr. 24–29). He asked her if she had money, and he rummaged through her furniture and belongings looking for valuables. A240–41 (Tr. 29–31); A250 (Tr. 55–56). He stole about $100 from her purse, as well as a watch and a bracelet. A251–52 (Tr. 58–60). When the man left, Hamer woke her adult son in the house, and he called the police. A244–45 (Tr. 38–39).

Hamer could not identify her assailant by voice. A254–55 (Tr. 68–69). She thought he sounded African American. A243 (Tr. 35). She estimated he was 175 pounds and tall at 5′8″ or 5′9″. A229 (Tr. 115–16); A242 (Tr. 34); A254–55 (Tr. 68–69); A285 (Tr. 33). Price at the time was 6′3″ and 225 pounds. A286–87 (Tr. 36–37). Hamer did not see her assailant's face or identify Price as her assailant.

See A236 (Tr. 21–22); A253–54 (Tr. 61, 68). Hamer was familiar with Price and had been for all of their lives. A253 (Tr. 61).

Scull was the primary detective for Hamer's case. A168 (Tr. 124). A CSI detective searched Hamer's crime scene for evidence, dusted for fingerprints, and collected items that the lab examined for trace evidence; no fingerprints or trace evidence matched Price. *See* A257A (Tr. 80); A258–59 (Tr. 85–87); A281 (Tr. 19); A282–83 (Tr. 23–25); A298–300 (Tr. 72–75).

B. The Perez burglary

The Perez burglary occurred a week later, early on June 29, 2000, close to 3:30 a.m. *See* A129 (Tr. 178). As noted, Perez lived above a drug store where she worked. The burglar climbed a ladder onto the roof, 11 feet from the ground above the store's entrance; while on the roof, he cut and lifted the screen of the window leading into Perez's living room. *See* A108 (Tr. 104–05); A170 (Tr. 128). Perez was awakened by the man's hand over her mouth. A100 (Tr. 88). He had an odor of cigarettes. *Id.*; A130 (Tr. 183); A135 (Tr. 12). He put a sharp object to her neck so she would not move. A102 (Tr. 92). She feared for her life. A105 (Tr. 99). He told her to get on her stomach and put her hands behind her back. A100–03 (Tr. 89–95). After she heard a tearing noise, the man tied her hands behind her back using torn pieces of pillow sham, and he put comforter foam in her mouth. A101–03 (Tr. 91–95); A120 (Tr. 146–47); A112A (Tr. 131).

Perez told the man she had money in her car, which was parked outside. A103 (Tr. 95). The man went to Perez's living room to get her car keys, which were on the floor, and he proceeded to her car. A103–04 (Tr. 95–97). While the man was in her car, Perez called 911. *See* A105 (Tr. 98). The dispatcher called a trooper at 3:30 a.m. as the crime was still in progress. *See* A129 (Tr. 178). The burglar fled, leaving the keys and a pair of scissors in the car. A113 (Tr. 132–33); A176 (Tr. 142). He stole $200 from Perez's purse in the car. A116 (Tr. 138–39). He had also stolen five jewelry items (three rings, a pair of earrings, and a bracelet) from Perez's bedroom dresser. A114–16 (Tr. 134–38).

Detectives Scull and Ulbrich and at least four other officers responded to the Perez crime scene that morning. A200–01 (Tr. 18–19); A206–07 (Tr. 37–40); A288 (Tr. 43). CSI detective Coffin detailed the scene, went on the roof looking for evidence, dusted for fingerprints, and collected a number of items of evidence from Perez's bedroom and car. *See* A173–76 (Tr. 137–42); A199 (Tr. 13–14); A208 (Tr. 42); A332 (Tr. 14); A366–67. Items that Coffin collected were sent to the lab; Price was excluded as a contributor to the saliva on those items, as his DNA did not match. *See, e.g.*, A319–20 (Tr. 141–44); A323 (Tr. 151); A324 (Tr. 154). No identifiable fingerprints were collected. A213 (Tr. 53).

Perez could not visually identify her assailant. A119 (Tr. 144). It was "pretty dark," A101 (Tr. 91), and she was not wearing her glasses, A100 (Tr. 89).

By feeling his short hair, she concluded he was African American. A101 (Tr. 90). He had some facial hair as if he had not shaved recently. *Id.* According to officers, Perez estimated that the burglar was approximately 5′10″ or taller, A130 (Tr. 183); A209 (Tr. 43), with a "medium build," A209 (Tr. 43). Perez said the burglar's voice sounded like Price's, but she could not be certain. *See* A130 (Tr. 183); A222–23 (Tr. 76–77). She testified that the burglar was trying to disguise his voice. A103 (Tr. 94); A122 (Tr. 158). (Voice recognition is discussed in detail below in the argument at part II.A.3.)

Aside from the cigarette-butt DNA evidence and Perez's testimony about the burglar's voice, the State's other evidence for the Perez crime is discussed below, in part II.A of the argument which addresses *Strickland* prejudice. This evidence included clothing from Price's room; testimony about scissors in Perez's car; statements that Price allegedly made to Scull and Ulbrich in custody after they arrested him with the invalid warrant, including an alleged statement (contradicted by other testimony) that he was home for the night after 8:00 p.m. on June 28, 2000; and Price's one-hour late arrival to work on June 29, 2000.

C. Verdict, sentence, and direct appeal

On August 19, 2004, the jury rendered a guilty verdict for the crimes charged. *See* A338–41(verdict).[3]

[3] The jury was not charged on counts 10, 12, and 16 of the indictment.

Price was sentenced on September 8, 2004 to an aggregate extended term of life in prison with a 25-year parole ineligibility term, plus 30 years in prison with a 15-year period of parole ineligibility. Dkt. No. 10-13 (sentencing hearing); A346–47 (criminal judgment); *see also* Dkt. No. 9-8, p. 2 (summarizing his sentence).

The Appellate Division affirmed the convictions on November 15, 2006, with one exception not relevant here. Dkt. No. 9-8.[4] The New Jersey Supreme Court denied a petition for certification on March 17, 2007. Dkt. No. 9-13.

III. Price Unsuccessfully Applied For Post-conviction Relief, And The District Court Denied Price's Federal Habeas Petition.

Price applied *pro se* for post-conviction relief (PCR) on April 23, 2007, Dkt. No. 9-14, and his appointed attorney advanced PCR claims on his behalf to the Superior Court ("PCR court"). Dkt. Nos. 9-15 & 9-16 (briefs); *see also* 3d Cir. Dec. 20, 2016 Modified Record (PCR counsel's exhibits). Among the claims was an ineffective-assistance claim based on trial counsel's failure to attack the chain of custody for the DNA evidence, given the risk of substitution or tampering after Scull took the butt that Pierce retrieved from the roof. Dkt. No. 9-15, pp. 11–18.

The PCR court (Judge Raymond Batten) heard arguments on the motion, Dkt. 10-15, and later rendered an oral decision on January 14, 2009, denying the motion without an evidentiary hearing. A370 (decision); A402 (order).

[4] A third-degree theft conviction (count 15) was vacated because the Appellate Division had ruled that the charge was not supported by evidence. Dkt. 9-8, p. 5.

The Appellate Division affirmed on March 8, 2011, A403, and adopted the PCR court's reasoning on the ineffective-assistance claim at issue here. A404–05. The New Jersey Supreme Court denied a petition for certification on July 22, 2011. A408.

In April 2012, Price filed a *pro se* federal habeas petition under 28 U.S.C. § 2254 in the U.S. District Court for the District of New Jersey. A409. The State answered. Dkt. No. 9. The district court denied his petition on June 30, 2015, and denied a certificate of appealability. A4 (order); A5 (opinion). Price timely appealed to this Court, and on August 25, 2016, this Court granted a certificate of appealability "on the issue of whether trial counsel was ineffective for failing to request suppression or otherwise challenge the chain of custody of the cigarette butt that was admitted into evidence." A71.

SUMMARY OF ARGUMENT

I. The claim before this Court involves *Strickland*'s application to DNA evidence used by the State to put Price at the scene of the crime. This record contains no log establishing that the filterless cigarette butt discovered by Pierce was secured in the evidence locker *before* Scull and Ulbrich returned to the station after encountering Price's filterless cigarette butts in his room on June 29, 2000. This gap in the chain of custody calls into question whether the cigarette butt that was sent to the lab for DNA testing was indeed the butt that Pierce retrieved from

the roof. Counsel rendered ineffective assistance by failing to attack the chain of custody after Scull acquired Pierce's discovery.

The PCR court's rejection of this claim was objectively unreasonable. In concluding that counsel performed reasonably at trial, the PCR court reasoned that counsel attempted to "discredit" this evidence. Although counsel argued that the crime-scene investigators failed to find a cigarette butt on the roof, counsel did not attack the chain of custody that followed Scull's collection of Pierce's discovery or raise the prospect of substitution or tampering. To the contrary, counsel forfeited that attack by inexplicably *conceding* that the butt found on the roof was sent to the lab and bore Price's DNA—that it was *his cigarette* on the roof. This concession effectively put Price on the roof near the burglar's point of entry, leaving the jury with no real option but to find Price guilty.

Also objectively unreasonable was the court's conclusion that counsel was not deficient for failing to seek exclusion of this DNA evidence altogether by filing a suppression motion based on the gap in the chain of custody.

II. Price established *Strickland* prejudice. Although the PCR court assessed prejudice in determining whether a judge would have granted a motion to suppress the evidence, the PCR court did not assess whether counsel's failure at trial to attack the crucial gap in the chain of custody prejudiced Price. Thus, on

that aspect of the claim, AEDPA deference is not warranted. But even with AEDPA deference, Price has established prejudice.

It was objectively unreasonable for the PCR court to conclude that there was no reasonable probability that a properly framed suppression motion would have been granted. And, regardless of the admissibility of the evidence, Price was prejudiced by counsel's failure during trial to attack the gap in the chain of custody and instead concede that the butt on the roof was Price's. DNA evidence has a unique and potent influence on jurors. And the State's other evidence, so much of which rested on the accounts of Scull and Ulbrich, was inconclusive. Attacking the gap in the chain of custody instead of conceding that the butt on the roof was Price's would have altered the complexion of the case for the jury, with a reasonable probability that at least one juror would have harbored a reasonable doubt about Price's guilt.

STANDARD OF REVIEW

Because the district court dismissed Price's habeas petition without holding an evidentiary hearing, this Court's review of the district court's decision is de novo. *Outten v. Kearney*, 464 F.3d 401, 413 (3d Cir. 2006).

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), if a state court adjudicates the merits of a claim, federal habeas relief is unavailable unless the state court's adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); *see Harrington v. Richter*, 562 U.S. 86, 101 (2011) ("A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision.") (internal quotation marks omitted). Under § 2254(d)(1), a state court decision unreasonably applies federal law if the "state court identifies the correct governing legal rule . . . but unreasonably applies it to the facts." *Williams v. Taylor*, 529 U.S. 362, 407 (2000). AEDPA's hurdle in § 2254(d) is cleared if the state court's application of federal law was "objectively unreasonable." *Id.* at 409; *accord Lockyer v. Andrade*, 538 U.S. 63, 75 (2003).

For an ineffective-assistance claim, *Strickland v. Washington*, 466 U.S. 668 (1984) constitutes clearly established federal law for purposes of § 2254(d)(1). *Williams*, 529 U.S. at 391. Thus, review under § 2254(d) asks if the state court applied *Strickland* in an objectively unreasonable manner or rendered a decision that was based on an unreasonable determination of the facts. *See Outten*, 464 F.3d at 419, 422; *Blystone v. Horn*, 664 F.3d 397, 417–18 (3d Cir. 2011). If a petitioner clears § 2254(d) by showing that a state court unreasonably applied

Strickland, a federal court must review the claim de novo. *See Panetti v. Quarterman*, 551 U.S. 930, 953 (2007); *Breakiron v. Horn*, 642 F.3d 126, 131, 137, 138 (3d Cir. 2011). A petitioner fulfills *Strickland*'s two-part standard by showing that "counsel's performance was deficient" and that this "prejudiced the defense." *Strickland*, 466 U.S. at 687.

In this case, at the PCR stage, the last state court decision on the merits was the Appellate Division's. On the ineffective-assistance claim in question, the Appellate Division substantially adopted the reasoning of the PCR court, making it appropriate to address the PCR court's reasoning. *See Blystone*, 664 F.3d at 417 n.15 ("Where a lower state court opinion represents the state courts' last reasoned opinion on [the relevant issue], we 'look through' the higher state court-opinion and apply § 2254(d)'s standards to the 'highest reasoned opinion.'") (alteration in original) (quoting *Bond v. Beard*, 539 F.3d 256, 289–90 (3d Cir. 2008)).

ARGUMENT

The Sixth Amendment right to the "Assistance of Counsel" requires "the assistance necessary to justify reliance on the outcome of the proceeding." *Strickland*, 466 U.S. at 691–92. Although under AEDPA a federal court gives "substantial deference" to a state court's ruling on a PCR motion, *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015), that "deference does not imply abandonment or abdication of judicial review," *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

And while the *Strickland* standard itself gives deference to trial counsel, it is "by no means insurmountable." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986); *see, e.g.*, *Branch v. Sweeney*, 758 F.3d 226, 235–36, 238, 241 (3d Cir. 2014) (concluding, under AEDPA, that a New Jersey PCR court unreasonably applied *Strickland* regarding counsel's failure to call two additional witnesses that the PCR court deemed merely cumulative). Even a "single, serious error may support a claim of ineffective assistance of counsel." *Kimmelman*, 477 U.S. at 383.

I. Price's Trial Counsel Performed Deficiently, And The PCR Court's Contrary Conclusion Was Objectively Unreasonable.

Strickland's performance prong is fulfilled if counsel's performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. A court determines "whether, in light of all the circumstances, the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance." *Id.* at 690. A "defendant must overcome the presumption that, under the circumstances, the challenged actions might be considered sound trial strategy." *Id.* at 689 (internal quotation marks omitted).

The claim before this Court involves the application of *Strickland* to DNA evidence. That evidence was on a filterless cigarette butt, an easily interchangeable object consisting of just paper and tobacco. With an interchangeable object, documenting the chain of custody is necessary "to avoid any inference that there has been substitution or tampering." *State v. Brown*, 238

A.2d 482, 484 (N.J. Sup. Ct. App. Div. 1968); *see also* Christopher B. Mueller & Laird C. Kirkpatrick, 5 *Federal Evidence* § 9.10 (4th ed. 2013) ("Mueller & Kirkpatrick") (observing that a demonstrated chain of custody "insur[es] that the object offered at trial is the very one connected to the party, transaction, or events, and of providing some assurance that it has not been materially altered").

When the government fails to establish a reliable chain of custody, a defendant can urge the jury to discount the weight of that evidence. After all, "questions about the chain of custody might cause the jury to acquit even though the evidence was properly admitted." 3d Cir. Mod. Crim. Jury Instr 4.12, cmt. That is why this Circuit's model chain-of-custody instruction tells jurors they "may consider *any* defects" in the chain, and that "[t]he government must prove beyond a reasonable doubt that the [disputed evidence is] the same as" what the government claims it to be. *Id.* (emphasis added).

After Scull collected the filterless cigarette butt that Pierce retrieved from the roof (and while Price remained jailed after Scull and Ulbrich had illegally arrested him on the invalid warrant), Scull and Ulbrich entered Price's room in the boarding house and, convinced of his guilt, came upon his ashtray containing filterless cigarette butts. This raised the prospect of substitution or tampering. It presented an opportunity to create an ironclad case against the man of whose guilt

they were firmly convinced, at a time when they could not know if fingerprints or the lab's testing of trace evidence would provide a match to Price.

Scull and Ulbrich also had reason to be skeptical that the butt retrieved by Pierce would be linked to Perez's burglar. They knew that an experienced crime-scene investigator (Coffin) did not see a cigarette butt when he was physically on that roof while looking for evidence. *See* A199 (Tr. 13–14); A332 (Tr. 14). It was not a large roof. Additionally, Scull and Ulbrich knew that they and other officers, perhaps a half dozen in all, were in Perez's home that morning, and yet none had reported seeing the butt that Pierce later saw in plain view from Perez's living room. *See* A200–01 (Tr. 18–19); A206–07 (Tr. 37–40); A288 (Tr. 43).

Moreover, when Scull went to Perez's home to retrieve the cigarette butt discovered by Pierce, Scull took no notes or photographs. A290–92 (Tr. 49–52). He never photographed the cigarette butt to document its appearance or condition. *See* A292 (Tr. 54).[5] He did not fill out a Crime Scene Evidence Log to document the collection and subsequent transfer of the cigarette butt. *See* A366–67 (Crime Scene Evidence Logs memorializing the collection and transfer of the other evidence collected from the Perez and Hamer residences).

[5] Nor did he photograph the roof. It was four months later when Scull returned to photograph the roof. He put a paint can lid on the roof to depict where he thought Pierce had seen the cigarette. A291 (Tr. 51–52); A368–69 (photos). Pierce testified that Scull's photo portrayed the wrong location. A139 (Tr. 20–21).

In his supplementary report (dated October 26, 2000), Scull wrote that after he collected the cigarette butt, it was "turned over to Detective Ulbrich." A365. But Ulbrich's report, which extensively documented each item of evidence he handled, says nothing about him handling that cigarette butt. Ulbrich's report says "Scull took the item into evidence and obtained the information regarding it's [sic] discovery and collection." A355.[6] Ulbrich's report distinguished taking an item into evidence (i.e., collecting it) from securing it in the evidence locker. *See, e.g.*, A359 (Ulbrich "took [a screen] into evidence" and "returned to the Woodbine Station and placed the screen in the temporary evidence locker").

On top of this irregularity, Ulbrich was careful to note in his investigation report the items that he had secured in the evidence locker.[7] But nowhere in his

[6] Presumably based on this remark, the PCR court said "[t]he cigarette butt found by Ms. Perez was taken into evidence by Detective S[c]ull before the defendant's room was searched." A380 (Tr. 20–21). Based on that sequence of events, the PCR court explained that a butt from Price's room could not have been *planted* on the roof because Price's room was not searched until after Pierce discovered the butt and gave it to Scull. We do not disagree. Price is not claiming that a butt from his room was planted on the roof. Rather, he argues that a chain of custody is required to eliminate the prospect that the cigarette butt discovered by Pierce was substituted with a different butt after it was collected by Scull. The district court below seemed to overlook this distinction. *See* A54.

[7] *See* A358 (photo of item from Perez crime scene: Ulbrich "returned to the Woodbine Station with the photograph and placed same in the temporary evidence locker"); A359 (Perez's screen: he "took [it] into evidence" and "returned to the Woodbine station and placed the screen in the temporary evidence locker"); A357 (control samples from Perez's: he "transported [them] back to the Woodbine

report did Ulbrich state that he or anyone else secured the cigarette butt from the roof by logging it into the evidence locker, much less that this happened before Scull and Ulbrich returned to the station from Price's room.

We are unaware of a log establishing that Pierce's discovery was secured in the evidence locker *before* the detectives returned to the station from Price's room after they encountered his ashtray containing filterless cigarette butts. Hence the gap in the chain of custody, which calls into question whether the cigarette butt that was sent to the lab for DNA testing was the butt retrieved from the roof.

The PCR court first addressed counsel's performance at trial, and then counsel's failure to file a suppression motion. We proceed in that same order.

A. The PCR court unreasonably applied *Strickland* in assessing counsel's performance at trial.

In concluding that counsel performed reasonably at trial, the PCR court reasoned that, in cross-examination and closing, counsel attempted to "discredit" the cigarette-butt evidence. A391.[8] But while counsel did try to discredit the

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Station where they were placed in the temporary evidence locker"); A356 (items from Price's room: "packaged separately, sealed, and transported back to the Woodbine Station where they were placed in the temporary evidence locker"); A353 (M. Perez tape-recorded statement: "placed in the temporary evidence locker"); A359 (same for another taped statement); A360 (another taped statement: "placed in the Woodbine Station temporary evidence locker").

[8] Specifically, the PCR court referenced counsel's cross-examination of Scull and Ulbrich and the purported cross of Coffin. We say "purported" because, in fact,

notion that the butt was on the roof during the crime (based on the investigators' failure to find a butt on the morning of June 29, as well as Scull's sloppy procedures at Perez's apartment when collecting Pierce's discovery), counsel did *not* attack the gap in the chain of custody occurring after Scull acquired the butt at Perez's home. To the contrary, counsel inexplicably *conceded* that the butt on the roof was tested by the lab and determined to bear Price's DNA.

Counsel's concession occurred in the defense's closing argument. Price's counsel told the jury that the cigarette butt that Pierce retrieved from the roof was indeed Price's cigarette with his DNA:

> I don't question Carmen Pierce. She saw it. She went and got it and gave it to Detective Scull. *The cigarette butt is such a main part of the State's case* and we don't really have any significant information on it. *We know that ultimately it's tested. And that the DNA is linked to, [with] reasonable certainty to Alonzo Price. It was his cigarette*. I don't know what that establishes especially when it's not recovered that morning.

A333 (Tr. 31–32) (emphasis added).

By unnecessarily conceding that the cigarette butt analyzed by the lab for DNA was the same butt found on the roof, counsel forfeited any attack on the

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defense counsel at the 2004 retrial never examined Coffin. The Coffin cross cited by the PCR court was from the 2001 trial, when Price was represented by a different attorney; that cross was submitted to the PCR court as an exhibit by Price's PCR counsel. Price's counsel at the second trial failed to subpoena Coffin, and Coffin did not appear; instead, counsel introduced a short joint stipulation about what Coffin would testify about if he were available. A332 (Tr. 14).

chain of custody occurring after Scull acquired Pierce's discovery.[9] Counsel did not advance an argument about that gap or the detectives' access to the filterless cigarette butts in Price's room. Counsel's concession effectively placed Price on the very roof that Perez's burglar used to enter her apartment.

