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

ANTUAN BRONSHTEIN,	:	**CIVIL ACTION**
	:	**THIS IS A CAPITAL CASE**
Petitioner,	:	
	:	
v.	:	
	:	
MARTIN HORN, Commissioner Designate, Pennsylvania Department of Corrections,	:	
	:	
Respondent.	:	**NO. 99-2186**

Reed, S.J. **July 5, 2001**

M E M O R A N D U M

Antuan Bronshtein was convicted of first degree murder and sentenced to death in state court, and now seeks habeas relief under 28 U.S.C. § 2554. The Commonwealth of Pennsylvania contends that Bronshtein's failure to comply with a state procedural rule bars this Court from hearing the merits of his habeas petition. Having carefully considered the arguments of both parties, the record of the trial proceedings,[1] and relevant precedent, I conclude, for the reasons explained herein, that Bronshtein's habeas claims are not procedurally defaulted, because the procedural rule that the Supreme Court of Pennsylvania relied upon in rejecting his claims was not clearly established or regularly followed at the time of his alleged default, therefore was not sufficiently "adequate" to bar federal habeas review. For that reason, this Court may consider the merits of his petition. Upon a review of the merits of Bronshtein's claims, I find that he is entitled to relief on three of his claims, and will grant the writ unless he is given a new trial and sentencing.

[1] This Court has, with the cooperation of the Court of Common Pleas of Montgomery County, obtained and reviewed a copy of the entire trial record in this case.

Factual Background

On January 11, 1991, Alexander Gutman was found dead in his jewelry store in the King of Prussia Shopping Center. Gutman had been shot twice in the face, and approximately $60,000 in jewelry were discovered missing from the store. In May 1991, Antuan Bronshtein, who was in custody in connection with another crime, volunteered information about the Gutman murder, telling authorities that the murder had been committed by a "Mr. X," a member of the Russian mafia.

This revelation made Bronshtein a prime suspect, and in 1994, he stood trial for Gutman's murder, as well as robbery and theft. The evidence presented at trial indicated that the murder weapon was a gun owned and kept in the store by the victim, however that weapon was never recovered. Bronshtein's prints were found in the jewelry store, and eyewitness testimony placed Bronshtein and another man at the store hours before Gutman's body was discovered. A former associate of Bronshtein's testified that Bronshtein had said that he had killed a person in a jewelry store "out past the boulevard" and had taken his jewelry.

Bronshtein's defense theory was that the murder was actually committed by a man referred to during the trial as Mr. X or Adik Karlitsky. The defense relied primarily on evidence linking a piece of a gun found at the jewelry store to Karlitsky, Bronshtein's prior statements that Karlitsky had committed the murder, and eyewitness testimony placing Karlitsky at the jewelry store on the day of the murder.

Procedural Background

At the close of the trial, the jury convicted Bronshtein of first degree murder, robbery, theft of movable property, possession of an instrument of crime, and criminal conspiracy to

commit murder. At the sentencing phase, the jury found two statutory aggravating circumstances – that Bronshtein had committed the killing during the perpetration of a felony and that he had a significant history of felony convictions involving the use or threat of violence – and three statutory mitigating circumstances – that Bronshtein suffered from extreme mental or emotional disturbance, that he had a poor childhood and upbringing, and that there was a possibility that he did not actually pull the trigger. The jury returned a sentence of death.

The Supreme Court of Pennsylvania affirmed Bronshtein's conviction and sentence on direct appeal. See Commonwealth v. Bronshtein, 547 Pa. 460, 691 A.2d 907 (1997). The governor of Pennsylvania signed a warrant of execution, which was stayed by the Supreme Court of Pennsylvania when Bronshtein petitioned the Supreme Court of the United States for a writ of *certiorari.* See Commonwealth v. Bronshtein, 548 Pa. 520, 698 A.2d 589 (1997). That petition was denied, see Bronshtein v. Pennsylvania, 522 U.S. 936, 118 S. Ct. 346 (1997), and another warrant of execution issued.

Petitioner then filed his first petition under the Pennsylvania Post-Conviction Relief Act, 42 Pa. C.S. § 9541, *et seq*. ("PCRA"), on December 3, 1997, and the warrant of execution was stayed pending the disposition of that petition. In January 1998, while that PCRA petition was pending, petitioner wrote a letter to the PCRA court expressing his desire to withdraw the petition. In January 1999, after three hearings, numerous psychiatric examinations, and the appointment of new counsel for Bronshtein, the PCRA court determined that he was competent to waive his rights and that his waiver was knowing, voluntary, and intelligent. Consequently, the PCRA court dismissed the PCRA petition and vacated the stay of execution.

In February 1999, Bronshtein's mother and sister, as his next friends, appealed to the

Supreme Court of Pennsylvania the PCRA court's dismissal of the petition, arguing that he was incompetent to withdraw his PCRA petition. Bronshtein opposed the appeal. The supreme court found that while the next friends had standing to raise the issue of competency, they had failed to make a compelling showing that Bronshtein was incompetent. See Commonwealth v. Bronshtein, 556 Pa. 545, 557, 729 A.2d 1102 (1999). Over a lone dissent,[2] the supreme court denied the next friends' appeal and affirmed the PCRA court's determination that Bronshtein was competent to waive his right to appeal and that his waiver was knowing, intelligent, and voluntary. See id.

Following the Supreme Court's decision, petitioner's mother and sister filed a petition for a writ of habeas corpus and a stay of execution in this Court.[3] During a hearing on that petition, in which Bronshtein participated via telephone, Bronshtein informed this Court that he had changed his mind and wanted to pursue post-conviction relief. On April 29, 1999, this Court stayed the warrant of execution and established a briefing schedule for his federal habeas petition. On June 9, 1999, Bronshtein returned to state court and filed with the PCRA court a document styled an "Amended Petition for Habeas Corpus Relief under Article I, Section 14 of the Pennsylvania Constitution and for Statutory Post-Conviction Relief Under the Post-Conviction Relief Act," which was, essentially, a second PCRA petition. That petition was dismissed by the PCRA court, which concluded that Bronshtein had irrevocably waived his

[2] The dissenter believed the next friends had carried the burden of raising a question concerning competency and would have granted a stay of execution pending further psychiatric assessment. See Bronshtein, 556 Pa. at 559 (Flaherty, C.J., dissenting).

[3] This case, then, began in this Court as Pogrebivsky v. Horn, Civil Action No. 99-2105, as a result of the next-friends petition of Bronshtein's mother and sister, and when Bronshtein decided to pursue the petition himself, the prior case was closed upon the withdrawal of the next friends' motion, and Bronshtein initiated the instant action.

rights to post-conviction relief and that the petition was tardy under a one-year time limitation established by 1995 amendments to the PCRA. See 42 Pa. C.S. § 9545 (b) (1).

Bronshtein appealed the dismissal of his second PCRA petition to the Supreme Court of Pennsylvania. In June 2000, the supreme court affirmed the PCRA court's dismissal, holding that the second PCRA petition was a second or successive petition filed more than one year beyond the date the judgment became final, and thus was late under § 9545 (b) (1) and could not be considered on the merits. See Commonwealth v. Bronshtein, 561 Pa. 611, 615, 752 A.2d 868 (2000). The supreme court also concluded that the alleged ineffectiveness of petitioner's counsel could not excuse the tardy filing of his PCRA petition. The supreme court therefore concluded that § 9545 (b) (1) deprived it of jurisdiction over the petition. See id. at 616-17.

Bronshtein then returned to this Court, where his federal habeas petition had been held in administrative suspense pending the outcome of his PCRA appeal. Now before this Court is the petition of Bronshtein for a writ of habeas corpus.

Procedural Issues – Exhaustion and Procedural Default[4]

Bronshtein's petition faces daunting procedural hurdles that, if resolved in favor of the Commonwealth, would bar the Court from considering the merits of his claims. These procedural issues are quite complex and, especially in light of the high stakes involved in this capital case, require careful consideration. Therefore, I turn first to the procedural issues presented by Bronshtein's petition.

