NOT FOR PUBLICATION

United States District Court
for the District of New Jersey

MAURICE ANDERSON, Petitioner, v. ADMINISTRATOR Northern State Prison; ATTORNEY GENERAL for the State of New Jersey, Respondents.	Civil No.: 09-1168 (KSH) **OPINION**

Katharine S. Hayden, U.S.D.J.

Proceeding pro se, Maurice Anderson has filed an all-inclusive amended petition for a writ of habeas corpus [D.E. 16], pursuant to 28 U.S.C. § 2254. He challenges a 2001 Essex County conviction on robbery, weapons, and drug charges arising out of two convenience-store robberies. Having reviewed the submissions and applying the required legal standard, the Court will deny the amended petition.

I. BACKGROUND

The following facts are drawn from the New Jersey Appellate Division's decision on direct appeal, which is attached as Exhibit U to the state's answer. [D.E. 21-25.]

At about 8:00P.M. on October 24, 2000, Maurice Anderson, Dadje Dawara, and Hamadi O. Aaron robbed Crosstown Food Market, in Newark, New Jersey, of about $550. During the robbery, a gun was brandished and Anderson sprayed mace on the owner of the convenience store, who called the police and gave them the color, make and license plate of the getaway car.

About ten minutes after the first robbery, Anderson and the others robbed the Central Avenue Supermarket, also in Newark. Then they drove to Dawara's girlfriend's house, dropped off the gun, and drove to Aaron's house. As they were about to drive to Anderson's house the police apprehended them.

The three men were indicted on several counts of armed robbery, weapons, and drug charges. Aaron entered into a plea agreement and testified against Anderson and Dawara at their joint trial.

An Essex County jury found Anderson guilty of four counts of first-degree armed robbery, unlawful possession of a handgun, possession of a handgun for an unlawful purpose, possession of cocaine, possession of cocaine with the intent to distribute, unlawful possession of mace, and possession of mace for an unlawful purpose. Anderson received an aggregate sentence of 40 years. Under New Jersey sentencing law, he must serve 28 years of the sentence before becoming eligible for parole.(See Judgment [D.E. 25-21].) The New Jersey Appellate Division affirmed in an unpublished opinion (see generally Dir.App.Op. [D.E. 21-25]) and the New Jersey Supreme Court denied certification on April 26, 2004. See State v. Anderson, 180 N.J. 152 (2004).

Anderson timely filed his first state petition for post-conviction relief ("PCR"), in which he raised several ineffective assistance of counsel claims and other claims of trial error. Initially filed pro se, Anderson's petition was eventually supplemental by counsel. After a hearing, the judge who had presided over the trial denied relief via an opinion from the bench. The Appellate Division summarily affirmed. See generally State v. Anderson, No. A-2128-06T4, 2008 WL

695864 (App. Div. Mar. 17, 2008). Certification to the Supreme Court was denied. See State v. Anderson, 195 N.J. 519 (2008) (table).

Anderson filed a second, pro se PCR petition on September 24, 2008. By order filed July 2, 2010, the same judge denied the petition, doing so at least partially on the merits. Anderson does not appear to have appealed this disposition.

While the second PCR petition was pending, the Clerk of this Court accepted for filing Anderson's federal 28 U.S.C. § 2254 petition. [D.E. 1.] In response to a Mason order,[1] Anderson represented that he wished to file an all-inclusive petition after state-court proceedings had come to a close. [D.E. 3–4.] Via order, the initial habeas petition was dismissed without prejudice as withdrawn, but because Anderson showed some confusion about what he was requesting, he was given 30 days to reconsider his decision. [D.E. 5.] Anderson wrote again within this period, saying that he would like to file an all-inclusive petition that would be stayed until the second PCR petition was fully resolved. [D.E. 6.] In another order [D.E. 7], the Court ordered the matter reopened, denied a stay, and warned Anderson that his original petition [D.E. 1] would be ruled upon unless he responded within 14 days. Anderson requested the Court reconsider that decision. [D.E. 8.] Ultimately, while these procedural orders in federal court were being issued, the state court ruled against Anderson on the second PCR petition and he filed an amended habeas petition [D.E. 16].

The amended petition raises a mixture of claims arising out of Anderson's direct and collateral state challenges to his conviction and sentence. He claims that the prosecutor's use of peremptory challenges was racially motivated, and that the trial court should have granted a

[1] See Mason v. Meyers, 208 F.3d 414 (3d Cir. 2000).

requested mistrial after jury selection. Additional claims are that his sentence was disparate and excessive; counsel was constitutionally ineffective in several ways; the admission of digital photographs violated due process; and the failure to grant him a severance violated due process. The state filed an answer, arguing among other things that certain grounds were unexhausted or procedurally defaulted and that the petition was untimely. [D.E. 21.] Anderson filed a reply. [D.E. 24.]

II. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") sets limits on the power of a federal court to grant a habeas petition to a state prisoner. 28 U.S.C. § 2254. If a state court has adjudicated a petitioner's federal claim on the merits, a federal court "has no authority to issue the writ of habeas corpus unless the [state c]ourt's decision 'was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States', or 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" 28 U.S.C. § 2254(d).

"'[C]learly established Federal law'" for purposes of § 2254(d)(1) includes only "the holdings, as opposed to the dicta, of this Court's decisions." Howes v. Fields, 132 S. Ct. 1181, 182 (2012) (quoting Williams v. Taylor, 529 U.S. 362, 412 (2000)). An "unreasonable application of" those holdings must be "'objectively unreasonable,'" not merely wrong; even "clear error" will not suffice. White v. Woodall, 134 S. Ct. 1697, 1702 (2014). To obtain habeas corpus relief from a federal court, a state prisoner must show that the challenged state-court ruling rested on "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Metrish v. Lancaster, 133 S.Ct. 1781, 1786-87 (2013)

(citation omitted).