The PCR court did not conclude that counsel's decision was a strategic one, and no strategic reason explains counsel's concession. By conceding that the butt found on the roof was Price's (while simultaneously arguing that it was not on the roof that morning), counsel's approach was untenable. No rational jury could conclude that a cigarette *with Price's DNA* appeared on the roof between mid-morning (after investigators departed Perez's) and early evening. In fact, the jury was aware that during that period, Price could not have been there: Price clocked into work by 7:00 a.m., A279 (Tr. 7), so he surely left for work before investigators departed Perez's. And, while it is far from clear whether counsel was trying to suggest that a butt was planted on the roof, *see* A333 (Tr. 31) ("I don't question Carmen Pierce."), a planting theory could not work because the detectives indisputably did not have access to Price's filterless cigarette butts until after Pierce's discovery.

[9] Unsurprisingly, given counsel's concession that it was Price's cigarette, the jury received no instruction on chain of custody. Such an instruction could have told jurors to consider the gap when assessing the weight of the DNA evidence.

Since the cornerstone of counsel's theory was an argument that no cigarette butt was on the roof until after the burglary, it was also egregious that counsel gave the prosecutor free reign to insinuate that the sole defense exhibit may have revealed a butt on the roof during the investigators' crime-scene investigation. To establish that no butt was on the roof that morning, counsel planned to cross-examine Coffin, the investigator who had photographed the roof after the Perez crime. *See* A316–17 (Tr. 111–13); A325–26 (Tr. 156–57). Price's counsel failed to subpoena Coffin, however, expecting the State to call him, since the State subpoenaed him. A324–26 (Tr. 154–57). When the State rested without calling Coffin, Price's counsel scrambled to get a photo of the roof that Coffin had taken; upon receiving the photo, counsel presented it to the jury and recalled Pierce to the stand. *See* A327–28 (Tr. 3–6); A329–32 (Tr. 8–13). In cross-examining Pierce, the prosecutor remarked that the photo may have shown "a white object of some sort." A332 (Tr. 13) (Q: "Does there appear [in the photo] to be a white object of some sort on the roof? Do you see where I'm looking? A: Yes. Q: Can you tell from here what that object is? A: I can't.").

Despite the prosecutor's insinuation about a white object in the photo, Price's counsel responded with nothing about that defense exhibit. The white spot could have been a stain on the roof rather than an object, much less a small cigarette butt, and it may not have even been at the specific location where Pierce

saw the cigarette butt. But Price's counsel did not redirect Pierce or even mention the photo in the closing argument. The prosecutor capitalized on counsel's silence by using the defense exhibit and exhorting the jury in summation, "[W]hat I see is clearly a white object some distance away about the size that one might expect a small cigarette butt to be." A336 (Tr. 74). Because counsel conceded that the cigarette butt on the roof was Price's, counsel left Price exposed if the jury were to agree with the State that the investigators simply missed the cigarette butt (particularly since, without a photograph documenting the butt's condition when found, all the jury had regarding the butt's age was Scull's testimony that, in his mind, the butt did not look old or weathered).[10]

[10] *See Siehl v. Grace*, 561 F.3d 189 (3d Cir. 2009). In *Siehl*, counsel stipulated at trial that a fingerprint found at the crime scene (on a showerhead above the bathtub where the stabbing victim lay dead) belonged to the defendant Siehl (who was married to but living apart from the victim). *Id.* at 192, 196. Counsel was aware the State would offer testimony not only that the print was Siehl's, but also about the print's age and position—that its appearance indicated it was left within 24-36 hours of when the body was discovered (a period in which the murder occurred), and that its position indicated it was left by someone standing outside the tub. *Id.* at 196. Counsel's "decision to stipulate that the print was Siehl's without any intention to counter that expected testimony [e.g., about the print's age] was ineffective because it effectively admitted that he was the murderer." *Id.* Counsel's failure to challenge the testimony, a failure alleged to have arisen from an inadequate investigation, "would likely lead the jury to conclude" that Siehl "had been in the victim's bathroom within 24 hours of the discovery of the fingerprint" and "had stood outside and beside the tub and directed the showerhead toward the place where the victim's body was found lying in the tub." *Id.*

The PCR court unreasonably failed to appreciate the damning impact of the defense's concession. *Cf. Breakiron*, 642 F.3d at 142–43 (concluding that a state supreme court was objectively unreasonable in concluding that counsel did not perform deficiently when he failed to take corrective action during voir dire, and noting that the state court unreasonably characterized the record, including testimony). Oddly, the PCR court said it was "particularly [during] Defense's closing argument" that counsel "clearly implied that there were defects surrounding the finding of the cigarette butt." A391 (Tr. 43). But whatever defects counsel was implying about "the finding" of the butt (namely, that investigators did not find it), counsel was not challenging the chain of custody *after* Pierce's find was turned over to Scull. Instead, counsel inexplicably conceded that the butt tested by the lab for DNA was the butt found on the roof—that it "was his [Price's] cigarette." A333 (Tr. 32). That doomed Price's defense.

The right to effective assistance of counsel is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984). *Strickland* certainly embraces a presumption that counsel "made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. But that presumption is rebutted by showing that defense counsel's challenged action cannot "be considered sound trial strategy." *Id.* at 689; *see Thomas v. Varner*, 428

F.3d 491, 500 (3d Cir. 2005); *see also Branch*, 758 F.3d at 234–38 (concluding that the record revealed no justification, strategic or otherwise, to support counsel's failure to call two additional witnesses at trial, and therefore the PCR court unreasonably applied *Strickland*'s performance prong).

In Price's case, the central issue was the identity of Perez's perpetrator. The State was offering DNA evidence and arguing that it tied Price to the crime scene—that Price's cigarette was on the roof that Perez's burglar used to enter her apartment. No sound strategy supported counsel's decision to forgo an attack on the chain of custody and concede that Price's DNA was on the cigarette butt found on the roof. Counsel's performance was plainly deficient, and the PCR court's contrary decision was objectively unreasonable.

B. Counsel was deficient for failing to seek exclusion of the DNA evidence based on the gap in the chain of custody.

Given the power of DNA evidence and the gap in the chain of custody, it was incumbent on counsel to seek exclusion of the evidence. But when Price was tried in 2004, his counsel did not try to exclude that evidence, either by moving in limine to suppress it or by objecting at trial to its admission into evidence. *Cf. Kimmelman*, 477 U.S. at 385 (recognizing that the failure to "file a timely suppression motion, not due to strategic considerations, but because" of inadequate preparation, can constitute ineffective assistance).

To be admitted, evidence must be authenticated. Because authenticating physical evidence should entail establishing "an uninterrupted chain of possession," *State v. Brunson*, 625 A.2d 1085, 1093 (N.J. 1993), "[s]erious gaps in the chain or suspicious discrepancies in the records . . . may raise enough doubt to require exclusion," Mueller & Kirkpatrick, § 9.10. Although the State need not "negate every possibility of substitution," proof of acquisition and subsequent handling is essential "to avoid any inference that there has been substitution or tampering." *Brown*, 238 A.2d at 484–85 ("The question is one of reasonable probability that no tampering has occurred.").

Price's counsel was deficient for not moving to suppress the DNA evidence or objecting to its admission based on the gap in the chain of custody occurring after Scull acquired the butt at Perez's apartment and the attendant irregularities. Again, no log that we are aware of demonstrates that the butt from the roof was secured in an evidence locker *before* detectives encountered filterless cigarette butts in Price's room. Moreover, because Scull took no photo to document the butt's condition, the jury had no way to independently assess the item's condition or appearance when it was recovered from the roof—and thus had no way to assess for itself how long the butt might have been there and the conditions to which it

was exposed.[11] And since only shreds of tobacco remained after lab testing, Pierce could not establish that the butt tested by the lab looked the same as the item that she found. A137 (Tr. 16–17) ("It's different.").

The PCR court hypothesized that a suppression motion was unlikely to prevail because normally a gap in the chain goes to the weight of evidence, not admissibility. A391–92 (Tr. 43–44). It is unclear whether the PCR court made that assessment only under *Strickland*'s prejudice prong, or also under the performance prong. To avoid redundancy, we explain below, in part II.B (prejudice), why it was unreasonable to conclude there was no reasonable probability a judge would have granted a properly framed motion to suppress.[12]

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[11] When the detectives responded to the Perez incident, it was drizzling and the roof was wet. A172 (Tr. 132); A203 (Tr. 30). DNA can wash off in the rain, a point which Price's counsel also neglected to raise. *See State v. Grady*, No. 14-0586, 2015 WL 1817029, at *5 n.12 (Iowa Ct. App. Apr. 22, 2015) (observing that the state's DNA specialist was unable to develop a DNA profile from a cigar tip he tested and that he "explained the thirty-minute rain shower before the cigar tip was taken into evidence 'absolutely' could have interfered with the DNA because the rain 'may dilute' or 'wash away' the saliva that had been on it"); *Argeta v. McDonald*, No. CV 14-04051-AB, 2015 WL 5998717, at *9 (C.D. Cal. June 23, 2015) (noting the state's testimony that the crime lab declined to test items "found at the crime scene for the presence of DNA because . . . rain on the night of the shooting likely washed away any DNA"), *report and recommendation adopted*, No. CV 14-04051-AB (DFM), 2015 WL 5971534 (C.D. Cal. Oct. 13, 2015).

[12] This would not have been the first case in which a gap in the chain of custody warranted exclusion of cigarette-butt evidence. *See Ex parte Cook*, 624 So.2d 511 (Ala. 1993). In *Cook* the victim was stabbed to death at his home. Investigating officers recovered cigarette butts at the crime scene. *Id.* at 512. Two days later,

II. Price Has Established *Strickland* Prejudice.

Prejudice is met by showing a "reasonable probability" that but for counsel's deficiency, the outcome would have been different. *Strickland*, 466 U.S. at 694. The petitioner "need not show that counsel's deficient performance more likely than not altered the outcome of the case—rather he must show only a probability sufficient to undermine confidence in the outcome." *Grant v. Lockett*, 709 F.3d 224, 235 (3d Cir. 2013) (internal quotation marks omitted). This standard is not "stringent" and "is 'less demanding than the preponderance standard.'" *Branch*, 758 F.3d at 238 (citation omitted). Of course, "*Strickland* prejudice does not depend on the sufficiency of the evidence despite counsel's mistakes." *Saranchak v. Sec., Pa. Dep't of Corr.*, 802 F.3d 579, 599 (3d Cir. 2015).

In this case, the Appellate Division did not address prejudice. Insofar as that court adopted all of the PCR court's reasoning, the PCR court adjudicated prejudice only in reasoning that it was unlikely that *a judge* would have *granted a*

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officers executing a search warrant at the defendant's mobile home discovered and collected cigarette butts there as well. *Id.* A toxicologist testified at trial that she received a sealed envelope with cigarette butts and they had saliva matching the defendant's blood type. *Id.* at 513–14. The officer who directed and observed the collection of the butts from both sites testified at trial, but no witness testified "regarding the handling and safeguarding" of the butts after they were recovered. *Id.* at 513. So, "[a] link was . . . missing in the chain of custody of the cigarette butts," as "the State did not establish when these items were sealed or how they were handled or safeguarded from the time they were seized until [the lab] received them." *Id.* at 514. For these reasons, Alabama's Supreme Court held that the trial court erred in admitting this evidence. *Id.*

motion to suppress the evidence, given the general principle that chain-of-custody issues normally go to the weight and not the admissibility of evidence. *See* A391–92 (Tr. 43–44). The PCR court did not adjudicate whether, at trial, counsel's failure to attack the gap in the chain of custody discussed above prejudiced Price in terms of influencing the jury's verdict. *See* A380–91 (Tr. 21, line 12, to Tr. 42, line 2). With respect to counsel's trial performance, the PCR court relied only on *Strickland*'s performance prong. *See id.*; *cf. Strickland*, 466 U.S. at 697 ("[T]here is no reason for a court . . . to address both components of the inquiry if the defendant makes an insufficient showing on one."). The PCR court never specifically addressed the probability of a different jury verdict.

Accordingly, this Court should review de novo whether Price was prejudiced by counsel's deficient performance at trial. AEDPA does not require a federal court to "fill a non-existent gap." *See Dennis v. Sec., Pa. Dep't of Corr.*, 834 F.3d 263, 281 (3d Cir. 2016) (en banc) (internal quotation marks omitted). For example, in *Porter v. McCollum*, 558 U.S. 30 (2009), the Supreme Court reviewed de novo the performance prong of a state prisoner's *Strickland* claim since the state court had denied relief on the prejudice prong alone. *See id.* at 39 ("Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim de novo."); *see also Breakiron*, 642 F.3d at

145 (addressing the prejudice prong of a state prisoner's *Strickland* claim de novo because on that claim the state court rendered a decision only on performance).

Even with AEDPA deference, however, Price has established *Strickland* prejudice, given the powerful impact of DNA evidence on jurors and the inconclusive nature of the State's other evidence.

A. DNA evidence has a unique influence on jurors, and the State's other evidence was inconclusive.

To jurors, DNA evidence is unusually persuasive. *See McDaniel v. Brown*, 558 U.S. 120, 136 (2010) ("Given the persuasiveness of [DNA] evidence in the eyes of the jury, it is important that it be presented in a fair and reliable manner."). Jurors view DNA evidence as "qualitatively different from other evidence because of its presumed scientific rigor and accuracy." Joel D. Lieberman et al., *Gold Versus Platinum: Do Jurors Recognize the Superiority and Limitations of DNA Evidence Compared to Other Types of Forensic Evidence?*, 14 Psych. Pub. Pol. & L. 27, 32 (2008). As researchers have put it, "a mystical aura of definitiveness often surrounds the value of DNA evidence." *Id.* at 27.

Here, it is reasonably probable that a juror would hang her hat on counsel's concession about the DNA evidence—which located Price's DNA on the roof near the window where Perez's cigarette-reeking perpetrator entered—without getting caught up in disputes about other evidence. The State's other evidence was qualitatively different than the DNA evidence and inconclusive.

1. No other evidence at either crime scene provided a biological match to Price.

Beyond the cigarette butt, the State was unable to link DNA evidence to Price. Other evidence that the State hoped would bear an assailant's DNA did not match Price. The State had Perez's torn pillow sham tested for DNA evidence on Ulbrich's theory that the assailant held the sham in his teeth as he tore it, *see* A211–13 (Tr. 49–53), since Perez told Ulbrich that her assailant had one hand holding her hands while he was ripping the sham, *see* A120 (Tr. 147). Perez's sham did indeed test positive for saliva. A320 (Tr. 143–44). But the lab established that Price was conclusively excluded as a contributor to the saliva. *Id.*

Moreover, no fingerprint evidence from either crime scene implicated Price. The burglar(s) lifted window screens, rummaged through personal items in the victims' bedrooms (e.g., opening drawers of dressers and nightstands and handling items inside), and, in Perez's case, entered her car. A116 (Tr. 138–39); A240–41 (Tr. 30–31); A249–50 (Tr. 54–55). But no fingerprint was linked to Price from either the Hamer incident or the Perez incident.

2. Price did not possess any stolen items from either crime.

In the Hamer incident and in the Perez incident, the perpetrator stole cash and jewelry—from Perez, $200 and five different items of jewelry. A114–16 (Tr. 134–39). Yet the detectives did not find any of the stolen items in Price's possession—not on his person, in his room, or in his work locker (he clocked into

work just a few hours after Perez was burglarized, and was later arrested there). A220–21 (Tr. 71–74). The detectives did a "very thorough search" of his room, "look[ing] for places that things could be hidden." A188 (Tr. 168). They even searched his mother's storage shed. A221 (Tr. 73–74).

3. Identifications.

Neither victim could visually identify her perpetrator's face. But each victim estimated her perpetrator's size, and the discrepancies between their estimates and Price were stark. According to officers' testimony, Hamer estimated that her perpetrator was 5′8″ or 5′9″, and Perez told officers her perpetrator was approximately 5′10″ or taller. A285 (Tr. 33) (Scull regarding Hamer: "5-8 or 5-9"); A229 (Tr. 115–16) (Gabor regarding Hamer: "5 foot 9 inches"); A130 (Tr. 183) (Kosko regarding Perez: "approximately five foot ten"); A209 (Tr. 43) (Ulbrich regarding Perez: "five-ten or taller"). Perez told officers the man had a "medium build"; Hamer said 175 pounds. A209 (Tr. 43) (Perez); A229 (Tr. 115–16) (Hamer).

At that time, however, Price was 6′3″ and 225 pounds. A286 (Tr. 36). Thus, while the man each woman described perhaps was tall relative to her (e.g., Hamer testified that the man, estimated to be 5′8″ or 5′9,″ appeared tall as she saw a shadow or silhouette when he stood (A242 (Tr. 34); A254 (Tr. 68)), their

estimates essentially depicted a man of average size.[13] But Price was in the tallest sector of the population. Hamer's estimate of 175 pounds for the man "laying on top of [her]," A254 (Tr. 68), conveyed below-average weight.[14] The difference between the man she described and Price was a substantial 50 pounds.

Unable to match Price to the victims' size estimates, the State instead relied on voice identification. But not from Hamer. Although Hamer had been familiar with Price for "[a]ll of [their] lives," A253 (Tr. 61), she did not identify her assailant's voice. A254–55 (Tr. 68–69). Moreover, Hamer, who was almost 47 years old, thought her assailant sounded "young." A286 (Tr. 35). Price, however, was a few months shy of 40.

Instead, the State leaned on Perez's voice identification. But Perez's voice identification was uncertain, and jurors rightly would greet it with due skepticism. When speaking to the 911 operator (Perez yelled to the burglar that she was on the phone with 911), Perez did not mention Price's name. A105 (Tr. 98); A123–24 (Tr. 161–62). Talking with troopers at her apartment afterwards, A103 (Tr. 94),

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[13] *See* U.S. Dep't of Health & Human Servs., *Anthropometric Reference Data for Children and Adults: U.S. Population*, 1999–2002 (2005) ("Anthropometric Reference Data"), at Table 32, https://www.cdc.gov/nchs/data/ad/ad361.pdf (height of black males ages 20–39: mean and 50th percentile were 5′10″; Price's height of 6′3″ would fall in the table's highest percentile).

[14] *See Anthropometric Reference Data*, *supra* note 12, at Table 30 (weight of black males ages 20–39: 50th percentile: 178 pounds; mean: 190 pounds).

Perez said the voice "sounded like Lonnie Price." A130 (Tr. 183). Later that morning, Perez provided a tape-recorded statement to Ulbrich at the station, and in that statement she did not identify Price, not even when asked about the assailant's voice. A125 (Tr. 165); A128A (Tr. 174–75); A349–50 (excerpts of statement).

Ulbrich's formal investigation report said that Perez told him "her attacker *might* be Lonnie Price." A351 (emphasis added). Notably, although Perez said her assailant had a voice that sounded like Price's, Ulbrich wrote: "She said, however, that she was *not certain* that it was Price's voice and did not want to rule out anyone else as a suspect." *Id.* (emphasis added); *see also* A222–23 (Tr. 76–77) (Ulbrich's trial testimony). Thus, Ulbrich understood that Perez was uncertain.

"The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967); *see United States v. Brownlee*, 454 F.3d 131, 141–42 (3d Cir. 2006) (noting that eyewitness testimony "'is among the least reliable forms of evidence'" (citation and emphasis omitted)). The problem of sincere but mistaken eyewitness identifications has been recognized by New Jersey's highest court. *See State v. Henderson*, 27 A.3d 872, 885–89, 892–930 (N.J. 2011) (mandating enhanced jury instructions), *holding modified by State v. Chen*, 27 A.3d 930 (N.J. 2011); *State v. Delgado*, 902 A.2d 888, 895 (N.J. 2006).

Moreover, at least one New Jersey court has recognized that "[t]he hazards as to the trustworthiness of eye witness identification are even more apparent where the identification is by voice alone." *State v. Johnson*, 351 A.2d 787, 788 (N.J. Sup. Ct. App. Div. 1976). Researchers have warned that such testimony can be unreliable and that a variety of factors can yield mistaken identifications. *See, e.g.*, A. Daniel Yarmey, *Earwitness Speaker Identification*, 1 Psych. Pub. Pol'y & L. 792 (Dec. 1995); Jason A. Cantone, *"Do You Hear What I Hear?": Empirical Research on Earwitness Testimony*, 17 Tex. Wesleyan L. Rev. 123, 126 (2011).

Several factors explain why Perez's voice recognition carries diminished weight. *First*, Perez did not establish that she had extensive interaction with Price before the incident; he was not a close acquaintance. She knew him because he was one of the customers at the pharmacy where she worked. A119 (Tr. 144). Limited exposure is associated with low familiarity, which naturally impacts voice recognition.[15] Also, Perez told Ulbrich that she knew Price's *voice* from his phone

[15] *See generally* A. Daniel Yarmey et al., *Commonsense Beliefs and the Identification of Familiar Voices*, 15 Applied Cognitive Psychol. 283 (2001) (discussing degrees of familiarity); *see also id.* at 297 ("[T]he results of this study indicate, with the exception of high-familiar persons [such as family and close friends], that voice identification of speakers talking in normal tones or whispers, although possible, are problematic."). To be sure, even "familiarity does not guarantee correct identification." Cantone, 17 Tex. Wesleyan L. Rev. at 126. Familiar voices are "not equally well recognized," and "[v]oices that are too similar to other familiar voices can also be confused with each other." Yarmey, *Earwitness Speaker Identification*, 1 Psych. Pub. Pol'y & L. at 796.

calls to the pharmacy. A219 (Tr. 70); A353. A phone can alter a voice's acoustic qualities.[16] *Second*, Perez testified that, during the incident, her perpetrator tried to disguise his voice. A103 (Tr. 94); A122 (Tr. 158). Obviously, with a disguised voice, recognition can pose special challenges.[17] *Third*, judging by Perez's testimony about the crime, the burglar did not speak at length. *See* A100–04 (Tr. 88, 89, 92, 95, 97).