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[4] I note at the outset the recent decision of the Supreme Court of the United States in Artuz v. Bennett, 531 U.S. 4, 121 S. Ct. 361 (2000), in which the Court held that a federal habeas application containing claims that were procedurally barred at the state level is nevertheless "properly filed" as required by 28 U.S.C. § 2244 (d) (2). Therefore, though Bronshtein's petition contains numerous claims that clearly were dismissed for procedural reasons at the state level, this Court cannot dismiss his application outright under Artuz and must independently consider petitioner's contention that his claims warrant federal habeas review despite his procedural default.

No Pennsylvania court has reached the merits of the issues Bronshtein raises in his federal habeas petition. This is not for lack of effort on Bronshtein's part; he has filed two PCRA petitions, one of which he withdrew by explicit, voluntary waiver, the other of which was dismissed by the Supreme Court of Pennsylvania as procedurally barred.[5]

The question before me, then, is not whether petitioner exhausted his state remedies. The federal habeas statute requires a petitioner to exhaust the "remedies available in the courts of the State." 28 U.S.C. § 2254; see Rose v. Lundy, 455 U.S. 509, 522, 102 S. Ct. 1198 (1982). Exhaustion in the habeas context requires only that the same issues, or issues "substantially equivalent" thereto, have been "fairly presented" to the state courts. See Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997). That is precisely what took place in this case; Bronshtein presented the issues in the instant habeas petition to both the PCRA court and the Supreme Court of Pennsylvania.[6] The state courts' rejection of Bronshtein's claims on procedural grounds raises a question not of exhaustion, but of procedural default. See O'Sullivan v. Boerckel, 526 U.S. 838, 854, 119 S. Ct. 1728 (1999) (Stevens, J., dissenting) ("We therefore ask in federal habeas cases not only whether an applicant has exhausted his state remedies; we also ask how he has done so. This second inquiry forms the basis for our procedural default doctrine: A habeas petitioner who has concededly exhausted his state remedies must also have *properly* done so by giving the State a fair 'opportunity to pass upon [his claims].'") (brackets in original) (quoting Darr v. Burford, 339 U.S. 200, 204, 70 S. Ct. 587 (1950)); Carpenter v. Vaughn, 888 F.

[5] I note that while the PCRA court concluded, in dismissing petitioner's second PCRA petition, that petitioner had irrevocably waived all of his rights to any PCRA relief, I conclude that the voluntary withdrawal of his first PCRA petition did not, in and of itself, prevent him from bringing a subsequent PCRA petition. The Commonwealth does not appear to contend otherwise.

[6] The Commonwealth does not contend that petitioner failed to exhaust his claims in state court.

Supp. 635, 647 (M.D. Pa. 1994) ("When the petitioner fails to exhaust state remedies, the claims are never presented to the state court. When the petitioner procedurally defaults, the claims are presented to the state court in violation of state procedural rules, thereby precluding consideration of the merits of the claims."). It is to the latter question that I devote the remainder of my procedural analysis.

1. Introduction to the Independent and Adequate State Ground Doctrine

The Commonwealth's central contention is that this Court cannot hear the merits of Bronshtein's habeas petition because the claims contained therein were presented in state court in violation of a state procedural rule and therefore are procedurally defaulted.

The law of procedural default is an outgrowth of the independent and adequate state ground doctrine, which provides that federal courts may not exercise jurisdiction over state court decisions that are based purely on matters of state law. See, e.g., Fox Film Corp. v. Muller, 296 U.S. 207, 210, 56 S. Ct. 183 (1935). The Supreme Court has observed, "Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." Coleman v. Thompson, 501 U.S. 722, 7291, 111 S. Ct. 2546 (1991). Procedural default due to an adequate and independent state ground does not technically deprive a federal court of jurisdiction; rather, it counsels against federal court involvement out of concern for comity and federalism. See Lambrix v. Singletary, 520 U.S. 518, 523, 117 S. Ct. 1517 (1997).[7]

[7] As the Supreme Court observed in Coleman:

Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner

The independent and adequate state ground doctrine applies equally to state rulings on substantive and procedural matters. See Coleman, 501 U.S. at 730. Thus, the doctrine may prevent a federal court from considering the merits of claims made in a federal habeas petition when a state court has declined to hear the merits of those claims because petitioner failed to comply with a state procedural rule. See Wainwright v. Sykes, 433 U.S. 72, 82, 97 S. Ct. 2497 (1977).

The independent and adequate state ground doctrine does not require a federal court to rubber-stamp a state court's procedural dismissal. To the contrary, federal courts are called upon to carefully examine the state rule at issue, and only when a federal court concludes that the state rule is both "independent" and "adequate" must the court dismiss the petition. See Coleman, 501 U.S. at 730-32. The independence of a state rule is not an issue in this case, because there is no question that in denying Bronshtein's PCRA petition, the Supreme Court of Pennsylvania relied exclusively on state and not federal law.[8] Rather, it is the adequacy of the state rule that is crucial to the procedural outcome in this case.

The resolution of the adequacy question requires an investigation of the background and precedent of the relevant state rule or practice. The Supreme Court of the United States has observed that "only a 'firmly established and regularly followed state practice' may be

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> who has failed to meet the State''s procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance. ... The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.

Coleman, 501 U.S. at 732.

[8] The independence of the state ground turns on whether the state court's analysis involves solely state law or is dominated by or interwoven with federal law, and whether the state court clearly and expressly relied upon a state ground in making its decision. See Harris v. Reed, 489 U.S. 255, 266, 109 S. Ct. 1038 (1989).

interposed by a state to prevent subsequent review by this Court of a federal constitutional claim." Ford v. Georgia, 498 U.S. 411, 423-24, 111 S. Ct. 850 (1991) (quoting NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58, 78 S. Ct. 1163 (1958)).[9] A state rule is adequate only if it is "consistently and regularly applied," Johnson v. Mississippi, 486 U.S. 578, 587, 108 S. Ct. 1981 (1988), "strictly or regularly followed," id., and applied "evenhandedly to all similar claims," Hathorn v. Lovorn, 457 U.S. 255, 263, 102 S. Ct. 2421 (1982). This does not mean that a state's "willingness in a few cases to overlook the rule" renders the rule inadequate. See Banks v. Horn, 126 F.3d 206, 211 (3d. Cir. 1997). As long as a state has applied the rule in "the vast majority of cases," the rule will be deemed adequate. Dugger v. Adams, 489 U.S. 401, 410 n.6, 109 S. Ct. 1211 (1989); see Doctor v. Walters, 96 F.3d 675, 683 (3d Cir. 1996).

The Supreme Court observed in NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 78 S. Ct. 1163 (1958), that a procedural rule applied by a state supreme court to bar merits review was inadequate because the petitioner

> could not *fairly be deemed* to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart [federal] review . . . applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.

Id. at 457-58 (emphasis added). Thus, the adequacy analysis is an objective one, meaning that the focus of the inquiry is on the state of the law at the time, and not on the petitioner's actual,

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[9] The primary reason for the adequacy rule is notice. A state procedural rule must "provide[] the habeas petitioner with a fair opportunity to seek relief in state court." Harmon v. Ryan, 959 F.2d 1457, 1462 (9th Cir. 1992). Traditional notions of fairness demand consistent adherence to a procedural rule, lest a petitioner be deprived of notice that the procedural rule will apply to her. See Calderon v. United States Dist. Court, 96 F.3d 1126, 1129 (9th Cir. 1996)("[I]t is grossly unfair – and serves none of the purposes of respect for procedural rules – to forfeit an individual's constitutional claim because he failed to follow a rule that 'was not firmly established at the time in question.'").

subjective awareness or understanding of the procedural rule at issue.

A key question in the adequacy analysis relates to timing: To what point in time should a federal court look in determining whether a state practice or rule was firmly established and regularly and consistently followed? Is the relevant time today, when this Court considers the case? Or when the state supreme court considered the case and applied the rule? Or when the procedural default itself occurred? The Supreme Court of the United States has held that the state rule must be "'firmly established and regularly followed' by the time as of which it is to be applied." Ford, 498 U.S. at 424. The Court of Appeals for the Third Circuit has interpreted this to mean that the relevant moment for determining the adequacy of a state rule is "not ... when the [Pennsylvania court] relied on it, but rather ... the date of the waiver that allegedly occurred." Doctor, 96 F.3d at 684; see also Reynolds v. Ellingsworth, 843 F.2d 712, 725 (3d Cir. 1988) ("procedural default is determined by the 'waiver law in effect at the time of the asserted waiver.'").