III. PROCEDURAL DEFENSES

The state raises several procedural defenses, one of which—timeliness—applies to the entire petition. (See Answer 51–55.) With exceptions not applicable here, federal habeas corpus petitions must be filed within a year of the date that the conviction becomes "final." 28 U.S.C. § 2244(d)(1). At issue here is when that one-year clock begins to run; whether the statutory period was tolled by 28 U.S.C. § 2244(d)(2), which stops time during the pendency of a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim"; and whether Anderson is entitled to equitable tolling. The state argues that more than a year of untolled time passed between the end of Anderson's direct appeal and the filing of his federal habeas petition and that it is thus untimely.

A. "Finality" Of Judgment

Under 28 U.S.C. § 2244(d)(1)(A), the one-year clock generally begins to run on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." For prisoners who pursue a full round of direct appeal review, "a state court criminal judgment is 'final' (for purposes of collateral attack) at the conclusion of review in the United States Supreme Court or when the time for seeking certiorari review expires." Kapral v. United States, 166 F.3d 565, 575 (3d Cir. 1999). For those who do not, the judgment becomes final when the time for seeking additional state review has fully run. Gonzalez v. Thaler, 132 S. Ct. 641, 653–54 (2012).

As mentioned above, the Appellate Division handed down its direct appeal opinion on November 20, 2003. Anderson's counseled petition for certification was dated January 20, 2004,

61 days later, which is 41 days after it was due under the New Jersey Court Rules. See N.J. Ct. R. 2:12-3(a) (2004) (setting out a 20 day period for petitioning).[2] Anderson's appellate counsel represented that the filing was "delayed because the Office of the Public Defender did not receive a copy of the written decision of the Superior Court of New Jersey, Appellate Division, until the time limit had expired." (Driscoll Cert. ¶ 2 [D.E. 21-26].) Counsel requested that the New Jersey Supreme Court accept the tardy petition for certification nunc pro tunc.

The New Jersey Supreme Court's short order denying the petition for certification did not say whether the denial was on the merits of the petition or was due to its untimeliness. If the New Jersey Supreme Court accepted the petition for review out of time and reached its merits, Anderson's conviction would be "final" July 26th, 90 days after the April 26, 2004 denial.[3] See Jimenez v. Quarterman, 555 U.S. 113, 121 (2009) (holding that restoration of direct appeal out of time resets the "finality" date). But if the Court intended to deny the petition because it was untimely pursued, Anderson's conviction would instead be "final" for AEDPA purposes on December 10, 2003, when the time to petition for certification actually expired.

Although the record is ambiguous, the balance of equities favors the view that the New Jersey Supreme Court accepted the out-of-time certification petition and denied it on the merits. First, under the framework applicable in New Jersey at the time, nunc pro tunc relief would have been afforded to an indigent criminal defendant like Anderson who requested that a petition for certification be filed, but whose petition was not timely pursued through no fault of his own. See

[2] This also falls after the time had run for seeking a 30-day extension. See N.J. Ct. R. 2:4-4(a) (2004).

[3] The state repeatedly refers to the decision as being handed down on April 22, 2004, which would instead lead to a July 21, 2004 finality date (July 25 was a Sunday). (See, e.g., Answer 4, 53.) While it is true that the New Jersey Supreme Court decided to deny the certification petition on April 22, the record reflects that the decision was not filed until April 26. Under United States Supreme Court Rule 13(1), the date of entry, not the date of decision, controls.

State v. Altman, 181 N.J. Super. 539, 541 (App. Div. 1981) ("[T]he sole determinant on a motion by an indigent criminal defendant for leave to file a notice of appeal nunc pro tunc is whether that defendant asked either private counsel or a Public Defender, within time, to file such a notice for him."), modified in part as stated in State v. Molina, 187 N.J. 531, 542 (2006). Second, orders of the New Jersey Supreme Court can reflect separate dispositions on requests for extensions of time and rulings on the merits of a petition for certification or leave to appeal, which demonstrates that the Court will distinguish between the merit-based and procedural components of its summary decisions. Finally, the state is the party best positioned to show by reference to the New Jersey Supreme Court's docket if the circumstances are to the contrary, but it has not done so.

Accordingly, the Court will deem July 26, 2004, to be the date that Anderson's judgment of conviction became "final" for the purposes of determining the timeliness of his federal habeas petition.

B. Statutory Tolling

Anderson filed two New Jersey PCR petitions. Because a "properly filed" PCR petition tolls the AEDPA one-year filing deadline, see 28 U.S.C. § 2244(d)(2), the Court must determine whether both PCR petitions were properly filed and, if so, for how long they tolled the clock.

The first PCR petition was filed on February 15, 2005.[4] Because the parties agree that it was properly filed, it tolled the AEDPA clock until May 6, 2008.