In sum, Perez's voice recognition was hardly compelling.[18] Given Hamer's failure to identify Price as her perpetrator and the discrepancies noted above, identification evidence was not a strong suit for the State.[19]

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[16] *See* Cantone, *supra*, 17 Tex. Wesleyan L. Rev. at 131 (noting that "in-person and telephone voices have different frequencies, which can impact the components of tone and pitch for earwitness memory").

[17] *See* Yarmey, *Earwitness Speaker Identification*, 1 Psych. Pub. Pol'y & L. at 799 (a disguised voice alters "acoustical components of speech"; "[e]ven voice alterations such as altering the tone of the initially heard voice from angry to normal at test significantly lowers identification accuracy"); Jessica Clark & Paul Foulkes, *Identification of familiar voices in disguised speech*, www.ling.gu.se/konferenser/iafpa2006/Abstracts/Clark_%26_Foulkes_IAFPA2006.pdf (noting a study which "showed, as predicted, that identification rates fall when listeners hear disguised voices"); Lawrence Solan & Peter Tiersma, *Hearing Voices: Speaker Identification in Court*, 54 Hastings L.J. 373, 405 (Jan. 2003).

[18] This says nothing of how Perez may have been later influenced by the suggestive one-man "show up" voice-identification procedure that Scull and Ulbrich orchestrated after they illegally arrested Price. *See* Dkt. No. 9-15, pp. 19–20.

[19] Price is African American. Each victim testified that her perpetrator was African American. *See* A243 (Tr. 35); A101 (Tr. 90). Perez also testified that her

4. Clothing.

Upon entering Price's room while convinced of his guilt, Scull and Ulbrich surely hoped or expected to discover the stolen items. They did not. They found a gray shirt, and according to Perez, her assailant appeared to be wearing a "grayish" shirt. A107 (Tr. 103). But it was dark during the burglary, A101 (Tr. 91), and Perez was not wearing her glasses, A100 (Tr. 89).

In any event, shirt-color evidence also cut against the State. Hamer testified that her assailant's shirt appeared to be red. A246 (Tr. 44). The detectives, however, found no red shirt in Price's possession. A296 (Tr. 61).

The State invoked Scull's and Ulbrich's testimony that the gray shirt and a pair of denim shorts "appeared wet" or "visually appeared to be damp." A215 (Tr. 57); A268 (Tr. 105). It had been raining around midnight of June 28 and June 29, as well as when officers responded to Perez's burglary. *See* A171–72 (Tr. 131–32); A188 (Tr. 168–69); A203 (Tr. 30). The extent of rain on, for instance, June 28 was not established. In any event, if the perpetrator's clothing was still visually wet nearly 20 hours after the Perez incident (detectives entered Price's room at 10:52 p.m.), these articles presumably would have been drenched during the crime. But Perez did not testify that her assailant's clothing was wet.

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assailant's face felt like he had not shaved in a couple of days. *Id.* Price was not cleanly shaved when he was arrested, but the State evidently did not deem this a key point, as it was not mentioned in the State's closing argument.

Scull and Ulbrich testified that the fronts of the gray shirt and denim shorts were stained. A190 (Tr. 172–73); A268 (Tr. 105–06). Ulbrich theorized that, while climbing onto the roof from the ladder, the burglar must have rubbed against dark-colored, slimy residue of "mold or moss" on the cedar shake; in Ulbrich's opinion, that would have transferred residue, based on his belief that such "residue comes off easily." A171–72 (Tr. 130–32). But there is no indication that the clothing stains were tested for moss or mold. A304 (Tr. 83). Jurors could question whether (if the clothing was Price's) stains came from Price's work at the recycling center, and whether *other* clothing in his room (uncollected by detectives) was stained too. And if the assailant's clothing had easily transferrable, slimy, dark residue, jurors would expect to hear from the State that such residue was found on Perez's sheets and clothing, since the assailant was in her bed, lying on her. But the State offered no evidence of that.

The State relied on carpet and wood fibers from the gray shirt and denim shorts. *See* A192–93 (Tr. 176–78). As to wood, Ulbrich hypothesized that Perez's burglar rubbed up against cedar shake on the roof. A171 (Tr. 130–31). An expert for the State testified that the shirt and shorts had wood fibers that "appeared to be the same type of fibers" that were in a control sample of cedar shake that Ulbrich took from Perez's roof, A305 (Tr. 86), but the expert qualified his opinion—he

could not say the fibers on the clothing came from that roof, adding: "as we all know, cedar is a very common construction material." A306 (Tr. 87).

As for carpet fiber, Scull and Ulbrich claimed that when they searched Price's room, they found in the pocket of the denim shorts a "piece of carpet-looking fiber" or tuft that looked like the color of Perez's living room carpet. A188–89 (Tr. 169–70); A268 (Tr. 106). Her living-room carpet had a frayed edge with strands exposed on the floor. A197–98 (Tr. 4–6). Having compared the piece of carpet fiber supposedly found in the shorts with a sample that Ulbrich took from Perez's apartment, the State's expert testified that the fibers were the same type of polyester, shape, and color, but he also cautioned that this was not like fingerprint evidence; such fiber could have come from a different carpet manufactured in the same way with the same material and dye. A311–14 (Tr. 102–08). The State hypothesized that Price scooped up carpet fiber upon grabbing Perez's car keys from the floor and then put them in his pocket. But this, again, was merely a theory. The keys were found in Perez's car, A204 (Tr. 31), yet no proof indicated that carpet fiber was in or near the car. And, since Perez testified that the burglar grabbed the keys on his way to the car, A103–04 (Tr. 95–97), it would be sheer speculation that the burglar bothered to put the keys in his pocket.

Other fiber evidence favored the defense. The State had the lab compare red fibers recovered from the gray shirt against fibers from the red shirt that Perez

wore during the incident, believing that her red fibers may have transferred to her perpetrator when he was on top of her. A309A–10 (Tr. 97–100). But the two sets of fibers did not match. A310–11 (Tr. 100–01).

5. The State's remaining evidence was underwhelming.

After the Perez incident, barber scissors were found in Perez's car, but they were not Perez's or in her car beforehand. A176 (Tr. 142). The State tried to link the scissors to Price through his landlord, i.e., the woman in whose house Price rented a room. She testified that weeks before the crime, she saw Price cut his hair with barber scissors in the home's shared bathroom. A150–51 (Tr. 47–49); *see* A143 (Tr. 28) (shared bathroom). The State showed the landlord a Polaroid picture of the scissors found in Perez's car. A184 (Tr. 160–61). Although she said they were of the same type that she saw Price use, she could not say they were the same scissors. A151–53 (Tr. 49–52). The State's theory then crumbled when the landlord was—for the first time—shown the actual scissors found in the car: She did not think they were the same size as those she saw Price use in the bathroom. A160–61 (Tr. 98–100) ("These look smaller"; "They just look littler"; the pair he used "were bigger"). And although Scull and Ulbrich did not find scissors while searching Price's room, they did not search the bathroom where the landlord saw Price using scissors. *See* A296 (Tr. 61).

The State also relied on Price's work schedule. On the day of the Perez incident (a Thursday), Price was an hour late to work—he arrived by 7:00 a.m.—whereas he was otherwise on time that week. A278–79 (Tr. 5–7). And on the day of the Hamer incident (also a Thursday), a day that Price had prearranged to take off from work, he did not attend a scheduled appointment. A279 (Tr. 7–8).[20] The prosecutor argued that tardiness could be a "coincidence" or that maybe Price "needed a little recuperation time" from the burglaries. A335 (Tr. 62). But being an hour late to work (and still clocking in by 7:00 a.m.) or missing an appointment hardly establishes that one has committed burglaries.

Finally, Scull and Ulbrich testified that Price made two false statements while in custody at the station after they illegally arrested him on the invalid warrant. Again, the State relied on the word of Scull and Ulbrich because the detectives did not tape the interview, A289 (Tr. 45–46), though they taped interviews of five others. The first alleged statement: the detectives said that when they asked Price about the Perez incident, he said he was in his room by 8:00 p.m. and remained there until 6:00 a.m., before heading to work. A181 (Tr. 154–55); A265 (Tr. 100). This alleged statement was contradicted by testimony that Price

[20] The State did not establish at what time of day the appointment was scheduled.

was out of his home.[21] A163–64 (Tr. 111–12). As for the second alleged statement, Scull and Ulbrich testified that Price answered "no" when they asked if he was aware of a rumor about him being involved with the Hamer incident. A181–82 (Tr. 155–56); A266 (Tr. 101–02). Price's landlord testified she had mentioned the rumor to him (though they did not discuss the rumor's details). A157–58 (Tr. 85–86); A159 (Tr. 89). In any event, regarding these alleged statements or denials, for a man in Price's shoes—arrested at work on a warrant purportedly arising from a traffic matter handled in municipal court, but then interrogated about felonies without a lawyer present—it is hardly surprising that he would try to terminate the interrogation by choosing not to fuel the suspicions of the detectives who had arrested him illegally.

B. Counsel's deficient performance prejudiced Price.

Given the gap in the chain of custody after Scull collected the cigarette butt from Perez's and the detectives' access to Price's filterless butts in his room, as well as the attendant circumstances, it was objectively unreasonable to conclude there was no reasonable probability that a properly framed motion to suppress would have been granted under the unusual circumstances of this case.

[21] No witness testified that Price was out after 3:00 a.m., when Perez was burglarized, much less near Perez's apartment at that time. And no witness testified about Price's whereabouts during the Hamer incident.

This case involved the most compelling form of forensic evidence—DNA evidence—in a dispute about the identity of Perez's perpetrator, which the State then parlayed into convictions for the crimes against Hamer. The cigarette butt discovered by Pierce was taken by Scull when he and Ulbrich were convinced of Price's guilt yet had reason to be skeptical that Pierce's discovery was connected to the crime (as it was unseen by a half-dozen officers including an experienced investigator looking for evidence on the roof). Soon thereafter, Scull and Ulbrich came upon Price's ashtray containing filterless cigarette butts. The record does not demonstrate a "reasonable probability that no tampering occurred." *Brown*, 238 A.2d at 485.

A suppression motion also could have explained that because the butt that the lab examined was substantially altered during testing—only remnants remained—Pierce could not establish that the cigarette butt tested by the lab looked like the one that she recovered. *See* Mueller & Kirkpatrick, § 9:10 ("[A proper chain of custody] is generally essential for evidence that is fungible, lacking in distinctive means of identification, or likely to deteriorate or change in condition."). On top of this, a jury would have no opportunity to evaluate for itself the age or condition of the butt when it was found, because Scull failed to photograph this crucial piece of evidence.

For these reasons, it was objectively unreasonable to conclude there was no reasonable probability that a properly framed motion to suppress would be granted.

As the PCR court noted, Price's attorney for his original trial in 2001, Stephen Patrick, moved to suppress the cigarette-butt evidence. *See* A379–80.[22] We have reviewed the motion that Patrick filed, which was unsuccessful, and his brief did not argue about the chain of custody after Scull took the butt from Perez's. Instead, Patrick's brief argued for suppression based on the fact that the crime-scene investigators did not find a cigarette butt on the roof (i.e., rather than calling into question whether the butt that was found on the roof and given to Scull was the one that was sent to the lab, Patrick trained on the period before the butt was found and dubbed it a "reverse" chain-of-custody problem). Given how that motion was framed, its denial (which was never appealed) did not excuse Price's counsel at the retrial from seeking to exclude the evidence by attacking the chain occurring after Scull acquired Pierce's discovery.

Finally, even if the evidence was properly admissible, counsel's failure at trial to adequately attack the gap in the chain of custody prejudiced Price based on the potent aura of DNA evidence and the inconclusive nature of the other evidence, so much of which rested on the accounts of Scull and Ulbrich. Mounting a proper attack at trial on the chain of custody would have altered the complexion of the

[22] For the 2004 trial, Price was not represented by Patrick.

case for the jury, making it reasonably probable that at least one juror would have harbored reasonable doubt as to Price's guilt. *See Buck v. Davis*, --- S. Ct. ---, 2017 WL 685534, *14 (U.S. Feb. 22, 2017) (framing the prejudice inquiry as whether there was a "reasonable probability that [without harmful information offered by the defense] at least one juror would have harbored a reasonable doubt"); *DeShields v. Shannon*, 338 F. App'x 120, 125 (3d Cir. 2009) (finding prejudice based on "a reasonable probability that at least one juror would have harbored a reasonable doubt as to [the defendant's] guilt").

CONCLUSION

The district court's judgment should be reversed.

Dated: February 24, 2017

Respectfully submitted,

s/ Sean E. Andrussier
Sean E. Andrussier
North Carolina Bar No. 25790
DUKE UNIVERSITY SCHOOL OF LAW
APPELLATE LITIGATION CLINIC
Box 90360, 210 Science Drive
Durham, North Carolina 27708
(919) 613-7280
Court-Appointed Counsel for Appellant

On the brief:

Chase Harrington
Kathleen Perkins
Laura Revolinski
Christine Umeh
Wenbo Zhang

Students, Duke University School of Law

RULE 46.1 CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 46.1 (e), I hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

s/ Sean E. Andrussier

Dated: February 24, 2017

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME, TYPEFACE, AND TYPE STYLE REQUIREMENTS, AND WITH 3d Cir. LOCAL APPELLATE RULE 31.1(c)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(C) because the brief contains 12,692 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman.

3. This brief complies with Local Appellate Rule 31.1(c) because the text of this electronic brief is identical to the paper copies being filed with this Court.

4. I certify that a virus check has been performed on this electronic brief using Symatec Endpoint Protection version 12.1 and that no virus was detected.

Dated: February 24, 2017 s/ Sean E. Andrussier

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), I hereby certify that on this 24th day of February, 2017, the foregoing Brief for Appellant was electronically filed with the Clerk of Court for the United States Court of Appeals for the Third Circuit using the CM/ECF System. I also certify that I caused seven paper copies to be delivered by UPS Next Day Air, which will send notice of such filing to the following registered CM/ECF users:

Service was accompanied on the following by the CM/ECF system:

Gretchen Pickering, Esq.
Assistant Prosecutor
4 Moore Road - DN 110
Cape May Court House, NJ 08210
gpickering@cmcpros.net
Counsel for Appellees

s/ Sean E. Andrussier

RECORD NO. 15-2807

In The
United States Court of Appeals
For The Third Circuit

ALONZO PRICE,

Appellant,

v.

CHARLES WARREN; ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, JEFFREY S. CHIESA,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

JOINT APPENDIX
VOLUME I OF II
(Pages 1 – 72)

Sean E. Andrussier
DUKE UNIVERSITY SCHOOL OF LAW
210 Science Drive
Box 90360
Durham, North Carolina 27708
(919) 613-7280

Counsel for Appellant

Gretchen A. Pickering
CAPE MAY COUNTY OFFICE OF PROSECUTOR
4 Moore Road, DN-110
Cape May Court House, New Jersey 08210
(609) 465-6854

Counsel for Appellee

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

TABLE OF CONTENTS
VOLUME I OF II

Appendix Page

TABLE OF CONTENTS
VOLUME II OF II

Appendix Page

Alonzo Price #427877/821484-A
New Jersey State Prison
P.O. Box 861
Trenton, New Jersey 08625

United States District Court
District of New Jersey
Civil Action No. 1:12-cv-02238-(RBK)

Alonzo Price,	:	
Petitioner,	:	Notice of Appeal From an Order Denying a Petition for a Writ of Habeas Corpus
v.	:	
Charles Warren, et al.,	:	
Respondents.	:	

Please take notice that petitioner, Alonzo Price, shall appeal to the United States Court of Appeals for the Third Circuit the order dismissing his petition for a writ of habeas corpus, entered in this action on the 30th day of June 2015, by Honorable Robert B. Kugler, United States District Judge.

Dated: July 21, 2015

Alonzo Price, Petitioner

Alonzo Price #821484
New Jersey State Prison
P.O. Box 861
Trenton, NJ 08625

William T. Walsh
Clerk of The United States
District Court.
P.O. Box 2797
Camden, NJ 08101

Alonzo Price #427877/821484-A
New Jersey State Prison
P.O. Box 861
Trenton, New Jersey 08625

United States District Court
District of New Jersey
Civil Action No. 1:12-cv-02238-(RBK)

Alonzo Price,	:	
Petitioner;	:	Proof of Mailing and Timely Filing of Notice of Appeal
v.	:	
Charles Warren, et al.,	:	
Respondents.	:	

I, Alonzo Price, hereby state the following:

1. On the date entered below, I gave to authorities at New Jersey State Prison, in Trenton, New Jersey, for processing through the prison's legal mail system, an envelope for mailing, addressed to William T. Walsh, Clerk of the United States District Court, P.O. Box 2729, Camden, New Jersey 08101; that envelope contained a letter to the clerk and three copies of the following: **(1)** my notice of appeal, **(2)** a notice of motion to proceed in forma pauperis, **(3)** affidavit of poverty, **(4)** a statement of the non-necessity of a brief, and **(5)** a proposed order.

2. I certify that the foregoing is true and correct.

Dated: July 21, 2015

Alonzo Price, Petitioner

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ALONZO PRICE,	:	
	:	
Petitioner,	:	Civ. No. 12-2238 (RBK)
	:	
v.	:	**ORDER**
	:	
CHARLES WARREN, et al.,	:	
	:	
Respondent.	:	
	:	

For the reasons expressed in the Opinion filed herewith:

IT IS this 25th day of June, 2015,

ORDERED that petitioner's request for a stay (Dkt. No. 18.) is denied; and it is further

ORDERED that petitioner's request to amend (Dkt. No. 24.) is denied; and it is further

ORDERED that petitioner's motion to compel (Dkt. No. 29.) is denied; and it is further

ORDERED that petitioner's petition for writ of habeas corpus (Dkt. No. 1.) is denied; and it is further

ORDERED that a certificate of appealability shall not issue; and it is further

ORDERED that the Clerk shall serve this Order and the accompanying Opinion on petitioner by regular U.S. mail.

s/Robert B. Kugler
ROBERT B. KUGLER
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ALONZO PRICE,	:	
	:	
Petitioner,	:	Civ. No. 12-2238 (RBK)
	:	
v.	:	**OPINION**
	:	
CHARLES WARREN, et al.,	:	
	:	
Respondent.	:	
	:	

ROBERT B. KUGLER, U.S.D.J.

I. INTRODUCTION

Petitioner is a state prisoner and is proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner was convicted by a jury on multiple counts including kidnapping, burglary, robbery, terroristic threats and unlawful possession of a weapon amongst others. He is currently serving a life sentence with a forty-year parole disqualifier. Petitioner raises several claims in his habeas petition. For the following reasons, the habeas petition will be denied.

II. FACTUAL AND PROCEDURAL BACKGROUND[1]

> Following a reversal and remand resulting from plain error as to the questioning of a discharged juror, defendant Alonzo Price was convicted by a jury on two counts of first-degree kidnapping; two counts of second-degree burglary; one count of third-degree burglary; two counts of first degree robbery; two counts of third-degree terroristic threats; one count of third-degree possession of a weapon for an unlawful purposes; one count of fourth-degree unlawful possession of a weapon; one count of theft as a disorderly persons offense; and one count of third-degree theft. The court sentenced defendant as a persistent offender, to a discretionary extended term of life imprisonment with a twenty-five year parole

[1] The factual background is taken from the Superior Court of New Jersey, Appellate Division opinion on petitioner's direct appeal that was decided on November 15, 2006. (*See* Dkt. No. 9-8.)

disqualifier on count six (robbery of Sadie Hamer). It also imposed a consecutive thirty-year term with a fifteen year parole disqualifier on count two (kidnapping of Mary Perez), and the following concurrent terms; thirty years with a fifteen-year parole disqualifier on count one (kidnapping of Hamer), twenty years with a ten-year parole disqualifier on count seven (armed robbery of Perez), ten years with a five-year parole disqualifier each on counts three and four (second-degree burglary of Hamer and Perez), and five years with a two-and-one-half-year parole disqualifier on count five (third-degree burglary of Perez) . . . .

The convictions arose in connection with two residential burglaries in Woodbine, which occurred one week apart, one involving Sadie Hamer on June 22, 2000, and the other involving Mary Perez on June 29, 2000. In both instances, the women were sleeping in their bedrooms when someone broke into their respective houses, threatened them, and bound and robbed them.

Hamer testified that a man straddled her, told her not to look at him, and put something flat, sharp and cold to the right side of her neck. She heard the sound of bedding being torn, and her assailant tied her hands behind her back and put a pillowcase over her head. He then put what Hamer thought to be a wood handle of a knife into her side and asked where she kept her money. Hamer heard the man open her drawers and search through her room for valuables. He then told Hamer he was leaving, and if she screamed, he would kill her. After she heard the front door open and close, Hamer shook the pillowcase off her head. She then went to her son's room and woke him, and called the police. The police untied Hamer when they arrived. The screen to the living room window had been cut, and Hamer reported that she was missing a watch and bracelet, each estimated to be worth $50, as well as $100 in cash.