2. The Adequacy Analysis

The proper inquiry, then, for a federal court considering the adequacy of a state rule or practice in the context of procedural default is to: (1) define the state rule or practice; (2) identify the moment that the procedural default occurred; and (3) review the decisions of the state courts prior to that moment to determine whether the rule was firmly established and regularly and consistently applied at that time.

a. What Is the Relevant Rule?

The relevant rule in the adequacy analysis is gleaned from the decision of the highest state court that dismissed the claims on procedural grounds. In the instant case, the Supreme Court of

Pennsylvania dismissed Bronshtein's second PCRA petition as untimely filed, holding that it was barred by 42 Pa. C.S. § 9545 (b) (1), which requires PCRA petitions to be filed within one year of final judgment. See Commonwealth v. Bronshtein, 561 Pa. 611, 615, 752 A.2d 868 (2000). The supreme court held that the one-year rule deprived courts of jurisdiction over late-filed petitions, see id. at 617, and was not subject to any exceptions beyond those set forth in the statute, see id. at 616. The relevant rule in this case, then, is the rule that § 9545 (b) (1) operates as an absolute, jurisdictional bar to hearing the merits of a late PCRA petition, and that no exceptions outside those in the statute may save a petition filed more than one year after the date judgment becomes final.

b. What Is the Relevant Time?

A federal court's investigation of the adequacy of a state rule is not an appellate review of a state court's procedural decision, and thus it is not this Court's place to determine whether the Supreme Court of Pennsylvania "erred" in dismissing Bronshtein's PCRA petition on procedural grounds. Indeed, this Court has no authority to conduct such a review. Rather, the question before me is one of federal law: Was the state rule sufficiently established, in the eyes of federal law, to put the petitioner on notice that he was about to do irreparable procedural damage to his case?

To answer this question, I must look to state law as it stood at the moment petitioner violated the procedural rule; that is, at the time Bronshtein's one-year window under § 9545 (b) (1) closed. The Supreme Court of Pennsylvania identified with precision the date the waiver occurred in this case:

> Here, Appellant's judgment became final on October 20, 1997, the date that the United States Supreme Court denied *certiorari*. Thus, Appellant was required to file his petition for post-conviction relief within

> one year of October 20, 1997, that is by October 20, 1998, in order for his PCRA petition to be timely filed. Instead, Appellant filed this, his second, petition for post-conviction relief on June 9, 1999, well beyond the one-year limit prescribed by § 9545 (b) (1).

Commonwealth v. Bronshtein, 561 Pa. 611, 615, 752 A.2d 868 (2000). The Supreme Court fixed the date of the waiver in this case as October 20, 1998, the date Bronshtein should have filed his second PCRA petition. Thus, my procedural analysis will focus on Pennslyvania law as it stood as of October 20, 1998.

c. Was the One-Year Time Limitation Clearly Established as of October 20, 1998?

An examination of the procedural bar in this case is a complex proposition. Not only must this Court review the history of the rule itself and its application, but I also must inquire into the exceptions applied by the Supreme Court of Pennsylvania to excuse past violations of procedural rules in capital cases.

The Pennsylvania Post-Conviction Relief Act came into being in 1988, replacing its predecessor, the Post-Conviction Hearing Act ("PCHA").[10] In 1995, the Pennsylvania legislature enacted amendments to the PCRA, which had the effect of further limiting post-conviction relief. The centerpiece of those amendments was a new time limitation on the filing of petitions contained in 42 Pa. C.S. § 9545 (b).[11] That section provides:

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[10] The PCRA significantly narrowed the avenues of relief open to convicted criminals, doing away with the PCHA's broad language and limiting relief only to "persons convicted of crimes they did not commit and serving illegal sentences." 42 Pa. C.S. § 9542.

[11] The Court of Appeals for the Third Circuit noted in Lambert v. Blackwell, 134 F.3d 506 (3d Cir. 1997) that before the 1995 amendments to the PCRA went into effect, "the Pennsylvania courts were lenient in allowing collateral review after long delays ... ." Id. at 524 (citing Commonwealth v. Johnson, 516 Pa. 407, 532 A.2d 796 (1987); Commonwealth v. McCabe, 359 Pa. Super. 566, 519 A.2d 497 (1986); Commonwealth v. Taylor, 348 Pa. Super. 256, 502 A.2d 195 (1985)). Thus, the time limits themselves in the 1995 amendments were a departure from a long-standing Pennsylvania practice of excusing tardiness in the filing of collateral appeals in criminal cases.

(b) Time for filing petition. –

(1) *Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date that judgment becomes final,* unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively. ...

42 Pa. C.S. § 9545 (emphasis added). The 1995 amendments to the PCRA became effective on January 16, 1996. The Supreme Court of Pennsylvania had no opportunity to consider the time limits set forth in § 9545 (b) until December 1998, months after the one-year time limit expired for Bronshtein on October 20, 1998.[12]

In dismissing Bronsthein's PCRA appeal, the Supreme Court of Pennsylvania held that the one-year time limit was an absolute, jurisdictional time bar, subject to no exceptions. Thus, the question in this case is whether the ground upon which the supreme court dismissed Bronshtein's PCRA petition – that § 9545 (b) (1) of the PCRA was an absolute, jurisdictional bar to petitions filed beyond one year and that no exceptions outside those set forth in § 9545 (b) (1) could overcome that bar – was clearly established and regularly followed as of October 20, 1998. This Court is not the first to address this question. In fact, a number of courts in this circuit have

[12] Looking to October 1998, the time of Bronshtein's violation of the one-year rule, all Bronshtein had to rely on was the language of the statute. I am doubtful that new, uninterpreted statutory language alone can create a "clearly established" state procedural rule.

addressed this question and found that the one-year rule of § 9545 (b) (1) was not clearly established until 1999, well after petitioner's default in October 1998.

Most persuasive is the decision of the district court in Banks v. Horn, 63 F. Supp. 2d 525 (M.D. Pa. 1999),[13] which addressed the very question now before this Court. The petitioner in that case had filed a second PCRA petition that was denied by the Supreme Court of Pennsylvania because the petition was filed outside the new one-year time limit for second and successive petitions contained in the amended version of the PCRA, 42 Pa. C.S. § 9545 (b) (1), and therefore could not be considered on the merits.[14] Presented with a federal habeas petition filed after that supreme court ruling, the district court in Banks examined the adequacy of the one-year filing rule. The district court first engaged in an interpretation of the statutory language of § 9545 (b) (1) and concluded that it is not clear from the language and structure of § 9545 that the one-year time limit is an absolute, jurisdictional bar subject to no equitable exceptions. See Banks, 63 F. Supp. 2d at 532. The court also noted that language one would expect in a jurisdictional time limit statute is nowhere present in subsection (b), which discusses the one-year time limit. See id. at 532. Thus, one could reasonably read the one-year time limit as a standard statute of limitations, not a jurisdictional bar.[15] See id. at 533 (citing Lambert v.

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[13] The petitioner's claims were denied on the merits in Banks v. Horn, 63 F. Supp. 2d 525 (1999), and the petitioner's appeal is now pending before the Court of Appeals for the Third Circuit.

[14] See Commonwealth v. Banks, 556 Pa. 1, 5, 726 A.2d 374 (1999).

[15] The reason this distinction is important is that jurisdictional limitations are not subject to any exceptions, whereas statutory limitation periods are subject to the equitable tolling doctrine, which has the effect of extending statutory time limitations under certain circumstances. See Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999) ("AEDPA's one-year filing requirement is a statute of limitations, not a jurisdictional rule, and thus a habeas petition should not be dismissed as untimely filed if the petitioner can establish an equitable basis for tolling the limitations period.") (citing Miller v. New Jersey State Dep't of Corr., 145 F.3d 616 (3d Cir. 1998)). Thus, if a petitioner were to reasonably interpret the one-year filing deadline in § 9545 (b) (1) as a statute of limitations, and not a jurisdictional bar, such a petitioner would reasonably conclude that a late-filed petition could be excused by the

Blackwell, 134 F.3d 506, 523-24 (3d Cir. 1997)).