[4] In both his amended federal habeas petition and accompanying brief, Anderson references a June 24, 2004 filing date. (See, e.g., Am. Pet. 2.) In his reply, Anderson says that he "originally" filed his first PCR petition on June 25, but "it went unnoticed." (Reply 20 [D.E. 24].) A letter from attorney Brian Driscoll addressed to the Office of the Public Defender [D.E. 25-5] reflects that Anderson reported having "sent his forms via certified mail" on that date, but it is not apparent from the context whether the "forms" in question are those to obtain

The state disputes whether the second PCR petition, filed on September 24, 2008 and decided after the federal habeas petition was filed, also tolled the limitations period. In fact, the state omits the second PCR petition from its timeliness recitation entirely. (See Answer 53–55.) In the petition, Anderson alleged both trial counsel's ineffectiveness (on several grounds) and judicial misconduct. The trial judge denied relief partly on non-timeliness procedural grounds—such as the petition's failure to comply with requirements for second and successive petitions (N.J. Ct. R. 3:22-4(b)) and its invocation of grounds already adjudicated (N.J. Ct. R. 3:22-5)—but also appeared to reach the merits of certain claims. Anderson did not appeal that decision.

A state post-conviction application is "properly filed" when "its delivery and acceptance are in compliance with the applicable laws and rules governing filings." Artuz v. Bennett, 531 U.S. 4, 8 (2000). Further, "time limits, no matter their form, are 'filing' conditions," Pace v. DiGuglielmo, 544 U.S. 408, 417 (2005), even if they operate as affirmative defenses, Allen v. Siebert, 552 U.S. 3, 6–7 (2007) (per curiam). If a state court fails "to rule clearly on the timeliness of an application, a federal court 'must . . . determine what the state courts would have held in respect to timeliness.'" Jenkins, 705 F.3d at 86 (quoting Evans v. Chavis, 546 U.S. 189, 198 (2006)).[5]

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representation from the public defender's office or whether the "form" was the PCR petition itself. Because nothing else is provided to support Anderson's contention that the PCR petition was "properly filed" with the court until February, the Court will use the later date.

[5] Both Evans and its predecessor case, Carey v. Saffold, 536 U.S. 214 (2002), focused more precisely on whether untimely original writs in California's unique post-conviction "appeal" structure rendered the time between original actions "pending" for tolling purposes. See Banjo v. Ayers, 614 F.3d 964, 968 (9th Cir. 2010) (discussing California's "unusual system of independent collateral review"). The Court understands the language quoted above from Jenkins to permit applying the same analysis to whether, in more traditional venues like New Jersey, the collateral application was "properly filed" in the first place, although Jenkins itself dealt with an appeal and not an original filing. Other courts have similarly concluded. See, e.g., Walton v.

At the time Anderson filed his second PCR petition, N.J. Ct. R. 3:22-12(a) provided:

> A petition to correct an illegal sentence may be filed at any time. No other petition shall be filed pursuant to this rule more than five years after rendition of the judgment or sentence sought to be attacked unless it alleges facts showing that the delay beyond said time was due to defendant's excusable neglect.

The five-year time limit "commences upon the entry of the judgment at issue, not the conclusion of direct appellate review." Engel v. Hendricks, 153 F. App'x 111, 112 n.2 (3d Cir. 2005) (nonprecedential) (citing State v. Mitchell, 126 N.J. 565, 574–77 (1992)).

Here, judgment was entered in December 2001; September 2008 is more than five years later. Nothing about the second PCR petition suggested that it was being filed late due to excusable neglect. Because it was untimely, it was not "properly filed" under 28 U.S.C. § 2244(d)(2), and thus did not serve to toll the AEDPA limitations period.

Anderson would fare the same under the present version of the New Jersey rule, which sets an additional one-year limitations period running from the latest of:

> (A) the date on which the constitutional right asserted was initially recognized by the United States Supreme Court or the Supreme Court of New Jersey, if that right has been newly recognized by either of those Courts and made retroactive by either of those Courts to cases on collateral review; or
>
> (B) the date on which the factual predicate for the relief sought was discovered, if that factual predicate could not have been discovered earlier through the exercise of reasonable diligence; or
>
> (C) the date of the denial of the first or subsequent application for post-conviction relief where ineffective assistance of counsel that represented the defendant on the first or subsequent application for post-conviction relief is being alleged.

N.J. Ct. R. 3:22-12(a)(2) (2014). The second PCR petition does not fit into any of these categories.

Sec'y, Fla. Dep't of Corr., 661 F.3d 1308, 1312 (11th Cir. 2011) (citing Walker v. Martin, 131 S. Ct. 1120, 1129 (2011), for the proposition that a state's time bar should be respected even if a state court bypasses the timeliness assessment and denies on the merits), cert. denied, 133 S. Ct. 186 (2012).

The Court finds further support in Chisolm v. Ricci, No. 10-2900, 2013 WL 3786306 (D.N.J. July 18, 2013) (Pisano, J.), certificate of appealability denied, C.A. No. 13-3409 (3d Cir. order entered Oct. 21, 2013).[6] There the state argued that a second PCR petition did not toll the limitations period. Id. at *2, 6. The state courts had not commented on the timeliness question, and had in fact bypassed it. Id. at *6. The district court found that, under both the old and current N.J. Ct. R. 3:22-12, the second PCR petition was untimely, and thus § 2244(d)(2) tolling was unavailable. Id. at *7. This record compels the same conclusion.

C. Equitable Tolling

Equitable tolling is available if a petitioner shows that he has been pursuing his rights diligently and that some extraordinary circumstance prevented his untimely filing. Holland v. Florida, 560 U.S. 631, 649 (2010). The obligation of showing "reasonable diligence" extends to the periods during which the petitioner is exhausting state-court remedies. LaCava v. Kyler, 398 F.3d 271, 277 (3d Cir. 2005). Courts "should be sparing in their use of this doctrine . . . applying equitable tolling only in the rare situation where it is demanded by sound legal principles as well as the interests of justice." Id. at 275 (internal quotation marks, citations, & alterations omitted).