Hamer could only see her assailant's silhouette as he initially came at her and she described him as "appear[ing] to be tall." When he had Hamer lie down, his cheeks touched hers, and she could not feel any facial hair. She also thought he had close, short hair and had a dark complexion.

Perez testified that her attacker directed her to turn onto her stomach and straddled her on the bed. He then placed a sharp object against her neck and told her not to move. She heard the sound of bedding being torn, and the assailant gagged her and bound her hands behind her back. Perez pleaded with her attacker just to take her money and jewelry, and informed him she had

money in her car. He said that if she was lying about the money in her car, he would come back and hurt her. The attacker left the house with Perez's car keys, which she had dropped on the living room carpet. She was able to dislodge the gag and called the police.

While resisting the attack, Perez felt her attacker's hair and face. She described him as "approximately five foot ten" with "African American" hair and informed the police he had been wearing a grey shirt and smelled of cigarettes. Perez also told them she believed she recognized her attacker's voice as that of defendant, who was a customer at the pharmacy where she worked, which was located in the building underneath her apartment. Perez reported that she was missing various pieces of jewelry and $200 taken from the wallet in her car.

A screen had been cut in Perez's living room and a cigarette butt, containing saliva that matched defendant's DNA, was located on the pharmacy roof outside Perez's window. The police also found a ladder placed against the pharmacy building, which the attacker had apparently used to climb onto the roof and into Perez's apartment. Detective Ulbrich testified that based on the space between the last rung of the ladder and the flat part of the roof, the attacker would have had to pull himself over the wet, wooden shingles onto the roof, which would have left dark-colored residue on his clothing. Pursuant to a search warrant of defendant's room, the detectives seized a damp gray t-shirt with staining on the front that appeared to be residue from the shingles. Defendant's jean shorts also contained similar staining, and in the pocket were some strands of "purplish" carpeting that were the same color as the carpet in Perez's living room.

Detective William Scull testified as follows regarding the similarities between the two crimes:

> With respect to date and time, both, both of these crimes were in the early-morning hours on a Thursday. They happened to be on subsequent Thursdays. One was approximately 2:20 and one was around 3:00 a.m. . . . And the Thursday happens to be the day after Alonzo Price's payday which he indicates on payday, on Wednesdays, he gets a bottle and gets drunk. . . . They were both within a close proximity to each other in Woodbine which also happens to be in close proximity to the defendant's apartment.

> They were both locations that were primarily housed by a woman . . . without the typical male/man/husband figure in the house as a . . . known thing, I believe, throughout the Town of Woodbine. Woodbine's very small, and people know each other. . . . Both of them are known to primarily have residing with them a minor child.
>
> . . . .
>
> [B]oth crimes were committed via entry of a, screen-through a window. Both of them happened to have screen windows on the outside. Both of these screen windows happened to be cut in a very similar fashion, as they were cut right along the bottom of the screen.
>
> I have investigated other burglaries and such throughout my, my time, and I believe in my opinion from my experience, that it's more common that if a screen's taken out, either the frame's ripped out or the screen's ripped out. Both of these were cut horizontally along the bottom. Both of them had the screens lifted up, not taken from their track, and both of them had then subsequent entry in through the window.
>
> And both of these crimes had exit through the primary entrance door or exit door. Both of them . . . were residences that had the television on. . . .
>
> The detective further testified that normally, to avoid confrontation, burglars do not wake sleeping victims. In both instances here, however, the perpetrator initiated contact with the victim. Detective Scull also noticed there were other items available to take, such as Perez's car which the attacker had the keys to, but instead, in both instances, he took only money and jewelry.

(Dkt. No. 9-8 at p. 2-3.)

After petitioner was convicted and sentenced at his retrial, he appealed to the Superior Court of New Jersey, Appellate Division. The Appellate Division affirmed except for reversing

a conviction on one count and remanding for resentencing on an issue not relevant to this Opinion. The New Jersey Supreme Court denied certification on March 20, 2007. (*See* Dkt. No. 9-13.)

Petitioner subsequently filed a petition for post-conviction relief ("PCR") in the Superior Court of New Jersey, Cape May County in April, 2007. That court denied the PCR petition on January 14, 2009. (*See* Dkt. No. 9-18.) The Appellate Division affirmed that denial on March 8, 2011. (*See* Dkt. No. 9-22.) The New Jersey Supreme Court denied certification on the PCR petition on July 22, 2011. (*See* Dkt. No. 9-25.)

Petitioner then initiated this federal proceeding by filing a petition for writ of habeas corpus in April, 2012. Petitioner was then given the requisite notice pursuant to *Mason v. Meyers*, 208 F.3d 414 (3d Cir. 2000). He informed the Court that he wanted his petition to be ruled upon as filed. (*See* Dkt. Nos. 2 & 3.) The respondent filed his response on June 20, 2012. Petitioner then filed his original traverse in September, 2012. Subsequently, petitioner has filed numerous updates and amendments to his traverse. He has also filed a motion to compel.

III. HABEAS CORPUS LEGAL STANDARD

An application for writ of habeas corpus by a person in custody under judgment of a state court can only be granted for violations of the Constitution or laws or treaties of the United States. *See Engle v. Isaac*, 456 U.S. 107, 119 (1982); *see also*, *Mason v. Myers*, 208 F.3d at 415 n.1 (citing 28 U.S.C. § 2254). Petitioner filed this petition for writ of habeas corpus after April 24, 1996, thus, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214 (Apr. 24, 1996), applies. *See Lindh v. Murphy*, 521 U.S. 320, 326 (1997). Under AEDPA, federal habeas corpus relief is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim: (1) resulted in

a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court. *See* 28 U.S.C. § 2254(d).

As a threshold matter, a court must "first decide what constitutes 'clearly established Federal law, as determined by the Supreme Court of the United States.'" *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) (quoting 28 U.S.C. § 2254(d)(1)). "'[C]learly established federal law' under § 2254(d)(1) is the governing legal principle set forth by the Supreme Court at the time the state court renders its decision." *Id.* (citations omitted). A federal habeas court making an unreasonable application inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." *See Williams v. Taylor*, 529 U.S. 362, 409 (2000). Thus, "a federal court may not issue a writ simply because the 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." *Id.* at 411.

The AEDPA standard under § 2254(d) is a "difficult" test to meet and is a "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, - U.S. -, 131 S. Ct. 1388, 1398 (2011). The petitioner carries the burden of proof and with respect to review under § 2254(d)(1), that review "is limited to the record that was before the state court that adjudicated the claim on the merits." *Id.*

In applying AEDPA's standards, the relevant state court decision that is appropriate for federal habeas corpus review is the last reasoned state court decision. *See Bond v. Beard*, 539 F.3d 256, 289-90 (3d Cir. 2008). Furthermore, "[w]here there has been one reasoned state

judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). Additionally, AEDPA deference is not excused when state courts issue summary rulings on claims as "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99 (2011) (citing *Harris v. Reed*, 489 U.S. 255, 265 (1989)).

IV. DISCUSSION

Petitioner raises multiple claims in his habeas petition; specifically:

1. The evidence did not support his conviction concerning the charges involving Sadie Hamer and did not support the kidnapping convictions as to both women.
2. Prosecutorial misconduct by the prosecutor injecting his personal feelings into the case and by utilizing a Power Point presentation that included a "mug shot" of petitioner for the jury to see.
3. The prosecutor elicited improper testimony when Detective Scull told the jury that Hamer informed him that perpetrator had inappropriately touched her breast such that a mistrial should have been granted.
4. Trial court error by essentially permitting Scull to provide expert testimony "connecting the dots" between the Hamer and Perez crimes.
5. Trial court error by failing to declare a mistrial when Ulbrich made two improper references to petitioner's prior incarceration.
6. Trial court error in failing to suppress petitioner's statement to police.

7. Trial court should have granted petitioner's motion for a change of venue or ordered a foreign jury penal because of pre-trial publicity.
8. Trial Court error in denying petitioner's motion for recusal.
9. Ineffective assistance of counsel for failing to move to suppress the cigarette butt or make an argument to the jury based on a lack of chain of custody.
10. Ineffective assistance of counsel for failing to move to suppress the voice identification procedure.
11. The arrest warrant issued for defendant did not comply with the statutory requirements for a valid arrest warrant and counsel was ineffective for failing to suppress the evidence that followed that illegal arrest.
12. The PCR petition was improperly denied as petitioner is entitled to an evidentiary hearing.

These claims will be considered in turn.

A. Claim I – Insufficiency of the Evidence

Petitioner makes two arguments with respect to claiming that there was insufficient evidence to support his convictions. First, he claims that there was insufficient evidence to support his convictions on the charges involving Sadie Hamer. Second, he claims that there was insufficient evidence to support the kidnapping convictions. The last reasoned decision from the state courts on this claim was from the Appellate Division on direct appeal. That court analyzed these issues as follows:

> In deciding a motion for a judgment of acquittal, the trial judge must review the sufficiency of the evidence and determine whether the evidence is sufficient to warrant a conviction. R. 3:18-1; *State v. Reyes*, 50 N.J. 454, 458-59 (1967); *State v. Kluber*, 130 N.J. Super. 336, 341 (App. Div. 1974), *certif. denied.*, 67 N.J. 72 (1975). The trial judge must determine whether the State has

presented sufficient evidence, viewed in its entirety, and giving the S tate the benefit of all its favorable testimony and reasonable inferences, to enable a jury to find the essential elements of the offense beyond a reasonable doubt. *State v. Martin*, 119 N.J. 2, 8 (1990); *State v. Reyes*, *supra*, 50 N.J. at 458-59. Here, in denying defendant's motion, the trial judge correctly concluded a rational jury could find substantial evidence of guilt of the offenses charged as to both victims, stating:

> The state has presented the direct evidence by virtue of the testimony of Mary Helen Perez that she recognized the defendant's voice, when joined with what little she could glean of the appearance of the defendant at the time of the arrest and the photograph that's been shown [and] admitted into evidence, certainly, the appearance of his hair for example.
>
> Miss Perez testified that the assailant smelled, whom she believed to be the defendant, strongly of cigarette[s]. A cigarette butt is found outside of the window which happens to contain the defendant's DNA.
>
> A pair of scissors is found in a car.
>
> The-there is a piece of carpeting found in the defendant's short pocket. And there is testimony that her keys had been lying on the floor and that there were bits of carpeting scattered throughout her room.
>
> The similarities between the details of the assault upon Miss Perez and that of the Sadie Elizabeth Hamer incident truly are striking: The hour of the night; the manner in which they were bound; the fact very nominal items were taken as opposed to, say, electronics; that the women were similarly situated that they had only a young child, a comparatively young child with them; the manner of entry; the fact that the defendant in one case didn't go to work at all; in another, the second instance, went to work an hour late; the testimony about the bicycle; his own statements about his whereabouts and his knowledge of rumors, both of

> which, there was ample testimony rebutting his statement.
>
> We find meritless defendant's argument that the trial court should have dismissed the kidnapping charges as to both victims or that there was insufficient basis to support these convictions. The record does not demonstrate that Hamer or Perez were restrained just so their assailant could commit the robbery of their respective residences, i.e., that the confinement was "merely incidental to the underlying substantive crime." *State v. La France*, 117 N.J. 583, 590 (1990).
>
> The cases where the kidnapping charge is based on confinement focus on the enhanced risk of harm, not the duration of the confinement. *State v. Soto*, 340 N.J. Super. 47, 74 (App. Div. 2001). For a defendant to be convicted of first-degree kidnapping, as defendant was in this case, the confinement must have substantially increased the risk of harm beyond that which was inherent in the crime itself. *State v. Lyles*, 291 N.J. Super. 517, 526 (App. Div. 1996). Defendant could have stolen the items without having wakened the sleeping women, just as he was able to complete the burglary of Hamer's home without ever waking her son. Instead, he confined and threatened their lives, which presented a substantial risk of emotional distress and physical injury to the victims. Defendant appeared in each of their bedrooms in the middle of the night and awakened them, straddled them on their beds, bound their hands behind their backs and also gagged Perez, and placed a sharp object against their throats and threatened to hurt them. Moreover, there is no evidence defendant released either victim "unharmed and in a safe place prior to apprehension." N.J.S.A. 2C:13-1c(1); *State v. Johnson*, 309 N.J. Super. 237, 265 (App. Div. 1998). Defendant did not release the victims from their confinement. He left both women bound on their beds, with a pillowcase over Hamer's head and a gag in Perez's mouth. The victims, with the police, removed the material which they were bound.

(Dkt. No. 9-8 at p. 2-3.)

The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). There is sufficient evidence to support a conviction, if "after viewing the evidence in the light most

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A petitioner raising an insufficiency of the evidence claim faces a "'very heavy burden' to overturn the jury's verdict for insufficiency of the evidence." *United States v. Root*, 585 F.3d 145, 157 (3d Cir. 2009) (citing *United States v. Dent*, 149 F.3d 180, 187 (3d Cir. 1998)). In analyzing a sufficiency of the evidence claim, a court examines both the direct and circumstantial evidence in their totality. *See United States v. Pavulak*, 700 F.3d 651, 668 (3d Cir. 2012) (citations omitted).

i. *Sadie Hamer Incident*

Petitioner's first insufficiency of the evidence claim is that there was insufficient evidence presented to establish that he was perpetrator with respect to the Hamer incident. In analyzing this claim, the Appellate Division relied on the circumstantial similarity evidence between the Hamer incident and the Perez incident in which there was more direct evidence connecting petitioner to that crime (in the form of voice identification and forensic evidence). Indeed, the court noted the similarity in time, the manner of entry, the items stolen, the nature of the victims and the fact that the petitioner either did not go to work or appeared for work late the next day with respect to the two incidents. Thus, in denying this claim, the Appellate Division in effect held that the Hamer and the Perez incidents had similar modus operandi. The Court finds that this was not an unreasonable application of clearly established federal law, because, as stated above, in analyzing a sufficiency of the evidence claim, a court needs to examine not only the direct evidence, but also the circumstantial evidence in their totality. *See Pavulak*, 700 F.3d at 668; *see also United States v. Cobb*, 397 F. App'x 128, 135-36 (6th Cir. 2010) (denying insufficiency of the evidence claim for Huntington Bank robbery where the robbery had a similar

modus operandi to robbery of Chase Bank where DNA evidence supported the conviction); *Dixon v. Tampki ns*, No. 12-2821, 2013 WL 1246751, at *9 (C.D. Cal. Feb. 11, 2013) ("Based on modus-operandi evidence from Petitioner's other convictions, a rational fact finder could have inferred that he committed the four crimes in question.") (citing *United States v. Momeni*, 991 F.2d 493, 494 (9th Cir. 1993); *United States v. Hirokawa*, 342 F. App'x 242, 248-49 (9th Cir. 2009)); *report and recommendation adopted by*, 2013 WL 1245981 (C.D. Cal. Mar. 27, 2013). Therefore, petitioner is not entitled to federal habeas relief on this insufficiency of the evidence claim.

ii. *Kidnapping Charges*

Petitioner also argues that there was insufficient evidence to find him guilty on the two kidnapping charges. "When assessing such claims on a petition for habeas relief from a state conviction, the sufficiency of the evidence standard 'must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law.'" *Robertson v. Klem*, 580 F.3d 159, 165 (3d Cir. 2009) (quoting *Jackson*, 443 U.S. at 324 n.16). In New Jersey, kidnapping is defined as follows:

> A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period, with any of the following purposes:
>
> (1) To facilitate commission of any crime or flight thereafter;
> (2) To inflict bodily injury on or to terrorize the victim or another;
> (3) To interfere with the performance of any governmental or political function; or
> (4) To permanently deprive a parent, guardian, or other lawful custodian of custody of the victim.

N.J. STAT. ANN. § 2C:13-1b. Additionally, the kidnapping statute provides that kidnapping is a first-degree offense, but that it is a crime in the second-degree if the actor releases the victim in a safe place prior to apprehension. In this case, petitioner argues that there was insufficient evidence to sustain both the kidnapping charge in and of themselves as well as a finding of a first-degree kidnapping charge in both incidents.

In a case such as this that involves confinement, the Appellate Division noted in New Jersey that the restraint must not merely be incidental to the underlying substantive crime, but must substantially increase the risk of harm beyond that necessarily present in the crime itself. *See State v. La France*, 117 N.J. 583, 587 (1990). The Appellate Division then explained that the restraint in this case was not incidental because petitioner could have stolen the items without having awoken Hamer or Perez, and without threatening their lives. Thus, it certainly increased the risk of harm beyond that necessarily present in the crime itself through petitioner's additional actions. Additionally, as noted by the Appellate Division, petitioner did not release the victims from their confinement, but, instead, left both of them bound in their beds. Under such circumstances, this Court finds that the Appellate Division did not unreasonable apply clearly established federal law or deny this claim based on an unreasonable determination of the facts. Accordingly, habeas relief is not warranted on Claim I.

B. Claim II – Prosecutorial Misconduct by Injecting Personal Opinion and Presenting "Mug Shot" Photo of Petitioner

Petitioner makes several distinct arguments within Claim II. First, he asserts that the prosecutor impermissibly injected his own personal opinion in his opening statement. Second, petitioner claims that the prosecutor improperly invoked sympathy for the victims during his closing argument. Third, petitioner asserts that the prosecutor impermissibly used a Power Point presentation.

Petitioner argued as follows in the state courts with respect to the prosecutor purportedly impermissibly injecting his personal opinion in his opening remarks to jury:

> During opening, the prosecutor injected his personal views into the matter, telling the jury about waking up with the television on, "I know myself included." He stated, "I suspect" the "worst concern" of the victims was only having a bad dream. When describing the evidence he intended to present, the prosecutor stated, "I can tell yo u that," injecting his views into the case. Nothing in the evidence supported these statements.
>
> The prosecutor improperly invited sympathy for the victims, telling the jury, "You can imagine, I suspect, some measure of fear and terror that enveloped [the victims] . . . I'm not sure any of us who have never experienced anything like that can truly understand and appreciate what a circumstance like that would create, but I suggest we all have a good idea of what she was going through at that point in time" "Whatever terror preceded that moment, I suggest to you, it just went through the roof. The absolute terror that she then was under is unimaginable." In closing, the prosecutor continued to invoke improper sympathy for the victims with the repeated use of "atrocity."

(Dkt. No. 9-3 at p. 40-41 (internal citations omitted).) Petitioner also claims that the prosecutor committed misconduct by continuing to use the word atrocities to enlist the jury to his cause without offering any evidence and that a Power Point presentation that the prosecutor used improperly included a "mug shot" of the petitioner for the jury to see. The last reasoned decision on these prosecutorial misconduct issues was from the Appellate Division on petitioner's direct appeal which analyzed them as follows:

> We find no error, let alone plain error, in the cited comments made by the prosecutor during opening and closing arguments, to which defendant did not object, which defendant now contends improperly injected the attorney's personal views into the case and improperly invited sympathy for the victims. There is no indication in the record the prosecutor's conduct in his comments, eliciting testimony from Detective Scull or in using visual aids substantially prejudiced defendant's fundamental right to have a jury evaluate the merits of his defense. *See, e.g.*, *State v. Timmendequas*, 161 N.J. 515, 575 (1999), *cert. denied*, 534 U.S.

> 858, 122 S. Ct. 136, 151 L. Ed. 2d 89 (2001). The State's comments did not exceed the bounds of proper argument or express a personal belief as to defendant's guilt. *See State v. Staples*, 263 N.J. Super. 602, 606-07 App. Div. 1993); *State v. Kounelis*, 258 N.J. Super. 420, 429 (App. Div.), *certif. denied*, 133 N.J. 429 (1992). Nor were any of the comments "plainly designed to impassion the jury" and to divert its attention from the facts of the case. *State v. Harvey*, 121 N.J. 407, 425 (1990), *cert. denied*, 499 U.S. 931, 111 S. Ct. 1336, 113 L. Ed. 2d 268 (1991). Moreover, the prosecutor's "striking similarities" Power Point presentation was accurate and was confined to the "evidence revealed during the trial and reasonable inferences to be drawn from the evidence." *State v. Smith*, 167 N.J. 158, 178 (2001). The presentation did not bootstrap physical evidence from the Perez incident to the Hamer incident and did not misrepresent Hamer's inability to identify defendant, although she knew him, or the lack of physical evidence tying defendant to the Hamer break in.

(Dkt. No. 9-8 at p. 6.)