The district court in Banks also observed that the meaning of the new one-year filing deadline remained uncertain even after the Supreme Court of Pennsylvania interpreted § 9545 (b) (1) for the first time in December 1998. In Commonwealth v. Peterkin, 554 Pa. 547, 722 A.2d 638 (1998), the petitioner had filed a second PCRA petition years after his first petition had been resolved, and the PCRA court had dismissed the second petition as premature because of ongoing federal habeas litigation. On appeal to the Supreme Court, the Commonwealth contended that the new time limit contained in § 9545 (b) operated to deny the PCRA court jurisdiction over the matter. The Supreme Court examined the text of § 9545 (b) and concluded that the petition had been filed outside the one-year time limit, fell within none of the statutory exceptions, and therefore could not be heard. See id. at 555. The Peterkin decision, however, contained no discussion of the jurisdictional, absolute nature of the one-year rule in § 9545 (b) (1), and thus, the district court in Banks concluded, Peterkin was "not sufficiently clear to establish the jurisdictional nature of the one-year limitation rule ... ." Banks, 63 F. Supp. 2d at 533 n.6.[16]

It was not until the Supreme Court of Pennsylvania's 1999 decision in Commonwealth v. Banks, 556 Pa. 1, 726 A.2d 274 (1999), the district court in Banks concluded, that there was a clearly established rule in Pennsylvania that nothing – not even the Pennslyvania's long-standing

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discovery rule or some other equitable tolling doctrine. Under such circumstances, the petitioner would not be on notice that there were no exceptions to the one-year deadline of § 9545 (b) (1).

[16] Accordingly, as of December 1998, when Peterkin was handed down, it was not clearly established that a late-filed petition would not be considered on the merits by the Supreme Court. Regardless, Peterkin was decided months after Bronshtein's October 1998 default and therefore could not have put Bronshtein on notice that the Court would have no jurisdiction over his late PCRA petition.

"relaxed waiver" practice of excusing procedural missteps in capital cases[17] – would save a late-filed PRCA petition from dismissal. See Banks, 63 F. Supp. 2d at 534. The district court

[17] The "relaxed waiver" doctrine is the term given to the Supreme Court of Pennslyvania's long-standing, well-established practice of relaxing its enforcement of state procedural rules in death penalty cases. This practice was explicitly applied in numerous capital cases on both direct appeal and in PCRA proceedings, to reach the merits of petitions despite violations of variety of statutory and judicial procedural rules. See, e.g., Commonwealth v. Beasley, 544 Pa. 554, 563, 678 A.2d 773 (Despite the failure of the petitioner to comply with the applicable PCRA procedural rules, and despite the fact that the petition could have and should have been dismissed without a hearing on the merits, the court held, "since this is a capital case, this court will address appellant's claims."), cert. denied, 520 S. Ct. 1121, 112 S. Ct. 1257 (1996); Commonwealth v. DeHart, 539 Pa. 5, 25, 650 A.2d 38 (1994) ("Appellant concedes that this issue is technically waived because it was not previously raised below, we will nonetheless address it because we have not been strict in applying our waiver rules in death penalty cases."); Commonwealth v. Zettlemoyer, 500 Pa. 16, 50 n.19, 454 A.2d 937 (1982), cert. denied, 461 U.S. 970, 103 S. Ct. 2444 (1983) ("The primary reason for this limited relaxation of waiver rules is that, due to the final and irrevocable nature of the death penalty, the appellant will have no opportunity for post-conviction relief wherein he could raise, say, an assertion of ineffectiveness of counsel for failure to preserve an issue or some other reason that might qualify as an extraordinary circumstance for failure to raise an issue. Accordingly, significant issues perceived *sua sponte* by this Court, or raised by the parties will be addressed and, if possible from the record, resolved."); Commonwealth v. McKenna, 476 Pa. 428, 441, 383 A.2d 174 (1978) ("The waiver rule cannot be exalted to a position so lofty as to require this Court to blind itself to the real issue – the propriety of allowing the state to conduct an illegal execution of a citizen.").

The Supreme Court of Pennsylvania did not begin to change its approach to waiver in capital cases until November 1998, a month after Bronshtein's "waiver." In Commonwealth v. Albrecht, 554 Pa. 31, 720 A.2d 693 (1998), the court observed, "While it has been our 'practice' to decline to apply ordinary waiver principles in capital cases, we will no longer do so in PCRA appeals." Subsequent mentions of Albrecht by the Supreme Court of Pennsylvania made it clear that Albrecht marked a sea-change in the court's approach to waiver in death penalty cases. See, e.g., Commonwealth v. Pirela, 556 Pa. 32, 41 n.5, 726 A.2d 1026 (1999) ("Although we have declined to apply ordinary waiver principles to capital cases in the past, we *recently held that this practice will be discontinued*.") (emphasis added), cert. denied, 528 U.S. 1082, 120 S. Ct. 804 (2000).

The rule of Albrecht was applied directly to the one-year deadline in § 9545 (b) (1) in Commonwealth v. Banks, 556 Pa. 1, 726 A.2d 374 (1999). The Banks decision relied on Albrecht in concluding that

> the issue here is one of jurisdiction and not waiver. The Legislature has spoken on the requisites of receiving relief under the PCRA and has established a scheme in whch PCRA petitions are to be accorded finality. The gravity of the sentence imposed upon a defendant does not give us liberty to ignore those clear mandates.

Id. at 6; see also Commonwealth v. Fahy, 558 Pa. 313, 325, 737 A.2d 214 (1999).

While it now appears to be clearly established that a late-filed PCRA petition will no longer be considered under the relaxed waiver rule, back in October 1998, relaxed waiver remained viable in PCRA cases. Because it is clear that the relaxed waiver doctrine did not fall out of favor in the PCRA context until after the waiver in the instant case occurred, Bronshtein's second PCRA petition was not dismissed on the basis of an adequate state ground. Thus, Pennsylvania's relaxed waiver rule offers further support for my conclusion that it was not clearly established at the time of Bronshtein's waiver that a late-filed PCRA petition in a capital case would not be considered on the merits.

observed:

> [W]e do not think that, prior to the holding of the Supreme Court in [Commonwealth v. Banks, 556 Pa. 1, 726 A.2d 274 (1999)] Banks can be said to have had notice that § 9545 (b) would be considered jurisdictional. Only at the time of that ruling can it be said with certainty that Banks would be absolutely barred from presenting unexhausted claims to the state courts on the basis of jurisdiction which, from respondent's point of view, also would mean that Banks had forfeited, without notice, his exhausted claims. We conclude that this would not be an adequate state ground ... .

Id.[18] The district court also concluded that because of Pennsylvania's "relaxed waiver" practice in capital cases, the time limit set forth in § 9545 (b) (1) was not adequate for the purposes of procedural default. The district court then proceeded to consider the merits of the habeas petition. See id.

The district court's 1999 decision in Banks is directly on point. The persuasive reasoning of that decision demonstrates that it was neither clearly established nor regularly followed at the time of Bronshtein's waiver in October 1998, that a late-filed PCRA petition in a capital case would be dismissed as untimely. Three other judges in this district have concluded that it was not clearly established that § 9545 (b) (1) bars all untimely petitions in capital cases until at least December 1998, well after Bronshtein's October 1998 default. See Pace v. Vaughn, No. 99-6568, 2001 U.S. Dist. LEXIS 7657, at *6-7 (E.D. Pa. June 7, 2001) (concluding that jurisdictional nature of § 9545 (b) was not clear until 1999); Fidtler v. Gillis, No. 98-6507, 1999 U.S. Dist.