Although Anderson does not request equitable tolling by name, the Court liberally construes the opening pages of his reply brief as making the argument. Apparently, on August 20, 2009, the state trial judge issued an order finding "good cause" to assign the services of a public defender to assist with Anderson's second PCR petition. Although his order is not part of the record, a letter from Stefan Van Jura, Assistant Deputy Public Defender of the Post-Conviction Relief Unit, sets forth that the office had received a "good cause" appointment under

[6] In its order denying a certificate of appealability, the Third Circuit panel determined that jurists of reason could debate part of the Chisolm decision that discussed equitable tolling. As discussed further infra, no tolling is warranted here.

N.J. Ct. 3:22-6(b), but that the order was unexplained. (See Aug. 26, 2009 Letter [D.E. 25-2].) In December 2009, Van Jura sent another letter requesting clarification of the counsel-assignment order "in light of Mr. Anderson's previous PCR proceedings." (Dec. 8, 2009 Letter [D.E. 25-4].) In early January, Van Jura wrote to Anderson and said, in effect, that the trial judge "ha[d] not decided the threshold matter of" good cause. (Jan. 29, 2010 Letter [D.E. 25-3].) In the eventual opinion, issued in July 2010, the court found "no good cause entitling the assignment of counsel."

Regardless of the confusion this might have caused, equitable tolling is unavailable because the back-and-forth about counsel appointment followed, rather than preceded Anderson's federal habeas petition. To the extent that equitable tolling could apply to the initial confusion regarding the filing of Anderson's first PCR petition, discussed in footnote 6 supra, the Court finds that the record demonstrates neither the diligence nor the extraordinary circumstances required for equitable tolling. Accordingly, no equitable tolling of the AEDPA time limit applies.

D. Calculation of Time Before Federal Filing

Following from the above, the Court calculates as follows. Anderson's conviction was "final" for § 2244(d)(1) purposes on July 26, 2004. He filed his first PCR petition on February 15, 2005, stopping time after **204** days. The clock restarted on May 6, 2008, and ran until (giving Anderson the benefit of the federal prisoner mailbox rule) the federal petition was filed on March 11, 2009, **309** days later. Thus, a total of **513** days elapsed before Anderson filed his federal habeas petition, rendering it untimely under the statute.

E. Remaining Procedural Defenses

A Court may under AEDPA deny a mixed petition on the merits, notwithstanding default or failure to fully exhaust, pursuant to 28 U.S.C. § 2254(b)(2). See McLaughlin v. Shannon, 454 F. App'x 83, 86 (3d Cir. 2011) (nonprecedential per curiam); Turner v. Artuz, 262 F.3d 118, 122 (2d Cir. 2001). Given the complexity of the procedural issues, the Court addresses the substantive claims in Anderson's petition.

IV. MERITS

Initially, the Court notes that, in support of his petition to this Court, Anderson relies on the brief his prior counsel filed on direct appeal of his conviction. This complicates this Court's habeas review, because the appellate brief is not written with the federal habeas standard of review in mind. In light of his pro se status the Court liberally construes Anderson's pleadings..

A. Peremptory Challenges

Ground One of Anderson's amended petition presents a claim under Batson v. Kentucky, 476 U.S. 79, 96 (1986), challenging "the state court's ruling that the prosecutor properly exercised his peremptory challenges when he excused twelve (12) jurors of the African American race [, with] the thirteen (13) challenges he [exercised]." (Am. Pet. 12.) The Court construes Anderson's claim as contending that the Appellate Division's decision on direct appeal was contrary to Supreme Court precedent and an unreasonable determination of the facts.

The Equal Protection Clause of the Fourteenth Amendment "forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." Batson, 476 U.S. at 89 (1986). The Supreme Court has set forth a three-step analysis for a Batson challenge:

> First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question . . . . Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating "the persuasiveness of the justification" proffered by the prosecutor, but "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike."

Rice v. Collins, 546 U.S. 333, 338 (2006) (citations omitted).

Establishing a prima facie case at step one requires a defendant to show that "the totality of the relevant facts gives rise to an inference of discriminatory purpose." Johnson v. California, 545 U.S. 162, 168 (2005) (quoting Batson, 476 U.S. at 93–94). The defendant may proffer evidence that the government exercised a "'pattern' of strikes against black jurors included in the particular venire, [which] might [then] give rise to an inference of discrimination." Williams v. Beard, 637 F.3d 195, 214 (3d Cir. 2011) (quoting Batson, 476 U.S. at 97). In addition, "the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose." Id.

The government's burden of production at step two is relatively low; "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." Williams, 637 F.3d at 215 (quoting Purkett v. Elm, 514 U.S. 765, 768 (1995) (per curiam)). Moreover, although the prosecutor must present a comprehensible reason, "[t]he second step of this process does not demand an explanation that is persuasive, or even plausible"; so long as the reason is not inherently discriminatory, it suffices. Purkett, 514 U.S. at 767-768.

At step three, the defendant must show that "it is more likely than not that the prosecutor struck at least one juror because of race." Hairston v. Hendricks, 2014 U.S. App. LEXIS 17054 (3d Cir. N.J. Sept. 3, 2014) (quoting Bond v. Beard, 539 F.3d 256, 264 (3d Cir. 2008)). Williams, 637 F.3d at 215 (citation omitted). "Step three of the Batson inquiry involves an evaluation of the prosecutor's credibility, and the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenges." Snyder v. Louisiana, 552 U.S. 472, 477 (2008) (alteration in original) (internal citations and quotation marks omitted). At this step, "all of the circumstances that bear upon the issue of racial animosity must be consulted." Id. at 478.

