

Ricciardi challenges to his conviction and sentence were rejected in the Pennsylvania court system on direct appeal and under the Pennsylvania Post Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541-9546 (“PCRA”). Federal court habeas review of state court proceedings is limited. Pursuant to the Antiterrorism and Effective Death Penalty Act (“AEDPA”), federal courts must give “considerable deference” to the factual findings and legal determinations of the state post-conviction relief court. *Branch v. Sweeney*, 758 F.3d 226, 232 (3d Cir. 2014); *Werts v. Vaughn*, 228 F.3d 178, 195-96 (3d Cir. 2000). Pursuant to 28 U.S.C. § 2254(d), as amended by AEDPA, a petition for habeas corpus may be granted only if 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 the State court proceeding.” 28 U.S.C. § 2254(d)(1)-(2).

The “unreasonable application” inquiry requires the habeas court to “ask whether the state court's application of clearly established federal law was objectively unreasonable.” *Williams v. Taylor*, 529 U.S. 362, 409 (2000). An “unreasonable” application of federal law requires more than merely an incorrect application of law. A petitioner must show that the state court's ruling “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011). A petitioner’s hurdle is high because federal habeas review of state convictions frustrates states’ sovereign power to punish offenders, their good-faith attempts to honor constitutional rights, and their interest in repose for concluded litigation. *Id.*

1. Due Process

Ricciardi's challenge to the jury instructions was presented as a state law issue in his direct appeal and as an ineffective assistance of counsel theory in his PCRA proceedings. (R&R at 10). The magistrate judge deemed the federal due process claim exhausted because the PCRA courts addressed the merits of Ricciardi's argument and recommended that Ricciardi's due process claim be denied on the merits. Assuming that the claim is properly exhausted, Ricciardi is not entitled to relief, as explained below.

A jury instruction violates the due process clause if it "reliev[es] the State of the burden of proof ... on the critical question of petitioner's state of mind." *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979). "[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." *Middleton v. McNeil*, 541 U.S. 433, 437 (2004). The question is whether the ailing instruction "so infected the entire trial that the resulting conviction violates due process." *Id.* (quoting *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)). An instruction "may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record." *Estelle*, 502 U.S. at 72. A state court's PCRA ruling that the jury instructions are adequate must be given deference under AEDPA. *Murray v. Diguglielmo*, 591 F. App'x 142, 147 (3d Cir. 2014) (deferring to PCRA court's conclusion that even if first-degree murder instruction in isolation misstated Pennsylvania law, the charge as a whole adequately advised jury of specific intent to kill element). In *Bennett v. Wenerowicz*, No. CV 13-1203, 2014 WL 11191050, at *11 (E.D. Pa. May 30, 2014), report and recommendation adopted, No. 2013-CV-1203, 2016 WL 1086555 (E.D. Pa. Mar. 21, 2016), the court summarized the two-step burden for a petitioner to obtain habeas relief:

“First, he must demonstrate that there is a reasonable likelihood that the jury applied the challenged instructions in a way that violated the Constitution by alleviating the Commonwealth's burden to prove every element of first-degree murder beyond a reasonable doubt. Second, in considering his petition, this court must determine whether the state court's determination of the claim was objectively unreasonable, meaning that it was not only erroneous, but also unreasonable.” *Id.* at *11 (citations omitted).

Pennsylvania has a special rule of vicarious liability for first-degree murder: a defendant cannot be convicted as an accomplice or conspirator unless he has the “specific intent to kill.” *Coleman v. Superintendent Forest SCI*, 613 F. App'x 138, 139 (3d Cir. 2015) (citing *Commonwealth v. Speight*, 854 A.2d 450, 460 (Pa. 2004)). A Pennsylvania trial court must instruct a jury that it can only find a defendant guilty of first-degree murder as an accomplice or co-conspirator if he possessed the specific intent to kill. *Bennett*, 2014 WL 11191050, at *4 (citations omitted). If the court's charge to the jury “allowed the jury to find that [the defendant] was an accomplice to first degree murder without finding that he possessed the mens rea required for that offense, then the instructions were constitutionally infirm.” *Williams v. Beard*, 637 F.3d 195, 220 (3d Cir. 2011).

Ricciardi recognizes that the jury instruction for first degree murder in his case correctly included the “specific intent to kill” element.¹ (Trial Transcript of Feb. 13, 2003 at 229-230).