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[18] In Commonwealth v. Banks, 556 Pa. 1, 726 A.2d 374 (1999), the Supreme Court of Pennsylvania considered a procedural scenario similar to that in Peterkin; a second PCRA petition filed years after final judgment but within a year after the effective date of the 1995 amendments to the PCRA. The court concluded, "Appellant's petition does not fall within any exception to the one-year requirement and the common pleas court lacked jurisdiction to entertain Appellant's claims." Id. at 5-6. Since Banks, the Supreme Court has consistently treated the time limits in the PCRA as jurisdictional. See Commonwealth v. Lark, 560 Pa. 487, 495, 746 A.2d 585, 589-90 (2000) (referring to the "PCRA's jurisdictional time bar"); Commonwealth v. Murray, 562 Pa. 1, 5, 753 A.2d 201 (2000) ("In addition, given the fact that the PCRA's timeliness requirements are mandatory and jurisdictional in nature, no court may properly disregard or alter them in order to reach the merits of the claims raised in a PCRA petition that is filed in an untimely manner."); Commonwealth v. Fahy, 558 Pa. 313, 325, 737 A.2d 214 (1999) ("Based upon the dictates of the PCRA it is clear that Appellant has failed to satisfy the PCRA's time requirements; thus we have no jurisdiction to entertain the petition.").

LEXIS 12141, at *9 (E.D. Pa. Aug. 6, 1999) (not clear that one-year rule would bar merits review until December 1998); Holman v. Gillis, 58 F. Supp. 2d 587, 594 (E.D. Pa. 1999) (one-year rule was not clearly established until at least December 1998); see also Peterson v. Brennan, No. 97-3477, 1998 U.S. Dist. LEXIS 12327, at *19 (E.D. Pa. Aug. 11, 1998) ("The possibility exists, therefore, that ... the statute of limitations bar will be waived by Pennsylvania courts in some cases. There is thus a lack of certainty with respect to state application of this procedural bar."); Hammock v. Vaughn, No. 96-3463, 1998 U.S. Dist. LEXIS 4562, at *6-7 (E.D. Pa. April 7, 1998) (same); Lambert v. Blackwell, 134 F.3d 506, 524 (3d Cir. 1997) ("We note that to date, no Pennsylvania court has been asked to decide under what circumstances it would excuse an untimely PCRA petition under the new statute of limitations provision.").

I find the district court's decision in Banks, as well as the decisions in Pace, Fidtler, and Holman, to be persuasive, and concur with their conclusions that the rule that the one-year limitation in § 9545 (b) (1) was not subject to equitable tolling or relaxed waiver was neither clearly established nor regularly followed at the time of Bronshtein's waiver.

The Court of Appeals for the Third Circuit recently removed all doubt as to whether the law concerning the one-year limitation in § 9545 (b) was clearly established at the time of Bronshtein's procedural default. In Fahy v. Horn, 240 F.3d 239 (3d Cir. 2001), the court of appeals observed:

> [A]t the time Fahy filed his fourth PCRA petition, Pennsylvania law was unclear on the operation of the new PCRA time limit. The Pennsylvania courts could have accepted Fahy's petition as timely because of its role within the capital case, see Banks v. Horn, 126 F.3d 206 (3d Cir. 1997), or could have found the government interference exception applicable. See Commonwealth v. Lark, 560 Pa. 487, 746 A.2d 585 (2000). The law at the time of Fahy's petition was inhibitively opaque. Fahy filed his fourth PCRA petition in November 1997, months before the Supreme Court announced that it would no longer observe the relaxed waiver rule in Commonwealth v. Albrecht, 554 Pa. 31, 720 A.3d 693 (1998). Further, the Pennsylvania Supreme Court did not clarify that the state PCRA statute was jurisdictional and not waivable until 1999 in Commonwewalth v. Banks, 556 Pa. 1, 726 A.2d 374 (1999). In Banks, 126 F.3d at 214, we

> rejected the Commonwealth's claim that a PCRA petition would be time barred and required Banks to return to state court because we could not confidently determine that the state court would not apply the relaxed waiver rule it had applied in previous capital cases. If we could not predict how the Pennsylvania court would rule on this matter, then surely we should not demand such foresight from the petitioner.

Id. at 245. Fahy, then, confirms the holding of the district court in Banks that it was not until after the Pennsylvania Supreme Court decisions of Albrecht in 1998 and Banks in 1999 by the Supreme Court of Pennsylvania that Pennsylvania's strict, exceptionless adherence to the one-year limitation period in § 9545 (b) (1) was clearly established. This Court is bound by the analysis set forth in Fahy, and therefore, I have no choice but to conclude that it was not clearly established at the time of Bronshtein's waiver in October 1998 that the Supreme Court would refuse to hear a late-filed PCRA petition.

In light of the statutory language of § 9545 (b) (1), the Supreme Court of Pennsylvania cases interpreting that language as a jurisdictional bar, the supreme court's past practice of relaxing waiver in death penalty cases and its recent break with that practice, and persuasive and binding federal precedent, I conclude that the rule upon which the Supreme Court of Pennsylvania based its dismissal of Bronshtein's second PCRA petition was not adequate. Because the rule was not adequate, I conclude that there was no procedural default sufficient to prevent this Court from considering the merits of the claims in Bronshtein's federal habeas petition.[19] I therefore proceed to a consideration of the merits of his claims.

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[19] Another possible state procedural bar is that petitioner failed to object to a number of the claimed errors during his trial and sentencing and thereby waived those issues. See Pa. R. App. P. 302. The Supreme Court of Pennslyvania did not rely on this ground in concluding that petitioner's claims were procedurally barred, and therefore it is not necessary to address it here. The Commonwealth does not raise this procedural issue, likely because it is a non-starter. Nonetheless, I believe the issue warrants a brief analysis.

As discussed above, supra at 18, n.21, until November 1998, the Supreme Court of Pennsylvania applied the "relaxed waiver" doctrine to capital cases, considering the merits of issues on direct appeals and PCRA appeals despite the fact that they were presented in violation of procedural rules. Rule 302 of the Pennsylvania Rules of

Merits Analysis

The threshold question on the merits of Bronshtein's claims is what standard of review governs his petition. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which went into effect on April 24, 1996, amended the standards for reviewing state court judgments in federal habeas petitions filed under 28 U.S.C. 2254, by elevating the level of deference applied to state court determinations. Petitioner argues that because no Pennsylvania court has considered the merits of his claims, the AEDPA's highly deferential standard does not

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Appellate Procedure provides that a failure to object at trial constitutes waiver of an issue for the purposes of appeal. Nevertheless, up until November 1998, the Supreme Court of Pennsylvania regularly excused violations of Rule 302 in capital cases on both direct and PCRA appeals. See, e.g., Commonwealth v. DeHart, 539 Pa. 5, 650 A.2d 38 (1994) (considering merits of issue on PCRA appeal despite failure to object at trial); Commonwealth v. Harris, 550 Pa. 92, 101 n.5, 102 n.7, 103 n.9, 703 A.2d 441 (1997) (same on direct appeal), cert. denied, 525 U.S. 1015, 119 S. Ct. 538 (1998). Thus, under the regime in place at the time of Bronshtein's default, the Supreme Court of Pennsylvania would likely have considered the merits of the issues raised in his PCRA petition despite his failure to object to the issues during his trial.

The Supreme Court announced in November 1998 that it was departing from its relaxed waiver practice in PCRA cases, and would no longer consider procedurally defaulted issues raised in PCRA appeals. See Commonwealth v. Albrecht, 554 Pa. 31, 720 A.2d 693 (1998). But any possible waiver of claims by Bronshtein due to his failure to object at trial took place long before the Supreme Court changed its tune on relaxed waiver in 1998. Therefore, there is no question that the rule announced in Albrecht was not clearly established at the time of Bronshtein's alleged default, and therefore the Albrecht rule is not adequate to bar federal habeas review of these issues. I conclude that even if this were raised, it would not bar this Court's review of the Bronshtein's habeas claims.