In this case, the prosecutor exercised 13 peremptory challenges, removing 12 African-Americans and one Caucasian. The final jury included six African-American jurors, which represented 40% of the 15 sitting jurors. (Dir.App.Op. 7–8.) The record shows that, at the close of jury selection, all parties agreed that the jury was satisfactory. But before the jury was to be sworn, the attorney representing Anderson's co-defendant Dawara requested a mistrial on the ground that the State's exercise of its peremptory challenges was discriminatory because all but one of its 13 challenged jurors were African-American. (Dir.App.Op. 7.) The trial judge found that Dawara had established a prima facie case under step one, heard the reasons proffered by the prosecutor,[7] and ultimately determined that Dawara had failed to establish by a preponderance of

[7] The prosecutor's explanations included factors such as "(1) juror's difficulty in understanding the nature of the criminal charges in the case at bar; (2) a juror's failure to report a serious crime committed against him; (3) a juror's relationship with a boyfriend who had just been released from jail; (4) a juror's intimate relationship with the father of her daughter who had been convicted and incarcerated in Union County; (5) inappropriate contact with defendant by a juror sitting in the box; and (6) other challenges relating to certain jurors who exhibited potential biases against the State, e.g., a sister charged with falsifying prescriptions who had been exonerated, and a recent conviction for DWI in Essex County." (Dir.App.Op. 12.)

the evidence that the prosecutor had exercised a peremptory challenge in a racially discriminatory manner. Id. at 8.

Anderson made a Batson claim on direct appeal, arguing that the trial court erred in denying the mistrial where the prosecutor had offered non-discriminatory reasons as to only seven out of the 12 African-American jurors. (App. Div. Br. 29–33 [D.E. 21-23].) The Appellate Division applied the three-step Batson standard. (Dir.App.Op. 9–14.) It agreed with the trial court that step one of the Batson analysis was satisfied.[8] As for step two, although the prosecutor was unable to recall his reasons for striking five of the African-American jurors, the Appellate Division concluded that "this was due in part to the time gap between the selection of the jury and the co-defendant's request for a mistrial." (Dir.App.Op. 8.) Specifically the Appellate Division found that defense counsel "should have challenged each selection immediately after the State's decision during the empanelling and not at the conclusion of the jury selection, which had taken a number of days, interrupted by a three-day weekend, and after both sides had found the jury satisfactory." (Dir.App.Op. 8.) The Appellate Division also agreed with the trial judge's step three finding that the defendant had not shown by a preponderance of the evidence that the totality of the circumstances showed that the prosecutor struck any juror on account of race. (Dir.App.Op. 8.)

[8] In its analysis, the Appellate Division did not discuss how many members of the venire panel were African-American. While this factor is relevant to the step one analysis, see Miller-El v. Dretke 545 U.S. 231, 240–41 (2005), omission of this factor is not troubling here in light of the court's conclusion that step one was satisfied. Further, the Appellate Division relied in part on State v. Gilmore, 103 N.J. 508 (1986), which has been expressly disfavored as establishing an overly severe "first prong" threshold, which was incompatible with Batson. See Clausell v. Sherrer, 594 F.3d 191, 194 (3d Cir. 2010) (citing State v. Osorio, 199 N.J. 486, 502–03 (2009)). This is of no moment for the same reason.

The contours of Anderson's Batson challenge before this Court are not clear from his amended petition and appellate brief. Presumably, he is contending that the Appellate Division unreasonably applied Batson by (a) failing to find in his favor at step two when the prosecutor was not able to recall why he struck five African-American jurors, and (b) by ruling against him at step three.

(1) Was the failure to terminate the inquiry at step two contrary to, or an unreasonable application of, clearly established Supreme Court precedent?

There does not appear to be a Supreme Court case precisely addressing whether a court should proceed to step three when, at step two, the prosecutor is unable to recall the reason he or she exercised a peremptory challenge against a particular juror. But several Supreme Court and Third Circuit cases are relevant to the issue. For example, in Purkett v. Elem, 514 U.S. 765 (1995) (per curiam), the Supreme Court emphasized that the persuasiveness of the prosecutor's justification for a particular strike does not become relevant until step three:

> At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge may choose to disbelieve a silly or superstitious reason at step three is quite different from saying that a trial judge must terminate the inquiry at step two when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

Id. at 768 (emphasis in original).

In Johnson v. California, 545 U.S. 162 (2005), the Supreme Court reversed the California Supreme Court's determination that the defendant had not established a prima facie case under Batson where California "require[d] at step one that the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." Id. at 168 (citation and internal quotation marks omitted). The Court emphasized

that "a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." Id. at 170. However, in rejecting California's contention that a prosecutor's failure to respond to a prima facie case would entitle a defendant to judgment as a matter of law on the basis of nothing more than an inference that discrimination may have occurred, the Supreme Court noted that a case proceeds to step three even if the State produces at step two "only a frivolous or utterly nonsensical justification" for its strike. Id. at 171. In a footnote, the Court added:

> In the unlikely hypothetical in which the prosecutor declines to respond to a trial judge's inquiry regarding his justification for making a strike, the evidence before the judge would consist not only of the original facts from which the prima facie case was established, but also the prosecutor's refusal to justify his strike in light of the court's request. Such a refusal would provide additional support for the inference of discrimination raised by a defendant's prima facie case.

Id. at 171 n.6.