¹ The first degree murder instruction did contain an ambiguity. The jury was instructed that the three elements were: “First, that [S.K.] is dead; second, that **the Defendant** killed her; and third, that the Defendant did so with a specific intent to kill and with malice.” Trial Tr. at 230 (emphasis added). This instruction was contrary to the prosecution's theory of the case, which was that Billy Monday killed the victim. The instruction did not clarify that Ricciardi was not required to be the actual killer; but as the Pennsylvania superior court noted in its PCRA opinion, this error inured to Ricciardi's benefit. (ECF No. 24-21 at 21). Monday was not on trial and the jury was not invited to find Ricciardi guilty based on Monday's intent. *See Bennett*, 57 A.3d at

Ricciardi argues, however, that the jury instructions regarding accomplice and co-conspirator liability allowed the jury to convict him without the “specific intent to kill” element. The jury was instructed: “It is the theory of the Commonwealth that the Defendant did not commit the actual act that killed [S.K.] but did so as an accomplice and/or as a coconspirator.” *Id.* at 227.

The accomplice instruction stated that “You may find the defendant guilty of a crime on the theory that he was an accomplice and as long as you’re satisfied beyond a reasonable doubt that the **crime** was committed and that the Defendant was an accomplice of the person who committed it.” *Id.* at 225-226 (emphasis added). The conspiracy instruction provided: “You may find the Defendant guilty of the **crimes** as a conspirator if you are satisfied beyond a reasonable doubt, first that the Defendant agreed with Billy Monday and David Garvey that he or one or more of them would commit the **crimes**.” *Id.* at 226 (emphasis added). Ricciardi was charged with, and the jury was instructed on, numerous crimes: first degree murder, second degree murder, third degree murder, conspiracy to commit homicide, conspiracy to commit rape by forcible compulsion, conspiracy to commit rape of a person less than thirteen years old, kidnapping to inflict injury, unlawful restraint, and abuse of a corpse.² Ricciardi contends, in essence, that the accomplice and conspiracy instructions did not distinguish first degree murder from the other charges and should have specifically included Pennsylvania’s special rule requiring specific intent for first degree murder.

The trial judge explained to the jury that the charge would be divided into three general areas: (1) general principles of law applicable in all criminal cases; (2) the specific charges and their

1203.

² At Defendant’s request, the three conspiracy charges were consolidated on the verdict slip into

elements and rules of law specifically relating to this case; and (3) guidelines for deliberations. Trial Tr. at 200. The instructions on accomplice and conspirator liability challenged by Ricciardi are in the “general principles of law” section of the charge. It is clear, in context, that the trial judge was explaining the general rules governing accomplice and conspirator liability “before I get to the specific crimes.” *Id.* at 224-225. When instructing the jury on the specific elements of the crimes charged, the trial judge identified the elements of first degree, second degree and third degree murder, all of which were on the verdict slip. The jury was instructed: “You have the right to bring in a verdict finding the Defendant guilty or finding him not guilty of one of these three types of criminal homicides.” *Id.* at 240. As noted above, the first degree murder instruction required defendant to have a specific intent to kill. The trial judge included a thorough explanation of the “specific intent to kill” element. *Id.* at 229-230. There was no reference to accomplice or co-conspirator liability in the first degree murder instruction.

The jury was then instructed on the elements of second degree murder, which did include accomplice and co-conspirator liability. The elements were: “First, that Billy Monday and/or David Garvey killed or caused the death of [S.K.]; Second, that Billy Monday and/or David Garvey did so while they and Defendant were partners in the kidnapping and/or rape of the victim; Third, that Billy Monday and/or David Garvey did the act that killed or caused the death of the victim in furtherance of the kidnapping and/or rape; and fourth, that Defendant was acting with malice.” *Id.* at 232. The trial judge revisited the concepts of accomplice and conspirator liability in the context of “the requirement that the Defendant, Billy Monday and David Garvey were partners in kidnapping and/or rape.” *Id.* at 236-238.

The jury was then instructed on third degree murder. The trial judge explained: “You’ll note the difference between third degree murder and first degree murder. First degree murder requires those elements but also the specific intent to kill. Specific intent to kill, malice. Third degree murder just requires malice.” *Id.* at 239. The trial judge again reviewed the differences between the degrees of murder and reiterated: “First degree murder requires a specific intent to kill.” *Id.* at 241.

The trial record provides further evidence that the Commonwealth was required to prove Ricciardi’s specific intent to kill. During deliberations on the evening of February 13, 2003, the jury asked to re-hear the definition of the three degrees of criminal homicide and coconspirator and accomplice liability. *Id.* at 275. The trial judge re-read those portions of the charge. Later that evening, the jury again asked to hear the definition of the charge of first degree murder. *Id.* at 298. The trial judge re-read that portion of the charge, including the instructions regarding the requirement that Ricciardi have a specific intent to kill. *Id.* at 299-302. The portions of the jury instructions cited by Ricciardi, when viewed in isolation, may be ambiguous. When considered in the context of the jury charge and trial record as a whole, however, the court is convinced that there is no reasonable likelihood that the jury applied the challenged instructions in a way that violated the Constitution by alleviating the Commonwealth’s burden to prove the specific intent element of first-degree murder beyond a reasonable doubt. The PCRA court’s rejection of Ricciardi’s due process claim was not objectively unreasonable. In summary, there was not a reasonable likelihood that the jury convicted Ricciardi without finding that he had a specific intent to kill.³