I do not believe that petitioner's failure to object at trial raises an exhaustion issue, but even if it did, that would not prevent review by this Court. This is because the mandatory review of death penalty cases required by Pennsylvania statutory law demands that the supreme court review the entire record of the case to determine whether"the sentence of death was the product of passion, prejudice or any other arbitrary factor." 42 Pa. C.S. § 9711 (h) (3) (ii). Likewise, the supreme court has held that in death penalty cases, the court must review "the sufficiency of the evidence to sustain a conviction of murder of the first degree." Commonwealth v. Ockenhouse, 562 Pa. 481, 489-90, 756 A.2d 1130, cert. denied, U.S. , 121 S. Ct. 1381 (2000) (citation omitted). Thus, the Supreme Court of Pennsylvania is required by statute and precedent to conduct a thorough review of the conviction and sentence in capital cases to determine whether there were any fundamental errors. Even when a petitioner fails to raise a particular constitutional issue, the mandatory review of capital convictions and sentencings required in Pennsylvania is sufficient to exhaust fundamental constitutional claims of the kind raised here by Bronshtein. See Beam v. Paskett, 3 F.3d 1301 (9th Cir. 1993) (concluding that an Idaho statute worded identically to Pennslyvania's required a review of death penalty cases that exhausted petitioner's constitutional claims, even though he failed to raise them in post-trial motions and thus procedurally defaulted on them), cert. denied, 511 U.S. 1060, 114 S. Ct. 1631 (1994).

apply.

Petitioner's argument has its genesis in 28 U.S.C. § 2254 (d), which, as amended by the AEDPA, provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the 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). Facially, § 2254 applies only to claims that were "adjudicated on the merits in State court proceedings." There is some controversy among the circuits as to precisely what the "adjudicated on the merits" clause means; some courts contend that it means that under § 2254 (d) "even the most summary orders disposing of federal claims without comment are adjudications on the merits," Washington v. Schriver, No. 00-2195, 2001 U.S. App. LEXIS 13480, at *20 (2d Cir. Jan. 15, 2001) (citations omitted), while other courts have held that § 2254 (d) cannot apply unless the state court expressly explains the merits of a claim of a federal constitutional violation, id. at 21-22.

The Court of Appeals for the Third Circuit has come down on the latter side of this debate. In Hameen v. Delaware, 212 F.3d 226, 248 (3d Cir. 2000), cert. denied, U.S. , 121 S. Ct. 1365 (2001), the court of appeals carefully reviewed the state supreme court decision to determine whether that court had addressed the merits of a particular claim. The court of appeals concluded that because the Delaware Supreme Court

> did not pass on Ferguson's Eighth Amendment constitutional duplicative aggravating circumstances argument, even though it had the opportunity to do so ... we cannot say that the Delaware Supreme Court took into account controlling Supreme Court decisions. This point is critical because under the AEDPA the

> limitation on granting of an application for a writ of habeas corpus is only "with respect to any claim that was adjudicated on the merits in State court proceedings." Hence, we exercise pre-AEDPA independent judgment on the duplicative aggravating circumstances claim.

Id. at 248. Thus, under binding Third Circuit precedent set forth in Hameen, the AEDPA standard of review established by § 2254 (d) does not apply unless it is clear from the face of the state court decision that the merits of the petitioner's constitutional claims were examined in light of federal law as established by the Supreme Court of the United States.

Bronshtein's case provides the quintessential circumstance of a state court's failure to adjudicate claims on the merits. The Supreme Court of Pennsylvania expressly refused to adjudicate the merits of any of the constitutional claims set forth in Bronshtein's PCRA petition because it was filed outside the one-year time limit set forth by 42 Pa. C.S. § 9545 (b). Thus, Bronshtein's claims were not "adjudicated on the merits in State court proceedings," a prerequisite to the application of the highly deferential standard of review contained in § 2254 (d) as amended by the AEDPA. Accordingly, I conclude that the AEDPA does not apply to Bronshtein's petition, and that his petition is governed by pre-AEDPA standards.

Prior to the AEDPA, a state court's resolutions of constitutional issues were accorded little deference, and pure questions of law and mixed questions of law and fact were reviewed *de novo*. See Williams v. Taylor, 529 U.S. 362, 400, 120 S. Ct. 1495 (opinion of O'Connor, J.) (citing Miller v. Fenton, 474 U.S. 104, 112, 106 S. Ct. 445 (1985)). Under the pre-AEDPA standard, the state court's factual findings are presumed to be correct unless, *inter alia*, the state court's findings are not "fairly supported by the record." Pemberthy v. Beyer, 19 F.3d 857, 864 (3d Cir. 1994) (quoting 28 U.S.C. § 2254(d)(8) (1994)).

With this standard in mind, I turn to the merits of petitioner's claims.

1. Jury Instruction on Co-Conspirator Liability

In Pennsylvania, a person may not be found guilty of first degree murder unless it is established beyond a reasonable doubt that she had specific intent. See 18 Pa. C.S. § 2502 (a). This holds true for accomplices and co-conspirators. See Commonwealth v. Huffman, 536 Pa. 196, 199, 638 A.2d 961 (1994); Commonwealth v. Bachert, 499 Pa. 398, 406, 453 A.2d 931 (1982), cert. denied, 460 U.S. 1043, 103 S. Ct. 1440 (1983). While a defendant may be guilty of first-degree murder in Pennsylvania absent proof that she actually "pulled the trigger," she cannot be found guilty of first-degree murder unless it is proved beyond a reasonable doubt that she intended that the killing to occur. See Smith v. Horn, 120 F.3d 400, 410 (3d Cir. 1997).

It is axiomatic, then, that when jury instructions have the effect of relieving the Commonwealth of the burden of proving beyond a reasonable doubt that a defendant had specific intent, those instructions are erroneous under Pennsylvania law. See Commonwealth v. Wayne, 553 Pa. 614, 632, 720 A.2d 456 (1998) ("To allow a conviction for first degree murder to stand without proof beyond a reasonable doubt establishing that the accused actually harbored the specific intent to kill, would be unconscionable."). Moreover, the Due Process Clause of the Fourteenth Amendment is implicated when instructions given to the jury condemn petitioner absent proof beyond a reasonable doubt of an essential element of a crime. See In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

Bronshtein challenges the following language in the jury instruction on co-conspirator liability, which applied to all the crimes of which he was accused, including first degree murder:

> [A] defendant may by reason of being a member of a conspiracy become liable for a crime he did not personally commit. He may be found guilty under this conspiracy theory in some situations where he could not be convicted under an accomplice theory. I'm going to tell you what accomplice means a little bit later.
>
> You may find the defendant [guilty] of either the crime of murder, robbery, or theft as a conspirator if you're satisfied beyond a reasonable doubt: First, that the defendant agreed with this John Doe or Mr. X that the defendant would aid John Doe or Mr. X in committing either the crime of murder, robbery and /or theft; second that the defendant so agreed with the intent of promoting or facilitating the commission of the crime; third, that while the agreement remained in effect the crime of murder, robbery, and/or theft was committed by John Doe or Mr. X and, fourth, that the crime of murder, robbery and/or theft, while it may differ from the agreed crime, was committed by John Doe or Mr. X in furtherance of his and the defendant's common scheme.
>
> What am I saying to you? If those four elements have been established, then, if you find the defendant is guilty of the conspiracy, he is also guilty of anything that John Doe or Mr. X did in furtherance of it. That's what I'm saying.

(Trial Transcript, April 20, 1994, at 215-16.) The following day, the trial court instructed the jury that it could find Bronshtein guilty of first degree murder if he "was a co-conspirator of one who had the specific intent to kill." (Trial Transcript, April 21, 1994, at 6.)

The effect of these co-conspirator liability instructions, Bronshtein argues, was to permit the jury to find him guilty of first degree murder absent proof that he had the requisite specific intent to kill. The Commonwealth counters that the trial judge instructed the jury at length on specific intent as a required element of first degree murder, and thus did not relax its burden of proving specific intent.[20]

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[20] Prior to the co-conspirator liability instructions, the trial court gave the following general instruction regarding first degree murder.

> What is first-degree murder. Well, first-degree murder is a murder in which the killer has the specific intention to kill. You may find the defendant guilty of first-degree murder if you are satisfied that the following three elements have been proven beyond a reasonable doubt – remember, every element of every crime must be proven beyond a reasonable doubt, each one – first, Alexander Gutman is dead – I suggest to you that issue is not in dispute; second, that the defendant killed him – that certainly is in dispute; and three, that the defendant did so with the specific intent to kill and with malice. All right. Specific intent to kill is part of first-degree murder. Malice is part of all murder. Those three elements – Alexander Gutman is dead; two, the defendant killed him; and three, that the defendant did so with the specific intent to kill and with malice – that's first degree murder.