A criminal defendant's due process rights are violated if prosecutorial misconduct renders a trial fundamentally unfair. *See Darden v. Waingright*, 477 U.S. 168, 182-83 (1986). A habeas petition will be granted for prosecutorial misconduct only when the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 181 (internal quotation marks and citation omitted). A prosecutorial misconduct claim is examined in "light of the record as a whole" in order to determine whether the conduct "had a substantial and injurious effect or influence" on the jury's verdict. *See Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). A "reviewing court must examine the prosecutor's offensive actions in context and in light of the entire trial, assessing the severity of the conduct, the effect of the curative instructions, and the quantum of evidence against the defendant." *Moore v. Morton*, 255 F.3d 95, 107 (3d Cir. 2001).

i. *Prosecutor's Opening Statement Remarks*

Petitioner's first argument is that the prosecutor improperly injected his personal views in his opening statement. Petitioner's main complaint is with the beginning of the prosecutor's opening statement and his use of "I" within the opening statement. The relevant portion complained of by petitioner is italicized below:

> In 2000, two women, residents of Woodbine, New Jersey, a small borough where virtually everyone is, to some degree, familiar with everyone else, these two women had their routine, ordinary lives forever changed in the most cruel and heinous manner one might imagine by this man, Alonzo Price.
>
> Exactly one week from each other, these two women independently fell victim to his cruelty. Each had gone to bed late that night or, in one instance, just after midnight – having gone through whatever routines their lives had leading up to going to bed, they went to bed those nights with no more or less concern than any others. Perhaps, *I suspect, maybe their worst concern, if any, might be the potential of a bad dream or nightmare of some sort*. But beyond that, they each felt that they were comfortable and secure in the sanctity of their own home.
>
> Each of them was in bed alone and had fallen asleep with no lights in their respective homes on with the exception of the dull glow from a TV screen that was left on as they had each gone to bed. They didn't intend to drift off to sleep as they were watching TV their respective late nights or early mornings. *But perhaps like many of us – I know myself included – well, we oftentimes do that, nonetheless, and find ourselves sometime later waking up to the glow of the TV screen in the early morning hours*. These two women, however, awoke under far more disturbing circumstances.
>
> Each of them found, suddenly, out of the depths of their sleep, that someone was in their bed with them. In the case of Sadie Hamer, the woman who was the first victim of this misconduct, she had two sons in her home at that point in time and, perhaps understandably, expected when she felt that somebody had sat down on the edge of the bed beside her while she was under her covers asleep, that it was one of her sons who had, for whatever reason, gotten up and come into her room for some purpose. She quickly realized otherwise.
>
> She was immediately instructed by a stranger – as she's shaking loose the grogginess of being awakened from a deep sleep, she

> confronted a stranger instructing her, in the virtual darkness, to not scream, "Don't make a noise. Lay back and don't look at me," commanding instructions from these individual – from this individual. She followed those instructions.
>
> When told, "Don't look at me," though in the darkness, even with the slight glow from the TV because the TV was back behind where this person was not illuminating the features of his face, she didn't know who this person was at that point in time. She, nonetheless and understandably, followed that instruction and turned her face – her head away from looking at his at the time while she lay on her back on her bed and this man then climbed on top of her.
>
> *You can imagine, I suspect, some measure of the fear and terror that enveloped her at that point. I'm not sure any of us who have never experienced anything like that can truly understand and appreciate what a circumstance like that would create, but I suggest that we all have a good idea of what she was going through at that point in time.*

(Dkt. No. 10-6 at p. 24-25.) The state courts determined that the prosecutor's statements during his opening statements did not so infect the trial to prejudice the defendant from receiving a fair trial. After reviewing the record as cited above with respect to the prosecutor's opening statement, the Court concludes that the state court's denial of this claim was not an unreasonable application of clearly established federal law. First, the prosecutor is entitled to considerable latitude to argue the evidence and reasonable inferences that can be drawn from that evidence. *See United States v. Werme*, 939 F.2d 108, 117 (3d Cir. 1991). Indeed, the evidence cited by the prosecutor was based on evidence that he intended to, and in fact did produce at trial such as, the fact that the TV was left on and the nature of the attack. Furthermore, as noted by the Appellate Division, the prosecutor did not state his personal opinion or belief in the petitioner's guilt. *See Fahy v. Horn*, 516 F.3d 169, 203 (3d Cir. 2008) (noting that a prosecutor cannot express his personal belief in the credibility of a witness or the guilt of a defendant). Finally, it is worth noting that the jury was specifically instructed that the prosecutor's opening statement was not

evidence, (*see* Dkt. No. 10-6 at p. 19.) and that it needed to base its decision on the evidence in the case. (*See* Dkt. No. 10-12 at p. 5-9.) The jury is presumed to have followed the instructions given to it by the trial judge. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000). Accordingly, under such circumstances, the Court finds that petitioner is not entitled to habeas relief on this prosecutorial misconduct claim.[2]

ii. *Prosecutor's Closing Argument Remarks*

Petitioner next argues that he is entitled to habeas relief because the prosecutor invoked sympathy for the victims by repeatedly using the term "atrocity" during his closing argument. The denial of this claim by the state courts was not an unreasonable application of clearly established federal law, nor based on an unreasonable determination of the facts. Indeed, the description of the crimes as atrocities where the victims were bound, threatened with a sharp object, and the robbed was based upon the evidence presented at trial. *Accord Lopez v. Folino*, No. 09-0975, 2012 WL 3777444, at *10 (E.D. Pa. Aug. 30, 2012) ("The prosecutor's description of the murder as an execution and Lopez as the executioner can also be argued based upon the evidence presented at trial. The shooter fired into the victim with a handgun which was placed directly against the back of his head."). Thus, petitioner is also not entitled to federal habeas relief with respect to this argument.

iii. *Power Point Presentation*

[2] To the extent that petitioner argued that the prosecutor also committed misconduct in his opening by stating, "I can tell you that," as noted by respondent, the petitioner misquotes the prosecutor. Indeed, the prosecutor reference to "I" was quoting what he intended Mary Perez to state during her testimony. (*See* Dkt. No. 10-6 at p. 32-33 ("First is the voice recognition by Mary Perez that we spoke of. And she can – will admittedly say 'Look, can I say with absolute certainty from that voice alone that it had to have been him? No. I mean he's who I recognize it to be but I suppose, you know, there could've been someone else of similar physical appearance and statute and – with a similar, if not, you know, altogether identical voice who was involved in this.'").)

Petitioner also objects to the prosecutor's Power Point presentation entitled, "A Tale of Two Atrocities," that was used at his trial. Petitioner claims that the Power Point presentation improperly bootstrapped evidence from the Perez incident into the Hamer incident. Finally, petitioner claims that the power point presentation should have been excluded because it glossed over elements of the kidnapping charges.

The last reasoned decision on the prosecution's use of the Power Point presentation was from the Appellate Division on petitioner's direct appeal. That court found that the use of the power point presentation did not so prejudice petitioner that prevented him from having a fair trial. (*See* Dkt. No. 9-8 at p. 6 ("There is no indication in the record the prosecutor's conduct . . . in using visual aids substantially prejudiced defendant's fundamental right to have a jury evaluate the merits of his defense.").)

This argument is not cognizable on federal habeas review to the extent petitioner asserts that the state court erred as a matter of state law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (stating that "it is not the province of a federal habeas court to reexamine state-court determinations of state-law questions"). The due process inquiry that is applicable to this issue is whether the state court's ruling was so arbitrary or prejudicial that it rendered the trial fundamentally unfair. *See Romano v. Oklahoma*, 512 U.S. 1, 12-13 (1994); *see also Keller v. Larkins*, 251 F.3d 408, 413 (3d Cir. 2001) (noting that to show that an evidentiary error rises to the level of a due process violation, a petitioner must show "that it was of such magnitude as to undermine the fundamental fairness of the entire trial"). The United States Supreme Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly." *Dowling v. United States*, 493 U.S. 342, 352 (1990).

Petitioner is not entitled to federal habeas relief on this claim. First, petitioner's argument that he is entitled to federal habeas relief because the Power Point presentation glossed over the kidnapping charges is without merit. Indeed, the state court instructed the jury on the elements that made up the kidnapping charges in its jury charge. (*See* Dkt. No. 10-12 at p. 11-12.) The jury is presumed to have followed this instruction during its deliberations. *See Weeks*, 528 U.S. at 234. Second, as the state court noted, the Power Point presentation did not bootstrap evidence from the Perez incident into the Hamer incident. Indeed, the striking similarities charge had separate columns for what transpired with respect to the two crimes. (*See* Dkt. No. 9-4 at p. 32.) This was merely an argument that there were reasonable inferences to be made from the evidence produced at trial. This did not make petitioner's trial fundamental unfair such that the denial of this claim was not an unreasonable application of clearly established federal law.

Finally, the use of petitioner's photo in the Power Point presentation and its subsequent use at trial does not entitle petitioner to federal habeas relief. Respondent asserts that there is no indication that the picture itself was a "mug shot" as the picture was redacted. The quality of the copy of the photo that respondent submitted to this Court is extremely poor. (*See* Dkt. No. 9-4 at p. 29.) Indeed, the copy of the photo respondent submitted is extremely blurry. While the Court can barely make out that it is a picture of a person, beyond the silhouette, no other identifiable features of the photo are clear. Nevertheless, the quality of the picture submitted by the respondent does not affect this Court's analysis of this Claim. Testimony revealed at trial indicates that petitioner was wearing normal clothes and not in prison garb in the picture. (*See* Dkt. No. 10-8 at p. 40 ("I don't remember what color his clothes were, although the photograph that you showed me would show what shirt he was wearing.").) This is important because some courts have noted that failing to remove the reference to a prison in a photo may constitute an

error. *See Peace v. Hendricks*, No. 03-5987, 2005 WL 3406405, at *6 (D.N.J. Dec. 12, 2005). Thus, it appears that the photo itself was not a "mug shot" per se, but instead an "arrest photo." *See Crawford v. United States*, No. 06-0265, 2008 WL 1775260, at *5 (W.D.N.C. Apr. 15, 2008) (distinguishing arrest photos from mug shots as arrest photographs "did not contain references to prison dates or incarceration.")

Respondent argues that petitioner's argument is without merit because, "[w]hile the photograph of Petitioner, S-22, was taken at the time of Petitioner's arrest, the redacted version of the photograph that the State of New Jersey showed to the jury did not give any indication of that fact." (Dkt. No. 9 at p. 42.) While perhaps technically true, respondent's argument fails to place into context how (in part) the photograph was discussed at trial. Indeed, as petitioner notes, when Detective Ulbrich was specifically questioned about the photograph, he noted that it was taken on June 30, 2002, or the day petitioner was taken into custody. (Dkt. No. 10-7 at p. 90 ("The photo was taken when he was lodged in the county jail which was on an unrelated issue.").) Thus, as this Court reads petitioner's arguments, the photograph, when combined with Ulbrich's testimony, shows that the photograph deprived him of a fair trial by the prosecutor's actions because it introduced evidence of petitioner's prior bad character.[3]

The state court determined that the use of the Power Point presentation did not prejudice the petitioner. To reiterate, to grant federal habeas relief, it is not enough for this Court to find that the state court's determination was incorrect, but rather, whether its determination was unreasonable which is a substantially higher threshold. *See Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (citing *Williams v. Taylor*, 529 U.S. 362, 410)). The use of the photograph coupled with Detective Ulbrich's statement that it was taken when he was placed in the jail on an

[3] The separate issue of whether petitioner is entitled to federal habeas relief due to Ulbrich's statement of petitioner's "prior" incarceration is discussed *infra* Part IV.E.

unrelated issue does give rise to the potential of prejudice towards petitioner. However, this Court notes that petitioner's identification at the time of the crimes was clearly at issue in that neither victim could visually identify the culprit, but did notice several of the culprit's features. Furthermore, in light of the deferential standard of review that this Court must apply under AEDPA to the state court's denial of this Claim, this Court finds that the state court's finding of no prejudice was not an unreasonable application of clearly established federal law. Indeed, the evidence against petitioner included DNA and forensic evidence which tied petitioner to the Perez crime scene. Furthermore, petitioner's voice was identified by Perez as her attacker on the night in question. Accordingly, this Court finds that the state court's denial of this claim based on a failure to show prejudice was not an unreasonable application of clearly established federal law. Thus, petitioner is not entitled to federal habeas relief on this claim.

C. Claim III – Improper Testimony necessitated a mistrial

In Claim III, petitioner argues that Detective Scull contributed to the unfair trial when he testified with respect to the Hamer incident that the perpetrator laid on top of her and inappropriately touched one of her breasts. Petitioner notes that in his first trial that he was charged with aggravated criminal sexual assault with respect to this touching, but that the charge was dismissed without prejudice and was not part of the second trial that is relevant to this habeas action. Petitioner claims that the trial court should have granted his motion for a mistrial which was made later on by petitioner's trial counsel during Scull's testimony. Petitioner further claims that the trial court agreed to give a curative instruction regarding Scull's comment but none was ever given. Relying on the New Jersey Rule of Evidence 403(b), petitioner argues that this added to the prejudice and made it more likely that the jury would use this improper reference to convict petitioner on an improper basis.

Neither the New Jersey Supreme Court nor the Appellate Division provided a reasoned decision on this claim on the merits. Therefore, the last reasoned decision on this claim is from the trial court which denied petitioner's motion for a mistrial in light of Scull's comment. In denying petitioner's motion for a mistrial, that court stated as follows:

> [I]n light of the fact both victims testified that they awakened in the middle of the night to find a strange man in their bedrooms who straddled them during the course of binding their arms, who put pillowcases over their heads and threatened their lives, that's, I think, compared to the touching that's been testified to far more significant conduct on the part of the defendant. The incident as described by Detective Scull is minimal compared to that.
>
> Miss Hamer testified that she felt a sharp object, that she felt a wooden handle, believed that the assailant had a knife, believed that he was going to kill her. When she initially got up and he returned, she believed she was going to be killed then. She was so fearful of the assailant that even though she thought she heard the person leave the house, when she went into her son's room, she spoke to her son in a soft voice, not being willing to have the chance, to take the chance that the assailant would come into her son's bedroom and harm him and her.
>
> Miss Perez also testified about being afraid.
>
> I don't think it makes any difference, frankly, in light of the context, the greater context and circumstances both victims have testified to, that this piece of information was supplied to the jury.
>
> There's also no dispute that that's what Miss Hamer reported not just to the police but in her statement which was maintained.
>
> There is no particular prejudice that can inure to the defendant that Miss Hamer in the first trial did not – was not willing, I guess, to describe anything of that nature. That was a choice that she made and the State reacted appropriately then.
>
> I don't believe that Detective Scull gratuitously mentioned it. Even if he did, given the other things that Miss Hamer testified and Miss Perez testified to, it pales by comparison.
>
> And there's no manifest injustice in proceeding. I'll give an instruction if counsel wants me either now or at the end of the trial.

> There is nothing about that statement that is inflammatory such as to warrant a mistrial.

(Dkt. No. 10-9 at p. 67.)

At the outset, this Claim is not cognizable on federal habeas relief to the extent that it asserts that the state court erred as a matter of state law in permitting this evidence from Scull to be admitted. *See Estelle*, 502 U.S. at 67-68 (stating that "it is not the province of a federal habeas corpus to reexamine state-court determinations of state-law questions"); *see also Keller v. Larkins*, 251 F.3d 408, 416 n. 2 (3d Cir. 2001) ("A federal habeas court . . . cannot decide whether the evidence in question was properly allowed under the state law of evidence."). In terms of a federal due process claim, to prevail, petitioner must prove that he was deprived of fundamental elements of fairness in his criminal trial. *See Glenn v. Wynder*, 743 F.3d 402, 407 (3d Cir. 2014) (quoting *Riggins v. Nevada*, 504 U.S. 127, 149 (1992)). As previously noted, the Supreme Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly based on the recognition that [b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited application." *Medina v. California*, 505 U.S. 437, 443 (1992). "In order to satisfy due process, [petitioner's] trial must have been fair; it need not have been perfect." *Glenn*, 743 F.3d at 407 (citing *United States v. Hasting*, 461 U.S. 499, 508 (1983)).

The trial court decided that in light of the other facts surrounding both the Hamer incident, for example, the binding and use of a sharp object to threaten her, the fact that Scull testified that the perpetrator inappropriately touched Hamer's breasts did not so prejudice the trial so as to make it fundamental unfair. This was not an unreasonable application of clearly established federal law on whether petitioner's fundamental fairness rights were violated. Accordingly, federal habeas relief is not warranted on this claim.

D. Claim IV – Purported Improper Expert Testimony from Scull

In Claim IV, petitioner argues that the trial court erred by permitting Scull to provide expert testimony by allowing him to "connect the dots" between the Hamer and Perez crimes. Petitioner asserts that this connection was for the jury to make, not the detective's to make. The last reasoned decision on this claim was from the Appellate Division on petitioner's direct appeal which analyzed this claim as follows:

> The trial court correctly overruled defendant's objection to Detective Scull's testimony "connecting the dots" between the two crimes, stating the detective was entitled to explain his decision to charge defendant for both crimes. The similarities between the two crimes – their locations the times they were committed, the choice of victims, and the assailant's conduct before and after each of the incidents, is not "expert" testimony beyond the understanding of the average juror. *See* N.J.R.E. 703. Rather, it is the kind of factual testimony that a police officers would typically provide based on his or her perception of the evidence obtained in the investigation.

(Dkt. No. 9-8 at p. 6.) Thus, the Appellate Division found that the testimony of Scull was proper as a matter of state law. It is not the province of this Court on federal habeas review to re-examine state court determinations on state law questions. *See Estelle*, 502 U.S. at 67-68. Therefore, petitioner is not entitled to federal habeas relief on this claim. *Accord Stidham v. Varano*, No. 08-3216, 2009 WL 1609423, at *20 (E.D. Pa. June 9, 2009) (where state court found that witnesses did not testify as experts but rather that such lay opinion testimony was admissible as a matter of state law, federal court on habeas review must accept state court's determination as it "would be in no position even to consider whether the Superior Court correctly ruled that the testimony was admissible as a matter of state law").

E. Claim V – Statements of Petitioner's Prior Incarceration

In Claim V, petitioner argues that the trial court erred in denying his request for a mistrial in light of Detective Ulbrich's references to his prior incarceration. The first occurred in discussing petitioner's appearance on direct:

> Q: And what were your observations of Mr. Price at the time of his apprehension?
> A: He had a day's growth, a stubbly beard and his hair was unkept like it was a little bit long enough to, to grab.
> Q: I show you a photo that's been marked S-22 for identification. Do you recognize what that photograph is?
> A: Yes. It's a photograph of Alonzo Price. This was taken on June 30, 2002 in conjunction with him being placed in the county jail.
> Q: And that was – the photo was taken with regard to his arrest for this occurrence?
> A: I believe that photo was taken when he was lodged in the county jail which was on a unrelated issue.

(Dkt. No. 10-7 at p. 90.) The second reference occurred later on during the direct examination of Ulbrich when he discussed the buccal swab that was taken from petitioner; specifically:

> Q: What is a buccal swab? How do –
> A: It's a –
> Q: How do you go about –
> A: It's a cotton swab –
> Q: -- obtaining –
> A: A buccal swab really is the buccal region of your mouth which is inside your jaw between your check and your gum. And it's a – it's a process that you use a cotton swab to obtain epithelial cells, like, from your mouth, some skin cells from the buccal region that'll be used for DNA purposes that are contained within the saliva. [¶] And it's the – that's the preferred method to send in a DNA sample as opposed to, say, something like a blood sample.
> Q: Directing your attention to the, to the second of those two envelopes, what's that?
> A: The second envelope is marked with the same case number. It's A05000531, Lab. No. 14003999. This says, "Two buccal swabs (saliva) taken from Alonzo Price, Sr., suspect. Date, 1/9 of 2001, time 10:02 a.m. location Cape May County Jail, nurse's office," my name, Detective Karl Ulbrich with my badge number. And it contains Items 14 and 14A, KEU14 and KEU14A.

(Dkt. No. 10-7 at p. 94-95.) At the close of testimony that day, petitioner's counsel moved for mistrial arguing that these two references were unduly prejudicial. The trial court denied the motion for a mistrial and stated as follows:

> And, in fact, an instruction can be fashioned to be given to the jury tomorrow if you want or at the end of the case if you prefer to the effect that the officer when reading off the place where the buccal swab was taken made reference to the nurse's office at the county jail, and that is because that's where the buccal swabs are taken in Cape May County Prosecutor's Office cases and leave it at that.
>
> So there just is – the first comment, honestly, this officer has a tendency to mumble. It's almost as if he has marbles in his mouth, and I had difficulty following his testimony and just barely heard the comment.
>
> I'll make – I'll fashion an instruction, review any you can propose, gladly give it to the jury if you want. I really don't have a concern that the jury could possibly have heard what he said or understand what it meant if they did. But I extend to you the opportunity to give me an instruction.
>
> The jail reference, I do feel obliged to address. I think that can be done very readily. And I don't think any prejudice in this case flows from either situation in a case where the charges include two first-degree kidnappings and two burglaries. Obviously, the defendant's going to be processed. The county resources are going to be involved in the investigation of the case. And I think we can just leave it at that.
>
> There is no, in my opinion, undue prejudice flowing from these. Obviously, it would have been cleaner if they hadn't but they didn't.

(Dkt. No. 10-7 at p. 99-100.) The trial court's denial of this claim is the last reasoned decision for purposes of this Court's review as the Appellate Division denied this claim without discussion. *See Ylst*, 501 U.S. at 803.