In Lark v. Secretary Pennsylvania Department of Corrections, 645 F.3d 596 (3d Cir. 2011), the Third Circuit considered whether a court hearing a Batson challenge should terminate the inquiry at step two, or proceed to step three, where the prosecutor is unable to recall why he or she struck a juror.[9] Lark filed a § 2254 petition in which he claimed that the Commonwealth of Pennsylvania violated Batson where the prosecutor used 13 out of 15 peremptory strikes against African-Americans and the jury was ultimately composed of four African-Americans and eight Caucasians. The district court conducted an evidentiary hearing on the Batson claim several years later, and the prosecutor could not remember why he struck three out of 13 African-American jurors. The district court granted a § 2254 writ on the Batson claim because the state failed to meet its duty of production at step two.

[9] Although this case was not governed by the AEDPA standard, its reading of Supreme Court precedent is instructive here.

The Third Circuit reversed and remanded. Citing footnote 6 in Johnson, the Lark panel reasoned that the prosecutor's failure to explain his reasons "is not, by itself, of such dispositive force that it establishes that there was a Batson violation." Id. at 625. Emphasizing that "the Supreme Court in Johnson rejected the argument that a prosecutor's failure to respond to a prima facie case 'would inexplicably entitle a defendant to judgment as a matter of law on the basis of nothing more than an inference that discrimination may have occurred,'" id. at 626 (quoting Johnson, 545 U.S. at 170), the court held that a prosecutor's "inability to explain the reasons for his use of three peremptory challenges at the second step of the Batson analysis was not a sufficient ground to grant the conditional writ of habeas corpus because that inability along with the other information available to the District Court did not enable [petitioner] to satisfy his ultimate burden of proving intentional discrimination." Id. at 621.

This year in Hairston v. Hendricks, the Third Circuit rejected petitioner's argument that the trial judge did not reach the necessary third step of the Batson analysis, finding that the trial judge was "well equipped to make a finding about whether he believed the reasons given by the prosecutor for exercising the state's strikes were a pretext for discrimination." Id. at 27. While not directly on-point, Hairston supports the proposition that where the trial court has enough information to determine the validity of the prosecutor's reasons for dismissing a juror, it may continue to the third step in the Batson analysis even if the prosecutor's reasons are suboptimal.

In Anderson's case, the Appellate Division's decision not to terminate its analysis at step two was not contrary to, or an unreasonable application of, Batson and its progeny. Consistent with Batson, and the dicta in Johnson, the Appellate Division proceeded to step three, even though the prosecutor could not recall why he struck five African-American jurors. In other

words, that the Appellate Division did not outright reject the prosecutor's response did not offend the Batson protocol. Because Purkett requires only that the proffered reason be comprehensible, and because footnote 6 in Johnson suggests that even if a prosecutor's refusal to respond at step two is not conclusive, and because there is no Supreme Court holding requiring a court to terminate the Batson analysis at step two under certain circumstances, this Court cannot find that the Appellate Division's failure to terminate the inquiry at step two was contrary to, or an unreasonable application of, clearly established Supreme Court precedent. Thus, Anderson is not entitled to habeas corpus relief under § 2254(d)(1) based upon the Appellate Division's failure to terminate its analysis at step two.

(2) Did the Appellate Division's step three inquiry satisfy the requirements of Section 2254(d)?

AEDPA outlines two grounds for consideration under § 2254(d). The first, § 2254(d)(1), considers whether the court's legal conclusions were contrary to clearly established Supreme Court precedent; the second, § 2254(d)(2), considers whether the court made an unreasonable determination of the facts given the evidence presented. The Court considers each section in turn.

Once it found the prosecutor had satisfied his burden of production at step two of the Batson analysis, the Appellate Division moved to step three, evaluating the strength of the prosecutor's explanations. The prosecutor gave six enumerated reasons, justifying excusing seven jurors, described in footnote 7 supra. The Appellate Division then found that the prosecutor excused "several young jurors who did not appear to understand the severity of the case," and that part of what motivated the prosecutor overall was "how the jurors sitting in the box appeared as a whole." (Dir.App.Op. 12-13.) The Appellate Division found that the

prosecutor was looking for "strong" jurors, and excused jurors who "seemed reticent and might be a weak voice in the jury room." (Dir.App.Op. 13.) Ultimately, the Appellate Division found that the trial court's reasoning was sufficient, and that the prosecutor's reasons for excluding individual jurors were "race-neutral, individualized to their particular circumstances and experiences, and reasonably relevant to the case on trial." Id.

According to Supreme Court precedent, to discredit a prosecutor's race-neutral reasons proffered at step two of the Batson inquiry, and thereby establish purposeful discrimination at step three, a petitioner must show that the race-neutral reasons are not credible. See Miller-El v. Dretke, 545 U.S. 231, 247 (2005) (stating that a "prosecutor's explanations cannot be reasonably accepted" when they are not credible). Credibility can be measured by "how reasonable, or how improbable, the explanations are." Miller-El v. Cockrell, 537 U.S. 322, 339 (2003). The Appellate Division's step three analysis considered the reasons given by the prosecutor for excluding potential jurors and considered the prosecutor's conduct as a whole to determine the credibility of his assertions pursuant to Snyder v. Louisiana, 552 U.S. at 477. Thus, the Appellate Division decision was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent. See Felkner v. Jackson, 131 S. Ct. 1305, 1307 (2011) (per curiam) (reversing the Ninth Circuit's opinion granting relief on Batson claim where the state trial court credited the prosecutor's explanations at step three, and the appeals court carefully reviewed the record and upheld the trial court's determination). Anderson is not entitled to habeas relief under § 2254(d)(1) based upon the Appellate Division's findings at step three.