It is clear from the bare language of the jury instructions given at Bronshtein's trial that the trial court impermissibly relieved the Commonwealth of the burden of proving beyond a reasonable doubt a key element of first degree murder: specific intent. The problem lies in the trial court's discussion of co-conspirator liability. In that instruction, the trial court first instructed the jury that Bronshtein could be guilty of "murder, robbery, or theft" if it found that he had agreed with another to commit "murder, robbery, and/or theft." This language lumped the specific intent crime of first degree murder together with the two general intent crimes of robbery and theft, and suggested that a finding that Bronshtein merely agreed to commit either robbery or theft would be enough to find him guilty of first degree murder. The use by the Court of the conjunctive and imprecise language "and/or" further muddied the waters, creating the real

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> A person has the specific intent to kill if he has a fully formed intent to kill and is conscious of his own intention. As my earlier definition of malice indicates, a killing by a person who has the specific intent to kill is a killing with malice. I don't want to misstate the evidence – and if I'm wrong on this or you construe the arguments differently, your own recollection will control. I don't think the issue of whoever it was that killed Mr. Gutman did so without a specific intent to kill. I think everybody has conceded that whoever did it had the intent. That's not where the issue really is, I don't believe; but if you think it's part of the case, that's an element, you have to do it.
>
> Stated differently, a killing is with specific intent to kill if it is willful, deliberate and premeditated. The specific intent to kill, including premeditation, needed for first-degree murder does not require planning or previous thought for any particular length of time. It can occur quickly. All that is necessary is that there be time enough so that the defendant can and does fully form an intent to kill and is conscious of the intention.
>
> In deciding whether the defendant had the specific intent to kill, you should consider all of the evidence regarding his words and conduct and the attending circumstances that may show his state of mind. If you believe that the defendant intentionally used a deadly weapon on a vital part of the victim's body, you may regard that as [an] item of circumstantial evidence from which you may, if you choose, infer that the defendant had the specific intent to kill.
>
> So that's first-degree. Someone is dead. The defendant killed him. The defendant did so with the specific intent to kill and with malice.

(Trial transcript, April 20, 1994, at 191-202.)

potential for the jury to incorporate the intent to commit one crime into its consideration of guilt for another crime. Because first degree murder requires a finding of specific intent, the mix-and-match approach to intent described by the co-conspirator liability instruction given at Bronshtein's trial was clearly erroneous.

The trial court then instructed the jury that in order to find co-conspirator liability, it must find beyond a reasonable doubt that Bronshtein had "the intent of promoting or facilitating the commission of the crime." This instruction begs the question: Which crime? Drawing on the list that immediately preceded this language, the jury could choose from among "murder, robbery, and/or theft," and thus find Bronshtein guilty of murder even if the evidence proved only that he intended to commit robbery or theft. Thus, the failure of the trial court to define with precision the criminal intent required to find Bronshtein guilty under a co-conspirator liability theory removed the element of specific intent from the jury's consideration and rendered the jury instructions erroneous under Pennsylvania law.

Another problematic aspect of the co-conspirator liability charge was the trial court's instruction that "if you find the defendant is guilty of conspiracy, he is also guilty of anything that Mr. X did in furtherance of it." This language reinforces the confusing array of possibilities created by the prior language by permitting the jury to find Bronshtein guilty of first degree murder regardless of his intent. The language on its face suggests that as long as Bronshtein was part of any kind of conspiracy – including a conspiracy to commit merely robbery or theft – he could also be found guilty of any crime committed by his co-conspirator, including first degree murder.

The errors in co-conspirator liability instructions were only exacerbated by the trial

court's instruction the following day that the jury could find Bronshtein guilty of first-degree murder if he "was a co-conspirator of one who had the specific intent to kill." (Trial Transcript, April 21, 1994, at 6.) This made explicit what was implicit in the previous day's instructions; under this instruction, Bronshtein could be found guilty of first degree murder even if the Commonwealth had not proved that he possessed a specific intent to kill.

The general instructions as to first degree murder, which preceded the co-conspirator instructions, do not cure the problem created by the co-conspirator liability instructions. The general first degree murder instructions contain a detailed discussion of specific intent, however, the specific intent discussion was contradicted, or at least confused, by the co-conspirator liability charge. A reasonable jury could have understood the co-conspirator language to be an alternate means to establish first degree murder, *sans* a finding of specific intent to kill.

The trial court easily could have avoided such confusion by making it clear in its discussion of co-conspirator liability that Bronshtein could only be liable for first degree murder as a co-conspirator if it was proved beyond a reasonable doubt that he had the requisite specific intent to kill. Such language was included in the accomplice liability instruction,[21] but the co-conspirator liability instruction strangely and erroneously contained no such clarifying language; to the contrary, it bound together the jury's consideration of the three crimes with which petitioner was charged in a manner that allowed the question of Bronshtein's specific intent to kill to become virtually irrelevant to the jury's deliberations.

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[21] The accomplice liability instruction included the following: "Remember when we talked about first-degree murder? That's the one that requires specific intent to kill? Yes, it is possible to convict the defendant as an accomplice to that even if he's not the one who killed Mr. Gutman, but you'd have to find that he shared that specific intent to kill Alexander Gutman before you can find him guilty as an accomplice ... ." (Trial Transcript, April 20, 1994, at 219.)

The above textual analysis of the jury instructions is confirmed by both state and federal precedent. The Supreme Court of Pennsylvania has repeatedly affirmed the proposition that in first degree murder cases, accomplice and co-conspirator liability charges must be carefully crafted to avoid relieving the Commonwealth of the burden of establishing specific intent. In Commonwealth v. Huffman, 536 Pa. 196, 638 A.2d 961 (1994), the Supreme Court was confronted with jury instructions in a case involving charges similar to those in the instant case: burglary, robbery, and first degree murder. The jury in Huffman was given instructions on the subject of accomplice and co-conspirator liability that read, in pertinent part, "you must find that the Defendant's act or the act of an accomplice or co-conspirator is the legal cause of death of [the victim], and thereafter you must determine if the killing was intentional." Id. at 198-99. The supreme court held that this instruction

> allowed the jury to reach a first-degree murder verdict with no finding of the requisite mental state of 'specific intent to kill' ... Under the contested instruction, the jury needed only to find that appellant had conspired to commit or assisted in a burglary with the actual murderer in order to find him guilty. Permitting such a faulty verdict to stand would be to tolerate a miscarriage of justice.

Id. at 198-99, 201. The supreme court found the error was not harmless, set aside the conviction, and remanded for a new trial. See id. at 202.

Bronsthein's instructions evoke the very concerns raised by the Supreme Court of Pennsylvania in Huffman. This case, too, involves a charge of first degree murder, co-conspirator and accomplice liability theories, and other lesser crimes not requiring specific intent. As in Huffman, the Bronshtein court's instruction on co-conspirator liability conflated the first degree murder charge with the lesser charges and allowed the jury to convict petitioner of first degree murder absent proof that he had a murderous intent. The language of the instant case – "if you find the defendant is guilty of conspiracy, he is also guilty of anything that Mr. X did in

furtherance of it" – echoes the instructions in Huffman – "you must find that the Defendant caused the death of another person, or that an accomplice or co-conspirator caused the death of another person." Both instructions permitted the jury to use the intent of a co-conspirator to convict the defendant of first degree murder. Thus, the co-conspirator instruction in the instant case poses the very problem that rendered the instructions a "miscarriage of justice" in Huffman.

Relying on Huffman in a more recent first degree murder case, the Supreme Court of Pennsylvania found another set of co-conspirator instructions erroneous. The instructions in Commonwealth v. Wayne, 553 Pa. 614, 629, 720 A.2d 456 (1998), read, "The co-conspirator is responsible for the mental state from the person who actually pulled the trigger." On appeal, the supreme court observed,

> To be guilty of first degree murder, each co-conspirator must individually be found to possess the mental state necessary to establish first degree murder – the specific intent to kill. ... To allow a conviction for first degree murder to stand without proof beyond a reasonable doubt establishing that the accused actually harbored the specific intent to kill, would be unconscionable. Accordingly, we agree with appellant that the charge as given here was erroneous.