The disclosure of petitioner's incarceration "may, in certain circumstances, violate a defendant's due process right to a fair trial." *United States v. Faulk*, 53 F. App'x 644, 647 (3d

Cir. 2002). For example, a panel of the Third Circuit in *Faulk*, using *Estelle v. Williams*, 425 U.S. 501, 512-13 (1976), noted that "a defendant's Fourteenth Amendment rights are violated if compelled to stand before a jury while dressed in identifiable prison clothes." *Faulk*, 53 F. App'x at 647 (citation omitted). In *Estelle*, "[t]he Supreme Court emphasized that 'the constant reminder' to the jury over the course of a trial that the defendant is a prisoner may impair the presumption of innocence." *Id.* (citing *Estelle*, 425 U.S. at 504). Nevertheless, many courts have noted that the "the mere utterance of the word [jail, prison, or arrest] does not, without regard to the context or circumstances, constitute reversible error per se." *United States v. Villanbona-Garnica*, 63 F.3d 1051, 1058 (11th Cir. 1995) (quoting *United States v. Veteto*, 701 F.2d 139-40 11th Cir. 1983) (quoting *United States v. Barcenas*, 498 F.2d 1110, 1113 (11th Cir. 1974))); *see also United States v. Atencio*, 435 F.3d 1222, 1237 (10th Cir. 2006) ("The rule of *Estelle* does not apply, to every mere utterance of the words [jail, prison, or arrest], without reference to context or circumstances.") (internal quotation marks and citation omitted); *Faulk*, 53 F. App'x at 648; *United States v. Alsop*, 12 F. App'x 253, 258 (6th Cir. 2001); *United States v. Henry*, Crim. No. 06-33-02, 2012 WL 5881848, at *6 (E.D. Pa. Nov. 21, 2012) (noting that courts from outside the Third Circuit have held, in line with *Faulk*, that mere utterance of words jail, prison or arrest does not amount to a constitutional violation). As some courts have explained, this distinction "is because 'the impact of referring to a defendant's incarceration is not constant as it is with prison garb.'" *United States v. Falciglia*, No. 09-120, 2010 WL 2408153, at *9 (W.D. Pa. June 7, 2010) (quoting *United States v. Washington*, 462 F.3d 1124, 1136-37 (9th Cir. 2006)). Thus, isolated or brief references to a defendant's incarceration during trial do not necessarily amount to a due process violation. *See Atencio*, 435 F.3d at 1238 (prosecutor's single reference that defendant was in jail did not impair presumption of innocence since it was

isolated and not a continuing occurrence); *United States v. Allen*, 425 F.3d 1231, 1236 (9th Cir. 2005); *Faulk*, 53 F. App'x at 647-48 ("[W]e find that the prosecutor's brief (albeit repeated) mention of Faulk's imprisonment in a single short series of questions did not serve as a 'constant reminder' to the jury of defendant's condition so as to impair the presumption of innocence."); *Falciglia*, 2010 WL 2408153, at *10 (witnesses two references to defendant being an "inmate" did not impair the presumption of innocence because it did not constitute a "constant reminder" that defendant had been incarcerated).

In this case, references to petitioner's incarceration were brief and in passing. They did not serve as a "constant reminder" to the jury that petitioner had been incarcerated and did not impair his presumption of innocence. *See Faulk*, 53 F. App'x at 647. Additionally, the trial court gave petitioner the opportunity to come up with a curative instruction.[4] Furthermore, the second reference by Ulbrich did not even necessarily implicate that petitioner was in jail, only that the buccal swabs were taken from petitioner at the Cape May County Jail. Under these circumstances, and when viewed in context, the Court finds that the state court's denial of this claim was not an unreasonable application of clearly established federal law and the decision was not based on an unreasonable determination of the facts. Accordingly, this claim does not warrant granting federal habeas relief.

F. Claim VI – Failure to Suppress Statement

In Claim VI, petitioner argues that the trial court erred in refusing to suppress his statement to the police. He claims that the State failed to prove that his statements were voluntarily given after waiving his *Miranda* rights. He states that he was interviewed by two detectives at once and was handcuffed and placed in a holding cell before the interrogation. The

[4] It does not appear that petitioner elected to create such an instruction for the trial court's consideration.

last reasoned decision on this claim was from the trial court which denied petitioner's motion to suppress his statement to police. In denying the motion to suppress, the trial court stated as follows:

> Clearly, the burden is on the State. Equally, clearly, the standard of proof is beyond a reasonable doubt. This being a 104 hearing outside the presence of the Jury to determine whether or not the defendant's statements will be admissible at trial whether or not the requirements of Miranda were complied with.
>
> The testimony is that the defendant had an outstanding bench warrant. Once the officers learned of the existence of the bench warrant, they sought him out and took him into custody and took him back to the station. The testimony of Detective Scull is that at the time the defendant was interviewed in essentially the Municipal Courtroom was not even in handcuffs although he had been told what was going to be the subject of the discussion and obviously of the existence of the bench warrant on an unrelated municipal matter.
>
> At the time he was interviewed, the witness has testified he was seated essentially at the head of a table with an officer on either side. All were seated when the conversation took place. The Miranda card was displayed. It was read to the defendant. He was asked if he understood what his rights consisted of. He responded, yes. And he in fact signed the card which was also signed, dated and a time noted by the officers who interviewed him.
>
> The question then becomes since the only proofs that I have from which conclusions of fact can be drawn are from the State and the proofs are that the defendant in a non-coercive atmosphere had his rights explained to him, said he understood them and then signed the card. Was whether or not there was anything whatsoever in the statements he made in the circumstances thereafter that somehow made this voluntary, knowing and intelligent waiver of his Miranda rights improper from the inception of the waiver or thereafter and there simply isn't.
>
> This was a relatively brief interview. The fact that it was not taped, given that the interview occurred four years ago, in particular establishes nothing. The officers did not anticipate that the defendant would make a full confession despite of his waiver of his Miranda rights as acknowledged on the car and by his verbal statements. Clearly, the facts that support the voluntariness of a

> waiver or the non-coercive atmosphere down to not having him cuffed, the brevity of the interview, the context of the interview, the fact that a defendant, although he had been in a holding cell, was alone. There were no weapons being shown, et cetera. That it was a knowing and intelligent as established from the fact that the defendant didn't even ask questions about it is a person actually with a prior criminal history of which the officers were aware. He said he understood what his rights were and that he would take to the officers and he signed an acknowledgement thereof on the Miranda card.
>
> It is certainly unrebutted that the defendant made a knowing and intelligent waiver of his rights. When discussing the cases, he did specify his whereabouts on a particular night. It turned out thereafter to be very significant. But as the officer stated, at that point in the investigation, they had spoken to several individuals including the defendant. The investigation was evolving and it was not until some time later that they understood the significance of the statements the defendant had made in which he claimed that he had basically been on his, in his room and intoxicated the entire night of the Maria Perez incident.
>
> The State has met its burden of proof.

(Dkt. No. 10-3 at p. 21-22.)

The United States Supreme Court decision in *Miranda v. Arizona*, 384 U.S. 436 (1966) "held that '[t]he defendant may waive effectuation' of the rights conveyed in the warnings 'provided the waiver is made voluntarily, knowingly, and intelligently.'" *Fahy*, 516 F.3d at 194 (quoting *Miranda*, 384 U.S. at 444). This inquiry has two dimensions as explained by the Supreme Court; specifically:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstance surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Moran v. Burbine, 475 U.S. 412, 421 (1986). "The ultimate question in the voluntariness calculus is 'whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution.'" *Fahy*, 516 F.3d at 194 (quoting *Miller v. Fenton*, 474 U.S. 104, 112 (1985)).

In this case, the state court analyzed the totality of the circumstances in determining whether petitioner's waiver of his *Miranda* rights was violated in the context of denying the motion to suppress after conducting an evidentiary hearing. The state court's decision was not an unreasonable application of clearly established federal law. Furthermore, upon reviewing the suppression hearing transcript, its decision holding that the *Miranda* waiver was knowing and intelligent was not based on an unreasonable determination of the facts. Accordingly, petitioner is not entitled to federal habeas relief on this claim.

G. Claim VII – Change of Venue

In Claim VII, petitioner argues that the trial court should have ordered a change of venue or empaneled a foreign jury because of undue pretrial publicity that failed to ensure that he received a fair trial by an unbiased jury. While the habeas petition states that the trial court should have granted his motion for a change of venue, it appears that no such motion was ever made by petitioner. Indeed, petitioner's direct appeal brief to the Appellate Division argued as follows, "[w]hile defendant did not specifically request a change of venue or foreign jury, the trial court had an independent duty to act swiftly and decisively to overcome the potential bias of the jury from outside influences." (Dkt. No. 9-3 at p. 55-56.) Nevertheless, there was some discussion of the pretrial publicity of the case in the lead up to the retrial. Indeed, immediately prior to jury selection, the following colloquy took place between the trial court, Mr. Michael J. Catanese, Esq. (petitioner's trial counsel) and Mr. David J. Meyer (assistant county prosecutor):

MR. CATANESE: Judge the only other issue, as we discussed in chambers, would be –
THE COURT: Oh yes.
MR. CATANESE: I have here a copy of – actually not the copy. It's actually the original article taken out of Sunday's – or Saturday's Atlantic City Press, dated August 7th, 2004. There was an article in the Region Section regarding this matter. The headline reads, "Retrial of Woodbine Man on Kidnapping and Robbery Charges Set to Begin." If I can have it marked, Your Honor, and –
THE COURT: Yes, please.
MR. CATANESE: Is it D-1 for identification? I'm going to show it to Mr. Meyer. May I approach the bench, Your Honor?
THE COURT: Yep. Prior to the notorious trials from Timothy McVeigh to O.J. Simpson to – of course, I can never think of notorious trials when I need to. Prior to those types of trials, articles such as this one seemed to have far greater significance than they do now.
I absolutely will ask each and every Juror if they have read anything about this case and I will ask them at sidebar if, as a result of reading that case, they have an opinion and, if so, can they set that opinion aside and honestly decide the case on its merits. It may make Jury Selection extremely difficult, but there it is and we'll just deal with it as best we can and, hopefully, not run out of Jurors, which is the main thing I'm concerned about. If too many people, as result of reading this article, have formulated opinions, it will be a problem.
But, like I said, folks have been asked in all kinds of contexts if they can be open minded, have indicated that they can. Hopefully, we'll end up with 16 people who are qualified in every respect, including that one. But believe me I will ask the Jurors about it because I share your concern that some folks may be tainted.
Are there any other Jurors available, Ms. Payne, for tomorrow?
THE JURY ATTENDANT: I don't believe so, Your Honor.
THE COURT: So – okay.
MR. CATANESE: Judge, if I may just briefly follow up on Your Honor's comments. This was obviously, I don't – well, it's getting rather old. I don't believe it has been the subject of extensive pretrial publicity. There has been some.
THE COURT: This is –
MR. CATANESE: The problem –
THE COURT: This is pretty serious.
MR. CATANESE: Well, the problem with this article, Judge – and I don't know if you could – anyway, if there's any Jurors that would, you know – I suppose we can't really deal with it until we see what happens, but the concern that I would have, Your Honor,

> is that – that the defense would have would be that any potential Juror who read that specific article is going to be aware of the fact that Mr. Price was convicted by a prior Jury. And it would seem to me that any person who would know that someone's been through a full-fledged trial and convicted – it even references the fact that it was a problem with Jury Selection, as opposed to, like, some sort of error in the trial itself, that that – even though a person may indicate, "I could keep an open mind," I don't know how a human being could not take that and give that weight in their deliberation. In other words, that individual – any – I would submit, Your Honor, just as a carte blanche, any individual who read that article as a potential Juror should be dismissed for cause, Your Honor.
> THE COURT: Well, I will absolutely –
> MR. CATANESE: Well, yeah, we'll deal with that when it –
> THE COURT: We'll deal with it –
> MR. CATANESE: There may not be anybody. Maybe we'll have a Jury Panel – a bunch of people who went out and went fishing or went to the beach on Saturday and never read the Press, but –
> THE COURT: Thank goodness it was good weather.
> MR. CATANES: And we'll see what happens. Exactly.
> THE COURT: Yeah, All right.

(Dkt. No. 105- at p. 9-10.)

The Appellate Division summarily denied petitioner's claim on direct appeal that the trial court should have *sua sponte* transferred venue of this case. However, petitioner's burden "still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington*, 562 U.S. at 98. "[A] habeas court must determine what arguments or theories . . . could have supporte[d] the state court's decision; and then must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Cullen*, 131 S. Ct. at 1402 (internal quotation marks and citation omitted).

The Fourteenth Amendment guarantees a criminal defendant a right to a trial by an impartial jury free from outside influences. *See Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966). In some cases, a court may presume prejudice to the defendant such as "[w]here media or other

community reaction to a crime or a defendant endangers an atmosphere so hostile and pervasive as to preclude a rational trial process[.]" *Rock v. Zimmerman*, 959 F.2d 1237, 1252 (3d Cir. 1992) (citing *Sheppard*, 384 U.S. 333; *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963)), *overruled on other grounds by*, *Brecht*, 507 U.S. 619; *see also Campbell v. Bradshaw*, 674 F.3d 578, 593 (6th Cir. 2012) ("'Presumptive prejudice from pretrial publicity occurs where inflammatory, circus-like atmosphere pervades both the courthouse and the surrounding community[.]'") (quoting *Foley v. Parker*, 488 F.3d 377, 287 (6th Cir. 2007)). "[T]he community and media reaction, however, must have been so pervasive as to make it apparent that even the most careful *voir dire* process would be unable to assure an impartial jury." *Rock*, 959 F.2d at 1252-53 (citations omitted). Nevertheless, the United States Supreme Court has explained that the presumption of prejudice from pretrial publicity "attends only in the extreme case." *United States v. Skilling*, 561 U.S. 358, 381 (2010); *see also Campbell*, 674 F.3d at 593 (noting that presumptive prejudice from pretrial publicity is rarely presumed); *Rock*, 959 F.2d at 1252 (cases of presumed prejudice from pretrial publicity "are exceedingly rare.").

In *Skilling*, 561 U.S. at 379-81, the Supreme Court traced the history of its cases with respect to presumed prejudice due to pretrial publicity by citing to its opinions in *Rideau v. Louisiana*, 373 U.S. 723 (1963), *Estes v. Texas*, 381 U.S. 532 (1965) and *Sheppard v. Maxwell*, 384 U.S. 333 (1966):

> Wilbert Rideau robbed a bank in a small Louisiana town, kidnaped three bank employees, and killed one of them. Police interrogated Rideau in jail without counsel present and obtained his confession. Without informing Rideau, no less seeking his consent, the police filmed the interrogation. On three separate occasions shortly before the trial, a local television station broadcast the film to audiences ranging from 24,000 to 53,000 individuals. Rideau moved for a change of venue, arguing that he could not receive a fair trial in the parish where the crime occurred, which had a population of approximately 150,000 people. The trial court

denied the motion, and a jury eventually convicted Rideau. The Supreme Court of Louisiana upheld the conviction.

We reversed. "What the people [in the community] saw on their television sets," we observed, "was Rideau, in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder." *Id.*, at 725, 83 S. Ct. 1417. "[T]o the tens of thousands of people who saw and heard it," we explained, the interrogation "in a very real sense *was* Rideau's trial—at which he pleaded guilty." *Id.*, at 726, 83 S. Ct. 1417. We therefore "d[id] not hesitate to hold, without pausing to examine a particularized transcript of the *voir dire*," that "[t]he kangaroo court proceedings" trailing the televised confession violated due process. *Id.*, at 726–727, 83 S. Ct. 1417.

We followed *Rideau* 's lead in two later cases in which media coverage manifestly tainted a criminal prosecution. In *Estes v. Texas*, 381 U.S. 532, 538, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965), extensive publicity before trial swelled into excessive exposure during preliminary court proceedings as reporters and television crews overran the courtroom and "bombard[ed] ... the community with the sights and sounds of" the pretrial hearing. The media's overzealous reporting efforts, we observed, "led to considerable disruption" and denied the "judicial serenity and calm to which [Billie Sol Estes] was entitled." *Id.*, at 536, 85 S. Ct. 1628.

Similarly, in *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966), news reporters extensively covered the story of Sam Sheppard, who was accused of bludgeoning his pregnant wife to death. "[B]edlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom," thrusting jurors "into the role of celebrities." *Id.*, at 353, 355, 86 S. Ct. 1507. Pretrial media coverage, which we characterized as "months [of] virulent publicity about Sheppard and the murder," did not alone deny due process, we noted. *Id.*, at 354, 86 S. Ct. 1507. But Sheppard's case involved more than heated reporting pretrial: We upset the murder conviction because a "carnival atmosphere" pervaded the trial, *id.*, at 358, 86 S. Ct. 1507.

In each of these cases, we overturned a "conviction obtained in a trial atmosphere that [was] utterly corrupted by press coverage"; our decisions, however, "cannot be made to stand for the proposition that juror exposure to ... news accounts of the crime ... alone presumptively deprives the defendant of due process." *Murphy v. Florida*, 421 U.S. 794, 798–799, 95 S. Ct. 2031, 44 L.

> Ed. 2d 589 (1975). See also, *e.g.*, *Patton v. Yount*, 467 U.S. 1025, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984). Prominence does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*. *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961) (Jurors are not required to be "totally ignorant of the facts and issues involved"; "scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case."); *Reynolds v. United States*, 98 U.S. 145, 155–156, 25 L. Ed. 244 (1879) ("[E]very case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits."). A presumption of prejudice, our decisions indicate, attends only the extreme case.

Skilling, 561 U.S. at 379-81 (footnote omitted). With these cases as a backdrop, in *Skilling* the Supreme Court found a number of considerations to be relevant in determining whether there is presumed prejudice, such as: (1) the size and characteristics of the community in which the crime occurred; (2) the content of the media coverage; (3) the timing of the media coverage; and (4) the existence of media interference with court proceedings. *See* 561 U.S. at 382-84.

Petitioner never presented before the state courts evidence with respect to the size and characteristics of the community in Cape May County[5], nor does he present such evidence before this Court. Furthermore, even if petitioner had presented such evidence with respect to the size and characteristics of Cape May County in his habeas petition, it is improper for this Court to receive such evidence when analyzing this Claim under the AEDPA standard of review. *See Cullen*, 131 S. Ct. at 1398, 1400 (noting that federal habeas review under § 2254 "is limited to the record that was before the state court that adjudicated the claim on the merits" and "that

[5] Petitioner's direct appellate brief to the Appellate Division referenced the "small community" of Woodbine and Cape May County itself. (*See* Dkt. No. 9-3 at p. 62.) However, petitioner provided the state court with no figures or evidence to support this statement.

evidence introduced in federal court has no bearing on" such review). As such, this Court cannot say that this factor weighed for or against a finding of presumed prejudice.[6]

The second factor requires a court to examine the content of the news coverage. As previously noted, petitioner's conviction arose from a second trial after the first trial was reversed and remanded due to the statements of a discharged juror. Before the trial court, petitioner's counsel expressed concern about an Atlantic City Press article that was issued a few days prior to the re-trial that discussed the prior trial and conviction. Petitioner's appellate brief on direct appeal also referenced another article that purportedly showed petitioner being led into the courtroom in handcuffs and referenced the prior trial and conviction.

Accordingly, the purported pretrial publicity as petitioner asserted in the state courts with respect to petitioner's re-trial amounted to two newspaper articles. Petitioner's trial counsel even admitted that the pretrial publicity for this case was not "extensive." While the first article was purportedly from the Atlantic City Press, it is unclear where the purported second article came from. For the most part, petitioner did not show the state courts that these articles were anything more than factual in nature that petitioner was being retried on kidnapping charges. As best this Court can determine since the two articles are not included in the record, the two articles mentioned by petitioner to the state courts may be far different than the type and content of pre-trial publicity that arose with the defendant's confession in *Rideau* or the type of "bedlam" coverage in *Sheppard*. Indeed, in *Skilling*, 561 U.S. at 383, the Supreme Court cited to *United States v. Chagra*, 669 F.2d 241, 251-52 n. 11 (5th Cir. 1982), which noted that, "[a] jury may have difficulty in disbelieving or forgetting a defendant's opinion of his own guilt but have no

[6] Even if this Court were to find that this factor weighed in favor of changing venue, the state court's denial of this Claim was not an unreasonable application of clearly established federal law based on the remaining factors as discussed *infra*.

difficulty in rejecting the opinions of others because they may not be well founded." As one court has noted, "the highly factual nature of the media coverage, coupled with the fact that the news stories contain no confessions by Defendants, weigh against a finding of presumed prejudice." *United States v. Savage*, Crim. Nos. 07-550-03, 07-550-04, 07-550-05, 07-550-06, 2012 WL 2376680, at *5 (E.D. Pa. June 25, 2012) (citing *United States v. Lindh*, 212 F. Supp. 2d 541, 549 (E.D. Va. 2002)). In this case, petitioner's statements to the state courts regarding the pretrial publicity in the form of two newspaper articles immediately prior to his second trial did not weigh in favor of transferring trial of this case to another venue.

The third factor to consider is the timing of the media coverage. The incidents giving rise to the charges in this case took place in 2000. Petitioner vaguely alluded to widespread dissemination of publicity of petitioner's first trial in his appellate brief to the Appellate Division on direct appeal. However, he only mentioned two articles that were issued immediately prior to his re-trial in 2004. In the absence of evidence that showed a high level of media interest continuing up to petitioner's re-trial, this factor also does not weigh in favor of a transfer. *See Hertzel v. Lamas*, 372 F. App'x 280, 284 (3d Cir. 2010) ("The passage of time and the sporadic nature of the coverage in the months proceeding the trial suggest that any prejudice that may have been presumed around the time of Guzman's death and Hetzel's arrest may have dissipated by the next year); *see also United States v. Matusiewicz*, Crim. Nos. 12-83-1, 12-83-2, 13-83-3, 2014 WL 2446084, at *4 (D. Del. May 29, 2014) ("In the absence of evidence that a high level of media interest had continued since the shootings, the court concludes that a period of more than a year is a sufficient cooling off period.") (citation omitted).

The fourth factor to consider is the extent to which there has been media interference Maybe I'll come downMMwith the actual courtroom proceedings. *See Skilling*, 561 U.S. at 382

n.14; *see also Savage*, 2012 WL 2376680, at *4 (citing *United States v. Diehl-Armstrong*, 739 F. Supp. 2d 786, 793 (W.D. Pa. 2010)). In this case, there was nothing before the state courts to suggest media interference with the courtroom proceedings. Therefore, this factor also did not weigh in favor of a transfer.