To grant relief under § 2254(d)(2), this Court would have to find that the Appellate Division's conclusion that the prosecutor did not strike any African-American jurors based on race was "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). The very language of the statute goes on to erect a significant hurdle that Anderson fails to overcome: "[A] determination of a factual issue made by a state court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). The Appellate Division's finding (affirming the trial judge) that the prosecutor's peremptory strikes were not motivated by race is "a pure issue of fact accorded significant deference." Hernandez v. New York, 500 U.S. 352, 364 (1991) (plurality opinion). This finding must be presumed correct unless Anderson shows by clear and convincing evidence that it is not. See 28 U.S.C. § 2254(e)(1).

Anderson argues that the reasons the prosecutor gave for striking seven African-American jurors were "bogus" and, "[s]ince all TWELVE (12) of the prosecutor's peremptory challenges w[ere] the focus . . . , the prosecutor should have advanced reasons for excusing all (12) and not just for seven (7) which all but one of his reasons had any merit." (Reply 13.)

Under the exacting legal burden imposed on him, Anderson would need far more than he has shown. "Reasonable minds reviewing the record might disagree about the prosecutor's credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination." Rice v. Collins, 546 U.S. 333, 341–42 (2006).

This Court has already found that the Appellate Division's finding that the failure to give reasons was not a Batson violation suffices under the applicable standard (and it also suffices based on common sense, inasmuch as defense counsel pronounced themselves satisfied at the

close of the jury voir dire). Anderson's bald, conclusory attack on the reasons given does not amount to clear and convincing evidence that would disturb the presumption of correctness. In light of the evidence presented, thus this Court finds that Anderson is not entitled to habeas relief on his Batson claim under § 2254(d)(2).

B. Excessive Sentence

Anderson contends in Ground Two that "the State court's ruling that defendant's sentence wasn't disparate and excessive was error." (Am. Pet. 12.) Anderson raised this ground in his brief to the Appellate Division on direct appeal. He compared his sentence of three consecutive terms of 15, 18, and seven years, for a total of 40 years, to the sentence of his codefendant, Hamadi Aaron, who received a total of 15 years for all three separate indictments in exchange for testifying against him. (App. Div. Br. 34–38.) Anderson argued on direct appeal that the sentences were disparate, his sentence was excessive compared to Aaron's, and the consecutive nature of his sentence violated state law. The Appellate Division rejected these arguments and found that the consecutive sentences fell within the appropriate sentencing guidelines. (Dir.App.Op. 14–15.)

Absent a claim that a sentence constitutes cruel and unusual punishment prohibited by the eighth amendment, or that it is arbitrary or otherwise in violation of due process, the legality and length of a sentence are questions of state law over which this Court has no jurisdiction under § 2254. See Chapman v. United States, 500 U.S. 453, 465 (1991) (holding that under federal law, "the court may impose . . . whatever punishment is authorized by statute for [an] offense, so long as that penalty is not cruel and unusual, and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment"). Anderson's

claim that his sentence is disproportionate to that of his co-defendant is resolved by Lockyer v. Andrade, 538 U.S. 63 (2003), where the Supreme Court observed that the eighth amendment's gross disproportionality principle "reserves a constitutional violation for only the extraordinary case." Id. at 77. This is not such a case, particularly where Aaron pleaded guilty, accepting responsibility for his crimes. Habeas relief is denied on the sentencing claims.

C. Ineffective Assistance of Counsel

In Grounds Three, Five, Six, Seven, Eight and Nine, Anderson claims that counsel was constitutionally ineffective for failing to present an alibi witness (Latesha Anderson ("Latesha")), failing to establish that the evidence from the robberies was found on his co-defendant (instead of the car's center console), failing to request a Wade hearing on the show-up identification, failing to conduct a background check on the witnesses and victims, failing to establish that Anderson had not met Hamadi Aaron until the day of his arrest, and failing to cross examine Aaron about the alleged motive they had for committing the robberies.[10] (Am. Pet. 13–18.)

The Sixth Amendment, applicable to states through the due process clause of the fourteenth amendment, guarantees the accused the "right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. A claim that counsel's assistance was so defective as to require reversal of a conviction has two components, both of which must be satisfied. See Strickland v. Washington, 466 U.S. 668, 687 (1984). The defendant must "show that counsel's representation fell below an objective standard of reasonableness" and that the specified errors resulted in prejudice. Id. at 687–88. To establish prejudice, the defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

[10] Anderson raises additional grounds in his reply brief. This Court will not consider those new grounds, as they were not included in Anderson's all-inclusive amended petition.

proceeding would have been different." Id. at 694 (citations omitted). The reasonable probability standard is less demanding than the preponderance of the evidence standard. See Nix v. Whiteside, 475 U.S. 157, 175 (1986); Baker v. Barbo, 177 F.3d 149, 154 (3d Cir. 1999).

Habeas review of a state court's adjudication of an ineffective assistance claim is "doubly deferential." Knowles v. Mirzayance, 556 U.S. 111, 123 (2009). To obtain habeas relief, a state petitioner "must demonstrate that it was necessarily unreasonable for the [state c]ourt to conclude: (1) that [petitioner] had not overcome the strong presumption of competence; and (2) that he failed to undermine confidence in the [outcome]." Cullen, 131 S. Ct. at 1403.

Anderson presented his ineffective assistance of counsel claims to the Appellate Division in his appeal from the order denying his PCR petition. The Appellate Division rejected the claims substantially for the reasons articulated in trial judge's 33-page oral opinion denying the PCR petition. See Anderson, 2008 WL 695864, at *1. The court found that counsel was not deficient for failing to call Latesha because Anderson had not submitted an affidavit (or anything else) setting forth what she would have said. In addition, even if Latesha had testified, the trial court determined the outcome would not have changed, given Hamadi Aaron's testimony. (PCR.Tr. 6–9 [D.E. 21-19].) The trial judge further found that Anderson failed to show prejudice resulting from claimed errors about (1) counsel's failure to establish that the evidence (from the robberies) was on the person of co-defendant Aaron, (2) counsel's failure to conduct background checks, (3) counsel's failure to show that Anderson did not know Aaron until the day of their arrest, and (4) failure to cross-examine Aaron on his motive for the robberies. . (PCR.Tr. 23–30.)