³ The evidence strongly supported the “specific intent to kill” element. The jury heard Ricciardi’s own taped statements to officers regarding the events of that day, to wit: Ricciardi, Monday and Garvey had previously discussed raping and killing a girl. On October 8, 2003, Monday told Ricciardi that it would be a perfect time to carry out that plan, but he was going to

Defendant relies heavily on *Everett v. Beard*, 290 F.3d 500 (3d Cir. 2002), which granted habeas relief because a jury instruction on accomplice liability violated due process by permitting the jury to convict Everett for first degree murder without the specific intent to kill. The decision in *Everett* is distinguishable from this case in two important ways. First, it did not apply AEDPA deference. See *Coleman*, 613 F. App'x at 140 (distinguishing *Everett* because it applied a de novo standard rather than AEDPA deference). Second, the first degree murder instruction at issue in *Everett* was clearly wrong, because the jury was told that the specific intent to kill could be held by Everett “or his accomplice.” *Everett*, 290 F.3d at 504; *Priester v. Vaughn*, 382 F.3d 394, 397 n.2 (3d Cir. 2004) (jury instruction in *Everett* was “patently erroneous”). Although the trial judge in this case did not specifically clarify the “special rule” for first degree murder as in *Coleman*, 613 F. App'x at 140, the first degree murder instruction in this case clearly and repeatedly required Ricciardi to have a specific intent to kill. See *Commonwealth v. Bennett*, 57 A.3d 1185, 1198 (Pa. 2012) (legal concepts of accomplice liability and first degree murder need not contain a “set pattern of magic words” if the charge as a whole coherently informed the jury that the Commonwealth must prove the specific intent to kill).⁴

The decision in *Laird v. Horn*, 414 F.3d 419 (3d Cir. 2005) (granting habeas relief), is distinguishable because in that case both alleged accomplices were tried together and admitted to kidnapping, but testified that the other person killed the victim and denied their own intent to kill.

leave it up to Ricciardi to say yes or no. Later in the encounter, Monday again asked Ricciardi ‘yes or no’ and Ricciardi told him “Yes.” Trial Exh. 21 (transcript of defendant’s statement). Ricciardi also stated that Monday pulled him to the side as the four people walked into the culvert and said “if you tell me ‘yes’ it’s going to happen.” Ricciardi nodded yes.

⁴ In April 2005 -- two years after Ricciardi’s trial -- the Pennsylvania Suggested Standard Criminal Jury Instructions were revised to include the “special rule” language. *Bennett*, 57 A.3d

Thus, it was essential for the jury to be clearly instructed that a first degree murder conviction must be based on that defendant's own specific intent to kill, not that of his accomplice. *See Williams*, 637 F.3d at 224-25 (distinguishing *Laird* based on the context of the trial record as a whole). Here, Ricciardi was the only defendant and therefore the "specific intent to kill" element clearly applied to him. In sum, Ricciardi did not show a violation of his federal due process rights in this case.

2. Ineffective Assistance of Counsel

The court adopts the reasoning and opinion of the magistrate judge regarding Ricciardi's claims of ineffective assistance of counsel. In addition, the court notes that Ricciardi was not prejudiced by any of counsel's alleged errors regarding the first degree murder jury instructions because he would be serving a mandatory life sentence in any event. The jury's verdict supported a conviction for second-degree felony murder because S.K.'s death occurred while Ricciardi was engaged as a principal or accomplice in the perpetration of the kidnapping and unlawful restraint. *See Rainey v. Varner*, 603 F.3d 189, 202 & n.5 (3d Cir. 2010) (rejecting ineffective assistance of counsel claim for lack of prejudice where jury verdict would have established second degree murder conviction and mandatory life sentence).

The report and recommendation of the magistrate judge will be adopted as the opinion of the court, as supplemented by this opinion.

An appropriate Order follows.

Dated: July 19, 2017

s/ Joy Flowers Conti _____
Joy Flowers Conti
Chief United States District Judge

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

PERRY S. RICCIARDI, II,)
Petitioner,)
)
v.) Civil Action No. 16-266
)
)
JAY LANE, et al.,)
Respondents.)

AND NOW, this 19th day of July, 2017,

IT IS ORDERED that the amended petition for a writ of habeas corpus filed by petitioner (ECF No. 20) is denied and, because reasonable jurists could not conclude that a basis for appeal exists, a certificate of appealability is denied.

The Report and Recommendation filed by Magistrate Judge Mitchell on March 8, 2017 (ECF No. 25) is adopted as the opinion of the court, as supplemented by the accompanying memorandum opinion.

s/ Joy Flowers Conti
Joy Flowers Conti
Chief United States District Judge

cc: All counsel of record