Applying the factors outlined above, petitioner did not show that the state court's denial of his claim of presumed prejudice necessitating a transfer was an unreasonable application of clearly established federal law or the result of a decision based on an unreasonable determination of the facts. This conclusion, however, does not end the analysis on this claim as this Court must next analyze whether actual prejudice infected petitioner's jury. *See Skilling*, 561 U.S. at 385; *see also Savage*, 2012 WL 2376680 at *3 (noting distinction between presumed prejudice and actual prejudice with respect to changing venue based on pretrial publicity).

Where there is an absence of facts demonstrating presumed prejudice, a petitioner must show actual prejudice such that those who served on the jury could not reach an impartial verdict based solely on the evidence produced at trial. *See Patton v. Yount*, 467 U.S. 1025, 1035 (1984), *citing Irvin*, 366 U.S. at 723); *see also Rock*, 959 F.2d 1237 ("In the absence of a showing of an 'utterly corrupt' trial atmosphere, the defendant, in order to demonstrate a violation of his right to an impartial jury, must establish that those who actually served on his jury lacked a capacity to reach a fair and impartial verdict based solely on the evidence they heard in the courtroom.") (citations omitted). As the Supreme Court has noted:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence

> of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin, 366 U.S. at 722-23 (citations omitted); *see also Rock*, 959 F.2d at 1253 ("The fact that jury members may have been exposed to press reports or other community reaction concerning the case and even the fact that they may have formed a tentative opinion based on that exposure will not establish a constitutional violation if the trial court has found, with record support, that each of the jurors was able to put aside extrinsic influences.").

A review of the voir dire indicates that the state court's denial of this claim did not run afoul of § 2244(d)(1) or (2). One potential juror indicated at sidebar that he had read in the paper that this case was a retrial. (*See* Dkt. No. 10-5 at p. 15.) That juror was promptly excused. (*See id.* at p. 16.) Another juror indicated at sidebar that she had prior knowledge of what occurred. (*See id.* at p. 18.) It is unclear whether this prior knowledge was from the pretrial publicity or from another source. However, this juror too was also promptly excused. (*See id.*) Subsequently, the trial judge made sure during voir dire that the remaining jurors did not have prior knowledge of this case on at least two occasions. First, the trial judge asked the potential jurors as follows, "[B]ut any of you, presently seated in the box, familiar with this case because of anything they've heard outside the courtroom? Anything at all outside the courtroom? Anybody know anything about this case because of anything they've heard outside the courtroom?" (Dkt. No. 10-5 at p. 45.) No prospective juror in the box responded in the affirmative according to the transcript. Subsequently, the trial judge was even more specific later on when he questioned the prospective jurors as follows:

> Do any of you have any prejudice against the defendant merely because he is a defendant in this case or for any other reason, including anything you might know about the case from outside

> the courtroom, media accounts, if any, discussions with friends – is there any reason whatsoever why anyone presently seated in the box could not serve as an open-minded and impartial Juror in this case?

(Dkt. No. 10-5 at p. 58.) No one responded in the affirmative to the trial judge's inquiry. Accordingly, a review of the voir dire transcript reveals that petitioner failed to show actual prejudice based on the pretrial publicity of his case. *See Stevens v. Beard*, 701 F. Supp. 2d 671, 726-27 (W.D. Pa. 2010) (reviewing voir dire transcript and finding no actual prejudice where only three prospective jurors were dismissed for cause because they had a fixed opinion about the case based on the media coverage). Therefore, the denial of this claim by the state courts was not an unreasonable application of clearly established federal law nor was the decision based on an unreasonable determination of the facts as petitioner failed to show presumed prejudice and/or actual prejudice to the state courts based on pretrial publicity. Accordingly, petitioner is not entitled to federal habeas relief on this claim.

H. Claim VIII – Failure to Recuse

In Claim VIII, petitioner argues that the trial court erred in denying his motion to recuse. The Appellate Division denied this claim without discussion. Therefore, the last reasoned decision on this claim for purposes of AEDPA review is from the trial court.

At petitioner's retrial, the trial court issued a mistrial during the course of the voir dire of the first jury to be empaneled due to statements that one prospective juror made. More specifically, one prospective juror in that first jury pool on retrial stated that, "I got mugged by a nigger a couple of years ago, and if I get a chance to put a nigger away, I will." (Dkt. No. 10-4 at p. 32.) Subsequently, petitioner moved for a mistrial which was granted such that a new separate second jury was empaneled a week later. The trial judge stated the following in granting the

motion for a mistrial due to this prospective juror's statements from the first jury that was empaneled:

> Folks, an application for a mistrial has been made in this matter because of the unforeseeable misconduct of a potential juror that at some point certainly warrants contempt proceedings against that individual for his conduct.
>
> I guess this defect is curable by an instruction. Most – not most, but all reasonable persons can agree that the conduct was so outrageous in nature that it would not influence an individual to be prejudiced against the defendant or persons of color as much as to cause a reaction in the contrary direction, to bend over backwards to the detriment of the State, frankly.
>
> The standard for the grant of a mistrial is the same as that for a new trial motion, whether or not the error is such that manifest injustice would result from the continuance. Frankly, it is my intellectually, honest opinion that it would not, that the error can be corrected.
>
> But the reversal in this case in my opinion was not grounded in reason initially. The situation in that case was if error readily correctable and not ultimately not error at all.
>
> To try cases because of the fear that the Appellate Division will disagree with the body of law that exists or the decisions that exist are made at the trial level to me is to bring the practice of law to a pretty low point.
>
> But I guess, given the reversal in this case, which is one I will certainly be mindful of the rest of my judicial career, I will declare a mistrial in this instance. I do not think it's an error that cannot be corrected, but I cannot with confidence believe that the corrective measure that would be taken would satisfy others.
>
> The proofs in this case are quite significant. They're – there's every reason to believe that there will be a second conviction and a review. I mean, we'll try again next Monday.

(Dkt. No. 10-4 at p. 44-45.) After the second jury was empaneled the following week, petitioner argued that the trial judge should recuse herself based on the statements she had made in granting the mistrial the previous week. Indeed, petitioner's counsel argued as follows:

> MS. PFEIFLE: . . . . Your Honor, first, as we discussed previously, at this point, on behalf of Mr. Price, I'm making a motion for recusal. Your Honor, I'm basing that request of asking that you recuse yourself from hearing this case based primarily on your comments made last Monday, while you were ruling on the mistrial. You indicated specifically that there had been convictions in the previous case, you anticipated convictions in this case and you commented, I felt with some specificity, on the weight and credibility of the evidence presented.
> Mr. Price does have a right for these proceedings to be unbiased and I believe your remarks call into question your ability to be open minded in this proceeding. Therefore, we're moving that you recuse yourself.

(Dkt. No. 10-5 at p. 4.) In denying petitioner's motion for recusal, the trial judge stated as follows:

> Not only do judges who are reversed routinely retry cases, judges in most counties are assigned matters for purpose of pretrial motions, bail hearings and, ultimately, trial, as a result of which you acquire an intimate knowledge of the proofs the State has. The proofs in this case involved two victims testifying, one of whom said she specifically recognized the defendant's voice. It's not surprising that I would have characterized the proofs in the manner that I did and I do anticipate the same outcome. That's what happens when proofs are strong.
>
> Does that constitute a basis for recusal? If I were the factfinder, absolutely. In Family Court, for example, it often happens that judges request some other judge to resolve a dispute because he or she is the factfinder and he or she has opinions. It's a little different in a criminal matter. I'm basically the ump.
>
> I have the good fortune that this case will be tried by experienced, competent and capable attorneys. I have the good fortune that we again have a large Jury panel. We are going to seat 16 in the box and the decisions as to whether the State has met its burdens of proof will rest entirely on them. Whatever my personal opinion may be as to this matter is irrelevant, will not be disclosed to the Jury, obviously, and I know that the attorneys will do their part, as officers of the Court, to ensure that the process is fair. Therefore, the application is denied.

(Dkt. No. 31-1 at p. 1.) In state court, petitioner argued that the trial judge was required to recuse herself based on New Jersey Court Rule 1:12-1 which requires recusal if the judge gives an opinion upon a matter in question in the action, is interested in the action or where there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so. However, as described previously, it is not the province of this Court to examine state court determinations of state law. *See Estelle*, 502 U.S. at 67-68.

Nevertheless, "[a] fair trial in a fair tribunal is a basis requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). However, '"most matters relating to judicial disqualification d[o] not rise to a constitutional level.'" *Martinez v. Stridiron*, 538 F. App'x 184, 188 (3d Cir. 2013) (quoting *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948)). "Due process requires recusal only when a judge 'has a direct, personal, substantial, pecuniary interest in a case' or when there are 'circumstances in which experience teaches that the [objective] probability of actual bias on the part of the judge or decisionmarker is too high to be constitutionally tolerable.'" *Id.* (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876-77 (2009)).

In this case, the denial of this claim by the state courts was not an unreasonable application of clearly established federal law nor was the decision based on an unreasonable determination of the facts. In *Liteky v. United States*, 510 U.S. 540 (1994), the Supreme Court noted that, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, *or of prior proceedings*, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment unfair." *Id.* at 555 (emphasis added). Indeed, the Supreme Court further noted in

Liteky that "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.* Furthermore, and perhaps most relevant to this case, the Supreme Court explained that, "[a]lso not subject to deprecatory characterization are 'bias' or 'prejudice' are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant." *Id.* at 551. In *Liteky*, the Supreme Court gave an example of what kind of statement by a judge would require his recusal. The Court's example was a District Judge's statement in a World War I espionage case against German-American defendants that, '"One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans' because their "hearts are reeking with disloyalty.'" *Id.* (citing *Berger v. United States*, 255 U.S. 22, 28 (1921)).

In this case, the trial judge's statement in granting the motion for mistrial was based on facts introduced in the prior trial. They did not display a deep-seated favoritism or antagonism that would make fair judgment impossible or unfair. Indeed, the trial judge noted that she would not make such an opinion known to the newly empaneled jury, and noted that it was the jury, and not her who was the ultimate factfinder. Accordingly, based on these circumstances, petitioner has failed to show that he is entitled to federal habeas relief on this claim.

I. Claim IX – Ineffective Assistance of Counsel for Failure to Seek Suppression of Cigarette Butt

In Claim IX, petitioner argues that trial counsel was ineffective for failing to seek suppression of the cigarette butt that contained his DNA evidence. He asserts as follows in his habeas petition:

> The cigarette butt was allegedly located some 16 hours after the crime scene investigator. There is no evidence that this evidence was ever lodged into evidence prior to police searching the defendant's home and admitting to coming into contact with cigarette butts that were known to belong to the defendant. The cigarette butt that was reportedly located at the crime scene was found to have the defendant's DNA on it. Counsel was ineffective for failing to challenge the chain of custody regarding this crucial and prejudicial piece of evidence.

(Dkt. No. 1 at p. 8.) Thus, petitioner's claim on habeas review appears to be that the cigarette butt was not found at the crime scene, but instead was a cigarette butt that the police found when they subsequently searched petitioner's dwelling.

In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Supreme Court articulated the test for demonstrating an ineffective assistance of counsel claim. First, the petitioner must show that considering all of the circumstances, counsel's performance fell below an objective standard of reasonableness. *See id.* at 688; *see also Ross v. Varano,* 712 F.3d 784, 798 (3d Cir.2013). Petitioner must identify acts or omissions that are alleged not to have been the result of reasonable professional judgment. *See Strickland,* 466 U.S. at 690. The federal court must then determine whether in light of all of the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance. *See id.*

Second, a petitioner must affirmatively show prejudice, which is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *See id.* at 694; *see also McBride v. Superintendent, SCI Houtzdale,*

687 F.3d 92, 102 n. 11 (3d Cir.2012). "With respect to the sequence of the two prongs, the *Strickland* Court held that 'a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" *Rainey v. Varner*, 603 F.3d 189, 201 (3d Cir.2010) (quoting *Strickland*, 466 U.S. at 697).

Additionally, in assessing an ineffective assistance of counsel claim under AEDPA, the Supreme Court has noted that:

> The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), an *unreasonable* application of federal law is different from an *incorrect* application of federal law. A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.

Harrington, 562 U.S. at 101 (internal quotation marks and citation omitted) (emphasis in original).

Petitioner raised this claim in his post-conviction relief ("PCR") petition. The last reasoned decision on this Claim was from the Appellate Division during petitioner's PCR proceedings. The Appellate Division analyzed this Claim as follows:

> A prima facie claim of ineffective assistance of counsel requires defendant to show (1) counsel's performance was deficient; and (2) but for counsel's deficient performance, the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693 (1984); *State v. Fritz*, 105 N.J. 42, 52, 519 A.2d 336 (1987).

Adequate assistance of counsel should be measured by a standard of "reasonable competence." *Fritz, supra,* 105 N.J. at 60, 519 A.2d 336. That standard does not require "the best of attorneys," but rather requires that attorneys be not "so ineffective as to make the idea of a fair trial meaningless." *State v. Davis,* 116 N .J. 341, 351, 561 A.2d 1082 (1989), *superseded by statute on other grounds as recognized by State v. Cruz,* 163 N.J. 403, 411, 749 A.2d 832 (2000). "[T]he defendant must overcome a 'strong presumption' that counsel exercised 'reasonable professional' judgment and 'sound trial strategy' in fulfilling his responsibilities." *State v. Loftin,* 191 N.J. 172, 198, 922 A.2d 1210 (2007).

Defendant argues he made a prima facie showing that police fabricated evidence, specifically that detectives switched a cigarette butt found on the roof of the second crime scene with one from his ashtray. We find this argument to be without merit and rely substantially on the reasons stated by Judge Batten on the record on January 14, 2009.

> [p]etitioner now asserts that trial counsel was ineffective in not moving for suppression to the cigarette butt on a chain of custody theory or in the alternative, failing to discredit that evidence through cross-examination or by jury argument because competent counsel would have done either or both of these things.
>
> These arguments, while interesting and while the subject of extensive dialogue between counsel and the Court when last we convened on this-is nonetheless denied and for the following reasons.
>
> The cigarette butt found by [the victim] was taken into evidence by Detective [Scull] before the defendant's room was searched.... The defense argument, therefore, that the police switched or planted the cigarette butt with one they obtained from his room is not borne by the evidence and certainly not supported. There is no evidence that [the victim] or the two individuals at the home with [the victim] at the time Detective [Scull] arrived had access to the defendant's room prior to the cigarette butt being found. As a result, this argument lacks sufficient merit.

> As to petitioner's assertion that trial counsel failed to discredit the argument on cross-examination, or when making arguments to the jury, the assertion also lacks merit as specific portions of the trial transcript demonstrate.
>
> We note that the court critically addressed defendant's argument concerning police fabrication of evidence in exhaustive detail. The court fully reviewed the record in search of credible evidence to support defendant's claims and determined the claims lack sufficient merit. Our review of the record supports the court's findings that defendant's characterization of the events regarding the discovery of the cigarette butt is factually inaccurate and unsupported by the record. Furthermore, the court pointed to numerous instances in the record, contrary to defendant's argument, where his counsel attempted unsuccessfully to discredit the cigarette butt's chain of custody.

(Dkt. No. 9-22 at p. 2-3.)

The denial of this claim by the state courts was not an unreasonable application of clearly established federal law. The Appellate Division cited to and applied the *Strickland* test to determine whether the PCR court properly denied this Claim. It specifically relied on the reasons given by the PCR court. That Court also stated the correct *Strickland* standard. It then painstakingly cited to the trial transcript with respect to the cross-examination of Detective Skull. This was the Detective who was called to Perez's dwelling where the cigarette butt was discovered. Skull testified that it was these witnesses who discovered and subsequently turned over the cigarette butt to him. As the PCR court noted, there was nothing to suggest that these witnesses had access to petitioner's cigarette butts in his dwelling prior to turning the cigarette but over to Skull. Accordingly, as there was a lack of evidence suggesting that the witnesses had access to petitioner's cigarette butts from another location, the denial of this claim was not based on an unreasonable application of *Strickland* since there was no reasonable probability that the outcome of the trial would have been different had such an argument been made by trial counsel.

Furthermore, petitioner fails to show that the denial of this claim was based on an unreasonable determination of the facts as the record does not suggest that these witnesses had access to petitioner's cigarette butts, other than that which was found on Perez's roof. Therefore, petitioner is not entitled to federal habeas relief on this claim.

J. Claim X – Ineffective Assistance of Counsel for Failure to Move to Suppress Voice Identification

In Claim X, petitioner argues that trial counsel was ineffective for failing to suppress the voice identification of petitioner by Mary Perez. More specifically, petitioner argues as follows:

> The detective conducting the voice identification of the defendant did so by engaging him in conversation with the victim standing outside of the holding cell door where the defendant was being detained reportedly on an unrelated arrest warrant. The detective accused the defendant of lying about his alibi, and asserted that a witness stated that he was out of his home at the time that the crime was committed against Mary Perez. The defendant reportedly responded by screaming that he did go out but that he was home well before midnight, well before the crime was allegedly committed. This procedure was extremely prejudicial. The victim asserted that the voice "sounded" like that of her assailant but that she could not be sure. It should be noted that this same victim gave a taped statement earlier this same day and was asked if she could learn anything from the suspects voice, she did not mention the defendant despite knowing him. By the time trial came around, the victim was convinced that she had previously named the defendant as the perpetrator of the crime against her. Clearly this is the result of the impermissibly suggestive voice identification procedure.

(Dkt. No. 1 at p. 8-9.)

It appears that the Appellate Division denied this specific claim without discussion. Therefore, the last reasoned decision on this Claim for purposes of this Court's AEDPA review is from the PCR court which denied petitioner's PCR petition. That Court stated as follows in denying this Claim:

The Court now considers the second point raised by PCR counsel, specifically, that defense counsel was ineffective for failing to move to suppress the voice identification authored by Mary Perez. Again, Mr. Patrick in the first trial represented – represented the defendant in the first trial and specifically moved to bar any testimony concerning the voice identification of Ms. Perez. The motion was dated September 8 of '01.

The State responded that it was not seeking to introduce the voice identification of the defendant at the police barracks – only identification that Ms. Perez at the scene . . . .

The three different police reports all pertaining to statements of Mr. Perez prior to the identification or confirmation of her assailant which took place at the police barracks, Ms. Perez states that the voice of her assailant was that of Lonny Price – specifically, Anthony [sic] Price.

For example, at page 18 of Exhibit M of the defendant exhibit Detective Albrich explained quote, "She explained her familiarity with Lonny Price's voice by telling Albrich that she works in the pharmacy that is located beneath her apartment. She knows Lonny Price and has spoken with him on the telephone on numerous occasions while working at the pharmacy."

"She stated that over time she's become familiar with the sound of people's voices to the extent that she often knows who the caller is without their identifying themselves. She said this is the type of situation as with Lonny Price. She said that he has called the pharmacy on a number of occasions and that she has also become familiar with his voice as well to the extent that she can recognize a telephone call from him without him identifying himself." close quote.

The State is correct in its assertion that trial counsel on behalf of the petitioner did, in fact, file a motion to suppress the voice identification. That motion was dated July 8th of 2004, filed with the Court July 9, of 2004 and, in fact, motion trial counsel made almost verbatim – in places, in fact, it is verbatim for paragraphs at a time – the same argument that PCR counsel is making as to why the voice identification should be suppressed. Same facts and cases are used in the motion to suppress and the PCR brief.

The State responded to this motion to suppress by advising the Court that the State would not present evidence in its case in chief regarding the voice identification that occurred at the police

barracks and that it would only present evidence as to the identification of the defendant at the scene of the crime. The same exchange took place before the first trial of the defendant when Mr. Patrick represented the petitioner.

Again, the record before this Court is less than clear as to the trial court's ultimate disposition of that motion although it is not relevant for purposes of this PCR application because of the appellate reversal. Not having the entire trial transcript of the second trial of the defendant, among the petitioner's excerpts are excerpts of the trial transcript and from pieces of the transcript that have been presented, it appears that the voice identification at the police barracks was not used at trial.

The following excerpt, part of trial counsel's closing argument illustrate this apparency.

Quote, "Those of you who hold uncertainties must find Alonzo Pri" – "must ultimately find Alonzo Price not guilty. Look at the State's proofs in light of its burden. The one piece of direct evidence that was presented was Mary Helen Perez's voice identification. She thought the voice sounded like the voice of Alonzo Price," close quote.

"Mary Helen Perez was not certain. She told us that. Mary Helen Perez," – excuse me – "Mary Helen Perez was not certain. She told us that. Mary Helen Perez didn't want to rule anyone out. She told us that. She wasn't sure about the voice. She was so uncertain, she didn't tell the 911 operator she was so unsure. She didn't scream it out the window at the fleeing assailant. Said – testified that she knows Alonzo Price. She knows him from around town. She's had contact with him. He's been in the pharmacy where she's worked 25 years as a customer."

"Camden County is small. Woodbine is smaller still. She knew Alonzo Price. She knew him. She could identify him. She knew him from their contacts from a coming to a place open to the public. And for all that, she wasn't certain from the voice. She told Detective Albrich she wasn't certain. Detective Albrich took a statement – formal taped statement meant to be a record of everything relevant, everything important that she remembered while still fresh in her mind. That's why it was tape recorded to create a record."