In his long opinion, the trial judge inadvertently failed to discuss Anderson's claim that counsel ineffectively failed to request a hearing under United States v. Wade,, 388 U.S. 218 (1967).[11] Anderson's brief to the Appellate Division raised the claim, and provided no analysis of the prejudice prong. (App. Div. PCR Br. 17 [D.E. 21-31].) This case did not hinge on identity, since the police arrested Anderson and his co-defendants with the vehicle that was used in the robberies shortly after the second robbery. In light of Aaron's testimony and the undisputed fact that three males committed the robberies by using a specific car and the police thereafter arrested the three defendants with that car, Anderson has failed to establish that there is a reasonable probability that the outcome would have been different if counsel had requested a Wade hearing.

The trial court's rejection of these claims as deficient because Anderson failed to show prejudice was proper under Strickland and even inevitable, given Hamadi Aaron's testimony and the first victim's identification of the car driven by the three men who robbed his store. Anderson has not shown that the New Jersey courts' rejection of his ineffective assistance of counsel claims, essentially for failure to establish prejudice, was contrary to, or an unreasonable application of Strickland or other Supreme Court precedent. As held in Strickland, 466 U.S. at 697, "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." Accordingly, Anderson is not entitled to habeas relief.

D. Admission of Digital Photos

[11] "A Wade hearing is conducted when a question arises concerning an identification procedure that has possibly violated a constitutional right. The hearing is made outside the presence of a jury, and concerns not the in-court identification, but only the pre-trial identification." United States v. Stevens, 935 F.2d 1380, 1386 n.3 (3d Cir. 1991) (citation omitted).

In Ground Four, Anderson argues that "the trial court erred in allowing digital photographs as evidence at defendant's trial after the police officer had them stored on his home computer for an entire year." (Am. Pet. 14.) The digital photographs were of the center console of the vehicle in which Anderson and his co-defendants were apprehended, and of the intersection at which police stopped the vehicle. In the console photos, the stolen property is seen in the vehicle console. As factual support for his claim, Anderson states that "the digital images . . . can be easily altered by using a computer and therefore, not admissible," and that their admission was "inappropriate" because the police officer used his own camera and he failed to produce negatives for purposes of authentication. Id. at 14–15.

Anderson raised this ground as part of an ineffective assistance of counsel claim on appeal from the denial of his PCR petition. The Appellate Division did not discuss the issue in its review, noting that Anderson's "contention his PCR counsel was ineffective is without sufficient merit to warrant discussion in a written opinion," while agreeing with the trial court that Anderson failed to demonstrate prejudice. Anderson, 2008 WL 695864, at *2. Anderson's co-defendant Dawara raised this same issue on direct appeal. Because the Appellate Division discussed the merits of the digital photo challenge in Dawara's appeal, this Court will consider the claim as if Anderson had exhausted it himself.

The question of the admission of evidence is essentially a state law evidence claim, and "the Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules." Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983). Here, the Appellate Division determined that the digital photos were properly admitted and authenticated under state law. State v. Dawara, No. A-3903-03T4, 2006 WL 3782964, at *4–6

(App. Div. Feb. 10, 2006). This Court finds that the New Jersey courts' adjudication of his admission of digital photos claim was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent.

E. Denial of Severance

In ground ten, Anderson asserts that he "was denied his right to a separate trial from so-called codefendant Dawara." (Am. Pet. 18.) According to the Supreme Court, "[i]mproper joinder does not, in itself, violate the Constitution." United States v. Lane, 474 U.S. 438, 446 n. 8 (1986). Denial of a motion to sever violates due process "only if there is a serious risk that a joint trial would compromise a specific right of . . . the defendant[ ], or prevent a jury from making a reliable judgment about guilt or innocence. Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant." Zafiro v. United States, 506 U.S. 534, 539 (1993). Moreover, "a fair trial does not include the right to exclude relevant and competent evidence." Id. at 540 (citation & internal quotation marks omitted).

The first time that Anderson raised this issue was in his PCR petition to the trial court as part of his ineffective assistance of counsel claim. The Appellate Division affirmed without discussion the trial court's ruling rejecting severance, and so this Court addresses that holding as the last reasoned opinion by the state courts. The point is worth making here that throughout Anderson's prosecution, the same judge with familiarity and experience with all facets of the case made all the trial level rulings. Faced with the severance argument arising after the conviction, the trial judge rejected it, holding that even if Anderson had been tried separately, the proofs against him would not have been different and the result would have been the same.

(PCR Tr. 30–32.) Anderson points to no evidence admitted at the joint trial that would not have been admissible if he had been tried alone, and he has not shown that the joinder compromised any specific right or prevented the jury from reliably judging his guilt or innocence. Thus, joinder of charges did not deny him a fair trial and the trial court's adjudication of the claim was not contrary to, or an unreasonable application of, Supreme Court precedent.

V. CONCLUSION

Accordingly, because this petition is untimely and without merit, and because jurists of reason would not debate this, the Court will deny it and will not issue a certificate of appealability. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 478 (2000). An appropriate order follows.

November 24, 2014

/s/ Katharine S. Hayden
Katharine S. Hayden, U.S.D.J.