"In that statement, she described the attack. She described the voice she heard, the tone, the volume. She didn't say anything

> about Alonzo Price in that statement because she wasn't certain. It is admittedly a statement of uncertainty of Mary Helen Price (sic). She didn't report the voice to the 911 operator because she wasn't sure. She left it out of the taped statement because she wasn't certain. Is that enough? . . . .
>
> Later in the closing, trial counsel stated – argued, quote "What else happened with the voice? The detectives on the scene, Detective Albrich says it's reported to him. This was initially reported to troopers. It's not called in. It wasn't given a lot of weight. It wasn't given a lot of credibility. I guess that mistake thing was still coming into play."
>
> "But no detective says, none of the eight troopers say, 'Let's call it in. Let's find out what his address is. Let's see if we can go check on this because she gave us a name.'"
> "No one gets that information and walks the block and a half or two blocks over to 514 Madison, the defendant's address and knocked door.". . . .
>
> As a result, trial counsel did file a formal motion to suppress the voice identification which occurred at the police barracks and that the State apparently did not use that identification and instead presented evidence and relied only on the initial voice identification at the scene of the crime on the morning of the incident.
>
> As a result, petitioner's argument that the voice I.D. was inadmissible under *Johnson – Madison* (phonetic) fails. The petitioner's claim that counsel was ineffective for failing to suppress the voice identification also must fail and therefore must be denied.

(Dkt. No. 10-16 at p. 24-27) (internal citations omitted).

As noted by the Superior Court, petitioner did in fact file a motion to suppress the voice identification at the police barracks. Thus, counsel was not ineffective since a motion to suppress was actually made. Furthermore, it appears as if there was an agreement not to refer to the voice identification by Perez at the police barracks. Petitioner does not note that the voice identification at the police station was used at trial. Accordingly, the state court's denial of this claim was not an unreasonable application of *Strickland* nor was the denial of this claim based on

an unreasonable determination of the facts. Therefore, petitioner is not entitled to federal habeas relief on this Claim.

K. Claim XI – Ineffective Assistance of Counsel for Failing to Request Suppression of Evidence Following Illegal Arrest Because Arrest Warrant was Invalid

In Claim XI, petitioner claims that his trial counsel was ineffective for failing to seek to suppress the evidence that was obtained after he was arrested since the arrest warrant was invalid. More specifically, he argues:

> The state conceded that this arrest warrant was indeed invalid. The state then asserted that they did not obtain any evidence from the defendant as a result of this illegal arrest. Instead of the trial judge conducting an evidentiary hearing to ascertain for himself what was obtained as a result of this illegal arrest of the defendant, he went along with the state's claim that nothing was obtained as a result of the illegal arrest, and subsequently denied the defendant the ability to make a clear and concise record regarding the facts surrounding his illegal arrest and all that was obtained as a result of it.

(Dkt. No. 1 at p. 9.) The Appellate Division denied this claim during the PCR proceedings by stating as follows:

> Defendant also argues counsel was ineffective for failing to contest the legality of his arrest and failing to move to exclude the "fruits" of the victim's voice identification. However, as the PCR court correctly found, defendant's claim that trial counsel was ineffective for not moving to suppress fruits of the arrest warrant is meritless. Although the State in its PCR argument conceded the arrest warrant was invalid, this fact did not have the potential to affect the outcome of the trial, because defendant was already a suspect.

(Dkt. No. 9-22 at p. 5.) Indeed, the Superior Court laid out the factual and legal underpinnings giving rise to the Appellate Division's affirmance for denying this Claim by stating the following:

PCR counsel is somewhat that brief on this point, but it appears that PCR counsel is attempting to argue that trial counsel should have filed a motion to suppress the jean shorts, gray shirt and carpet finders (sic) – carpet fibers – excuse me – found in the shorts as fruit of the poisonous tree. It should be initially noted that the State concedes that the arrest warrant in this matter – that issued June 29 of 2000 – was invalid.

Even had a motion to suppress the incriminating evidence obtained from petitioner's home been filed on the theory that the evidence obtained was fruit of an illegal arrest, the motion would more likely than not, in this Court's view, have been denied as a result the failure to make the motion does not warrant a finding of ineffective assistance of counsel for the following reasons.

The police obtained a voice identification from Mr. [sic] Perez shortly after the crime on June 29 occurred . . . sometime after 2:42 a.m.

As such, the petitioner was already on the detective's radar, figuratively speaking, as a suspect. Initially, the police did not follow up on the petitioner because they believed Ms. Perez was referring to Lonny Price, Jr. who was incarcerated on the night in question. After they interviewed Ms. Perez at approximately 9:40 a.m., they learned that there was an Alonzo Price, Sr. and looked into his criminal record.

They spoke with an Ocean County police officer regarding an arrest of the petitioner in Ocean City in 1989 and learned that the crime committed in 1989 was similar to the crimes committed on June 22nd and 29th. The defense – the defendant allegedly broke into the apartment of a female neighbor after posing as a police officer, sexually assaulting her, tying her up and then stealing her jewelry.

After learning this, detectives proceeded to proceed and interview Christopher Turner, a person named as Ms. Hamer as a possible suspect. He was questioned as to the assault on Ms. Hamer and stated that he heard rumors that Lonny Price was a suspect though denied any direct knowledge.

The petitioner was thereupon arrested on June 29 of 2000. As a result, even before the arrest, the police had information which led them to suspect the petitioner as the perpetrator of this offense. And even without the arrest, p – law enforcement would mostly have undertaken the same investigation and proceeded – as

proceeded after the interview with the petitioner. Specifically, attempt to speak with Pat Jones, the petitioner's landlord at that time, which led to their interview of Lisa Jones, which then led the police speaking et cetera.

As petitioner was already was already on the police radar – again, figuratively speaking – they probably would have located his residence and begun speaking with him and others about his whereabouts on the night in question just as they did with Christopher Jones. . . .

[H]ere the subsequent search of petitioner's home was not undertaken pursuant to an exception to the warrant requirement and subsequent search therefore was not tainted by illegal arrest. Here, the search of the petitioner's home appears to have been undertaken following an application for a search warrant was made and granted.

This occurred after the illegal arrest with the affidavit with in support of the search warrant was not based on anything obtained from the petitioner as a result of his illegal arrest. The search warrant that was issued and which lead to the discovery of the jean shorts, gray tee shirt, carpet threats was based on the following.

First, details of the crime committed on June 22, 2000.

Second, information provided to Detective Skull by Michael Tony, Ms. Hamer's adult son. That Alonzo or Lonny Price was a possible suspect because he knew Price and felt that he fit the suspect's description.

Three, the details of the second crime committed on Jun 29, 2000 including Ms. Perez's identification of the voice as that of Alonzo/Lonny Price and her reasons for believing the voice was that of the defendant and the fact that despite her believe, quote, "She could not definitely," -- "She could not say definitely that she was positive that it was Alon" – "that it was Alonzo Price." Close quote.

Fourth, a recitation of the use of police dogs to follow the assailant's trail and the conclusion that based on the way the dogs followed the trail, the assailant had been riding a bike.

Fifth, the similarity between the two crimes as specifically relates to the method of entry, actions, comments made by the suspect, tying up of both victims in almost the same way.

Sixth, a check of the criminal background of the defendant which revealed he had 12 arrests including kidnap, sexual assault, burglary, theft, weapons offenses and drug offenses.

Seventh, a description of the defendant's appearance as the detectives were arresting him. The defendant had very short facial and head hair, strong odor of cigarettes, all consistent with Mrs. Perez's description.

Finally, the interview with Lisa Jones who also rents a room in the same home as the defendant which revealed that she had lent the defendant her bike sometime after midnight on June 28th and that the bike was returned sometime before she woke up on the 29th.

Further described was Ms. Jones' statements regarding a robbery in Woodbine where a woman had been tied up and that she had heard that the defendant was responsible of this crime though she could not say what the source the information was or if it were true, but she became concerned because she knew the defendant was out of his apartment using her bike during the time the second crime occurred.

All but the last of these items, the interview with Ms. Jones, was evidence obtained by the police before they arrested the defendant. And it is therefore clear that the voice identification at the police barracks was not part of the facts used in the affidavit for the search warrant. The suppression of the search – of the fruits of the search warrant – even if one disregarded the interview with Ms. Jones – sufficient, in this Court's view, to have supported a finding of probable cause as was the case.

The Court in *State v. Worthy* set forth the following regarding illegal searches and the exception to the exclusionary rule.

And I quote at 100 N.J. Reports at pages 238, a 1985 decision specifically, "In *State v. Sugar*," – cited omitted – "this Court adopted an inevitable discovery exception to the judicially created exclusionary rule applicable to an unreasonable search and seizure. The exception applied when: 1. Proper, normal and specific investigatory procedures would have been pursued in order to complete the investigation of the case; 2. Under all of the surrounding relevant circumstances, the pursuit of those procedures would have inevitably resulted in the discovery of the evidence; and 3. The discovery of the evidence through the use of such procedures would have occurred wholly independently of the discovery of such evidence by unlawful means."

> "The Court ruled in *Sugar* that the State must show by clear and convincing evidence that had the illegality not occurred, it would have pursued established investigatory procedures that would have inevitably resulted in the discovery of the controverted evidence wholly apart from its unlawful acquisition." . . . .
>
> The Court in *Worthy* held that the inevitable discovery exception did not apply to the facts of that case noting, quote, "Courts must be extremely careful not to apply the inevitable discovery rule upon the basis of nothing more than a hunch or speculation as to what otherwise might have occurred."
>
> Prior to the April 19 of 1991 conversation, there was no indication that any other independent investigative process would have resulted in the interception of the conversations and the result of the – and the arrest – excuse me – of the defendants in the hotel in Vineland on June 12. It was during the course of the illegally recorded conversations that Worthy and the informant agreed on the essential elements of the transaction; quantity, price, method of payment and the tentative dates the deal would be completed.
>
> As the trial court noted, the State, quote, "may have gotten John Worthy on something, someday, somewhere if they continued investigating him, but I'm not convinced that they would have ever gotten to this deal with these 30 pounds of marijuana in this hotel room on June 12, 1991, and I'm not thoroughly convinced of that,"
>
> The case here is unlike those facts in *Worthy*. As I've pointed out, even without the illegal arrest of the defendant, the factors the State concedes, defendants [sic] would have questioned the defendant and others connected to the defendant as they questioned Christopher Turner and Mr. Turner's girlfriend after Mr. Turner was named as a possible suspect. . . .
>
> Further, even without the interview of Lisa Jones, there was enough in the affidavit, in this Court's view, to support a finding of probable cause. As such, the evidence obtained as a result of the valid search warrant is not tainted by the illegal arrest.
>
> As petitioner has therefore failed to show, there is a reasonable property [sic] that but for trial counsel failing to move to suppress the fruits of this search, is tainted by the illegal arrest or to challenge the validity of the arrest that the outcome of the case would have been different.

(Dkt. No. 10-16 at p. 27-31 (internal citations omitted).)

The state court's denial was not an unreasonable application of *Strickland.* The state court determined that the motion to suppress would have been denied such that there was no reasonable probability that the outcome of the proceeding would have been different. Indeed, as the state court noted, much of the evidence giving rise to the search of petitioner's dwelling (in which key evidence used at trial was seized) was discovered before and independent of petitioner's subsequent arrest. Accordingly, petitioner failed to show to that the state court unreasonable applied *Strickland*'s prejudice prong by finding that petitioner had failed to show to a reasonable probability that the outcome of his proceeding would have been different. Thus, this Claim does not merit granting federal habeas relief.

L. Claims XII & XIII – Failure to Conduct Evidentiary Hearing During PCR Proceedings

In Claims XII and XIII, petitioner asserts that the PCR court erred in denying his PCR petition without first conducting an evidentiary hearing. According to petitioner, he made a prima facie showing that his Fourteenth Amendment right to a fair trial was violated. Furthermore, petitioner claims that he should have been awarded an evidentiary hearing during the PCR proceedings because trial counsel failed to suppress the cigarette butt due to a lack of chain of custody and because the detective lied about what he did with this evidence. (*See* Dkt. No. 1 at p. 9.)

As previously noted, petitioner is entitled to federal habeas relief for violations of the Constitution, laws or treaties of the United States. *See* 28 U.S.C. § 2254(a). Thus, claims based on state law error are not cognizable. *See Estelle*, 502 U.S. at 67-69. Furthermore, "the federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what occurred in the petitioner's *collateral* proceeding does not enter into the habeas calculation." *Hassine v.*

Zimmerman, 160 F.3d 941, 954 (3d Cir. 1998); *see also Lambert v. Blackwell*, 387 F.3d 210, 247 (3d Cir. 2004) ("[H]abeas proceedings are not the appropriate forum for Lambert to pursue claims of error at the PCRA proceeding."). Thus, petitioner's claim that he should have obtained an evidentiary hearing in his PCR proceedings before the state courts is not properly before this Court as a habeas claim. *Accord Davis v. New Jersey*, No. 12-5748, 2014 WL 2615657, at *17 (D.N.J. June 12, 2014); *Vreeland v. Warren*, No. 11-5239, 2013 WL 1867043, at *4 n.2 (D.N.J. May 2, 2013). Accordingly, petitioner is not entitled to federal habeas relief on this claims that the PCR court should have conducted an evidentiary hearing.

M. Petitioner's Traverse

Petitioner appears to raise a new claim in his Traverse. He asserts in his traverse that the search warrant issued lack probable cause. At the outset, the propriety of petitioner bringing this new claim in his traverse which was filed more than one year after the New Jersey Supreme Court denied certification on his PCR petition is questionable. *See Ryan v. Hendricks*, No. 04-4447, 2014 WL 268578, at *3 n.4 (D.N.J. Jan. 23, 2014) (explaining court will not consider new claims brought in reply in support of habeas petition where petitioner was provided with required *Mason v. Myers*, 208 F.3d 414 (3d Cir. 2000) notice made no effort to timely amend the petition). However, even if such a claim was properly before this Court, petitioner still would not be entitled to federal habeas relief on this issue. In *Stone v. Powell*, 428 U.S. 465 (1976), the United States Supreme Court held that, "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial." *Id.* at 494. This bar applies whether or not the claim is potentially meritorious. *See Deputy v. Taylor*, 19 F.3d 1485, 1491 (3d Cir. 1994).

Petitioner gives no indication that he did not have a full and fair opportunity to litigate this Fourth Amendment claim in the state courts. Thus, he fails to show that he is entitled to federal habeas relief on this claim, even if it is was properly raised before this Court.

N. Request for a Stay

Petitioner has also filed a request for a temporary stay of these proceedings. (*See* Dkt. No. 18.) The entirety of his request is as follows:

> I would like to request that I be allowed a Temporary Stay regarding your pending decision on my petition for writ of habeas corpus. There are several issues that I have failed to address on the trial level, and I would appreciate the chance to have them heard in the appropriate court. [¶] I am referring to a fourth amendment violation, discovery violation, identification issue, and an illegal sentence violation.

(*Id.*) Thus, it appears as if petitioner seeks a stay so that he can exhaust unexhausted claims.

A state prisoner applying for a writ of habeas corpus under § 2254 in federal court must first "exhaust[ ] the remedies available in the courts of the State," unless "(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1); *see also Rose v. Lundy*, 455 U.S. 509, 515 (1982). A petitioner must exhaust state remedies by presenting his federal constitutional claims to each level of the state courts empowered to hear those claims, either on direct appeal or in collateral post-conviction relief proceedings. *See, e.g., O'Sullivan v. Boerckel*, 526 U.S. 838, 847 (1999) (announcing the rule "requiring state prisoners to file petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State"); *see also* 28 U.S.C. § 2254(c) ("An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this

section, if he has the right under the law of the State to raise, by any available procedure, the question presented.").

Recognizing the complexities that face prisoners who must exhaust state remedies while complying with the one-year statute of limitations period for § 2254 habeas petitions as set out in § 2244(d)(1), the United States Court of Appeals for the Third Circuit has held that "[s]taying a habeas petition pending exhaustion of state remedies is a permissible way to avoid barring from federal court a petitioner who timely files a mixed petition [containing both exhausted and unexhausted claims]." *Crews v. Horn*, 360 F.3d 146, 151 (3d Cir. 2004). Indeed, the Third Circuit has stated that "when an outright dismissal could jeopardize the timeliness of a collateral attack, a stay is the only appropriate course of action." *Id.* at 154.

Since *Crews*, however, the United States Supreme Court has explained when a stay should be issued; specifically:

> stay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines that there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless. . . .
>
> [I]t likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics.

Rhines v. Weber, 544 U.S. 269, 277-78 (2005).

In this case, petitioner's request for a stay is devoid of any argument illustrating "good cause" for why he has failed to exhaust these general admittedly unexhausted claims.

Furthermore, his stay request is completely lacking with respect to the specifics of these claims to show that they are potentially meritorious. Therefore, this Court will deny petitioner's request for a stay.

O. Petitioner's Request to Amend Habeas Petition

Petitioner has also filed a motion to amend his habeas petition. (*See* Dkt. No. 24.) In the request, petitioner seeks to add a claim that counsel was ineffective in failing to object to a jury instruction given by the trial judge. The jury instruction given to the jury that is at issue was as follows:

> As you know, Mr. Price elected not to testify at trial. It is his constitutional right to remain silent. You must not consider for any purpose or in any manner in arriving at your verdict the fact that he did not testify. That fact should not enter into your deliberations or discussions in any manner at any time. Mr. Price is entitled to have the Jury consider all the evidence presented at trial. He's presumed innocent even if he chooses not to testify.

(Dkt. No. 10-12 at p. 5.) While Federal Rule of Civil Procedure 15 states that leave to amend should be freely given, the motion may be denied where there is undue delay, bad faith, dilatory motive, unfair prejudice, or futility of amendment. *See Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir. 2002) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997)).

Generally, claims involving jury instructions in state criminal trials are matters of state law and are cognizable only if the instructions are so fundamentally unfair that they deprive a petitioner his rights to a fair trial and due process. *See Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). Petitioner appears to argue that the above listed jury instruction left the jury with the impression that the petitioner had an obligation to answer to the charges by testifying in his own defense. However, this Court gleans nothing from the jury instructions, when read in full, that

would give the jury such an impression. Indeed, the trial court specifically instructed the jury that petitioner had the right to remain silent and that his choice to remain silent should not enter into their deliberations in any way whatsoever. Accordingly, as the proposed claim by petitioner is meritless, his request to amend his habeas petition to add this claim would be futile such that the request to amend will be denied.

P. Petitioner's Motion to Compel

Petitioner has filed a renewed motion to compel. (*See* Dkt. No. 29.) In the motion, petitioner requests that the Court order respondent to supply a copy of petitioner's arrest warrant. Petitioner previously sought to have this Court compel respondent to produce the arrest warrant. In denying that first motion to compel without prejudice, this Court stated that respondent admitted that the arrest warrant was invalid. Furthermore, the Court explained it appeared that the actual arrest warrant would not be necessary to decide petitioner's claims. (*See* Dkt. No. 28 at p. 1.) The same holds true now for the reasons discussed *supra* why petitioner's ineffective assistance of counsel claims related to the arrest warrant do not merit federal habeas relief. Accordingly, the renewed motion to compel will be denied.

Q. Certificate of Appealability

Pursuant to 28 U.S.C. § 2253(c), unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken from a final order in a proceeding under 28 U.S.C. § 2254. A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327

(2003). Applying this standard, this Court finds that a certificate of appealability shall not issue in this case.

V. CONCLUSION

For the foregoing reasons, petitioner's habeas petition will be denied and a certificate of appealability shall not issue. Furthermore, petitioner's request for a stay and motion to compel will be denied. An appropriate order will be entered.

DATED: June 25,2015

s/Robert B. Kugler
ROBERT B. KUGLER
United States District Judge

CLD-128 **February 4, 2016**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **15-2807**

ALONZO PRICE, Appellant

VS.

CHARLES WARREN, et al.

(D.N.J. Civ. No. 12-cv-02238)

Present: FISHER, JORDAN and VANASKIE, Circuit Judges

Submitted are:

(1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1);

(2) Appellees' Response in Opposition thereto; and

(3) Appellant's document in support of appeal

in the above-captioned case.

Respectfully,

Clerk

MMW/CAD/tmm

ORDER

Price's application for a certificate of appealability is granted on the issue of whether trial counsel was ineffective for failing to request suppression or otherwise challenge the chain of custody of the cigarette butt that was admitted into evidence. As to the remaining claims of ineffective assistance of counsel, jurists of reason would not debate the District Court's conclusion that Price did not show that his Sixth Amendment right to the effective assistance of counsel was violated. See Miller-El v. Cockrell, 537 U.S. 322, 336 (2003); Strickland v. Washington, 466 U.S. 668, 687, 694 (1984). In

particular, Price has not shown prejudice, as a motion to challenge the victim's initial voice identification, and a motion to suppress evidence obtained following Price's arrest would not have been likely to succeed, for the reasons explained by the District Court. As to Price's remaining claims, jurists of reason would not debate the District Court's conclusion that the evidence submitted at Price's trial was sufficient to convict him, and that the prosecutor's comments and alleged trial court errors did not so infect the trial as to render it fundamentally unfair. Glenn v. Wynder, 743 F.3d 402, 407 (3d Cir. 2014). And jurists of reason would not debate the District Court's conclusion that alleged errors in post-conviction proceedings are not cognizable in a federal habeas proceeding. See Lambert v. Blackwell, 387 F.3d 210, 247 (3d Cir. 2004).

By the Court,

s/ D. Michael Fisher
Circuit Judge

Dated: August 25, 2016

JT/cc: Sean E. Andrussier, Esq.
Gretchen A. Pickering, Esq.
Alonzo Price