Id. at 632. However, the court concluded that because first degree murder was the only crime at issue in the case, the "conspiracy had only one object, the deliberate decision to take a life," id. at 634, and thus, despite the unclear co-conspirator liability instruction, there was no possibility that the jury had found anything but an intent to kill on the part of the defendant. Therefore, the supreme court concluded, the Commonwealth was not relieved of its burden of proving specific intent on the part of the defendant.

The Wayne instruction – "The co-conspirator is responsible for the mental state from the person who actually pulled the trigger" – is strikingly similar in effect to the trial court's instruction at Bronsthein's trial that the jury could find him guilty of first-degree murder if he

"was a co-conspirator of one who had the specific intent to kill." (Trial Transcript, April 21, 1994, at 6.) The instructions given at Bronshtein's trial were stained by the same error identified in Wayne; the possibility that a jury could convict the defendant on the first degree murder charge based solely on the intent of his co-conspirator, and absent a finding that he intended a killing to take place. And because the alleged conspiracy in Bronshtein's case involved charges other than first degree murder, the factual matrix that rendered the error harmless in Wayne was absent in Bronshtein's case; Bronshtein could have been convicted of murder on a co-conspirator liability theory even if he only intended to commit robbery or theft. Thus, Wayne conclusively demonstrates that the instructions given to the jury in Bronshtein's case were deeply flawed.

The flaw here is not merely a mistake of state law; the error in the jury instructions here implicates petitioner's federal constitutional rights. In Smith v. Horn, 120 F.3d 400 (3d Cir. 1997), the petitioner objected to the trial court's instructions as to accomplice and co-conspirator liability, claiming that the instructions relieved the Commonwealth of the burden of proving beyond a reasonable doubt one of the elements of first-degree murder under Pennsylvania law. The instructions on co-conspiratorial liability in Smith read:

> You should ... determine ... whether there was the requisite intent to enter into this conspiracy to commit the robbery and killing which the Commonwealth contends flowed therefrom or whether there was the requisite intent to enter in and be the accomplice with the other in bringing this about. That is to say, did Clifford Smith agree, although not necessarily by words, but by conduct and circumstances to bring about this robbery which, in turn, led to the ultimate shooting, so the Commonwealth contends, and the killing of Richard Sharp? If so, then the major basis of conspiratorial liability exists as to him.

Id. at 406. The court of appeals found this instruction problematic, observing,

> The [trial] court did not clarify to which crime this 'conspiratorial liability' applies; the charge was given in the context of the general conspiracy instruction. Thus, it is likely that the jury understood this charge as instructing that Smith could be found guilt of conspiracy to commit first-degree murder if he intended to commit the robbery even if he did not intend that the killing be committed.

Id. at 413. Combined with vague instructions on accomplice liability and specific intent, the co-

conspirator liability language rendered the instructions erroneous.

The co-conspirator liability instruction given in Bronshtein's case presents the same shortcomings identified by the court of appeals in Smith; it allowed the defendant to be convicted without proof of his specific intent that a killing would result. Like Smith, this case involved charges of robbery and first degree murder, and a co-conspirator liability instruction that failed to require the jury to find specific intent to kill on the part of the defendant. The instruction in Smith lumped the intent to commit robbery and murder together just as instruction in Bronshtein's case, thus allowing the jury to convict the petitioner of first degree murder even though the evidence showed only an intent to commit robbery. Both instructions effectively nullified an essential element of the crime of first degree murder. Accordingly, under Smith, the co-conspirator liability instruction in Bronshtein's case constituted not only a violation of state law, but a violation of a federal constitutional right.

While the Commonwealth argued in Smith that the Court of Appeals for the Third Circuit was bound by the determination of the Supreme Court of Pennsylvania that the jury instructions were not in error, the court of appeals disagreed, observing that "where an allegedly faulty jury charge implicates a habeas petitioner's federal constitutional rights, as we conclude in the next section this charge did, we have an independent duty to ascertain how a reasonable jury would have interpreted the instructions at issue." Smith, 120 F. 3d at 413. While a state may define the elements of a crime as it sees fit, the court of appeals noted, once it has done so, the Due Process Clause of the Fourteenth Amendment requires proof beyond a reasonable doubt of every element of the crime. See id. at 414-15 (citing In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970)); see also Rock v. Zimmerman, 959 F.2d 1237, 1246 (3d Cir.), cert. denied, 503 U.S. 1222, 112 S.

Ct. 3036 (1992). "A jury instruction that omits or materially misdescribes an essential element as defined by state law relieves the state of its obligation to prove facts constituting every element of the offense beyond a reasonable doubt, thereby violating the defendant's due process rights." Id. at 415 (citing Carella v. California, 491 U.S. 263, 265, 109 S. Ct. 2419 (1989) (per curiam); Rock, 959 F. 2d at 1245-46)). Because the jury instructions at issue had allowed the Commonwealth to secure a conviction without proving the essential element of specific the court of appeals held that Smith's due process rights had been violated and that he was entitled to a new trial and sentencing. For the reasons discussed above, I conclude that the instructions given at Bronshtein's trial present the very same constitutional problems that tainted the jury instructions in Smith.

The jury instructions given at Bronshtein's trial present a pure question of law that is entitled to no deference under pre-AEDPA standards. My review of the text of the jury instructions in light of Smith, Huffman, and Wayne, compel the conclusion that they instructions impermissibly relieved the Commonwealth of the burden of proving beyond a reasonable doubt an essential element of the crime of first degree murder, and thus ran afoul of the Due Process Clause of the Fourteenth Amendment. Furthermore, I cannot conclude that the error here was harmless; the Court of Appeals for the Third Circuit held under the very similar circumstances of Smith that the jury instructions that tended to relieve the Commonwealth of its burden of proving the essential element of specific intent was not harmless error. See Smith, 120 F.3d at 419.[22] Therefore, petitioner is entitled to habeas relief on this claim as a matter of law.

[22] The Smith court noted that "several pre-Roy [California v. Roy, 519 U.S. 2, 117 S. Ct. 337 (1996)] decisions from both the Supreme Court and this Court all hold that similar types of instructional error constitute trial error." See Smith, 120 F. 3d at 417 (citing cases).

2. Life Means Life Without Parole Instruction

Petitioner also claims that he was entitled to an instruction to the jury at the sentencing phase that a sentence of life in prison would mean life without parole under Pennsylvania law.[23]

Petitioner relies on Simmons v. South Carolina, 512 U.S. 154, 114 S. Ct. 2187 (1994).[24] There, the petitioner was sentenced to death after the state trial court refused to instruct the jury that the only available alternative sentence – life in prison – would mean that the petitioner would never be released on parole. The Court concluded that in refusing to instruct the jury of petitioner's ineligibility for parole, the state court denied petitioner his only means to rebut the prosecutor's argument that petitioner should be put to death so that he would not be a danger to the public if released from prison. See id. at 163. The Court concluded, "Because truthful information of parole ineligibility allows the defendant to 'deny or explain' the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court." Id. at 169. The Court reaffirmed the Simmons decision in Shafer v. South Carolina, U.S. , 121 S. Ct. 1263 (2001),

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[23] I note that it appears the petitioner did not object at trial to the trial court's failure to instruct the jury that life means life without parole. However, as discussed supra in footnote 19, petitioner's failure to raise this issue at trial does not mean that this claim is procedurally defaulted, because of the relaxed waiver doctrine and the Supreme Court of Pennsylvania's mandatory obligation to conduct a searching review of trial and sentencings in death penalty cases.

[24] I note at the outset that plaintiff's Simmons claim is not barred by Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 (1989), under which federal habeas relief may only be had under rules that were clearly established at the time of the relevant state court decision. The Supreme Court has held that the date to which federal courts should look in applying Teague is the date the judgment of conviction became final. See Williams v. Taylor, 529 U.S. 362, 382, 120 S. Ct. 1495 (2000). Bronshtein's petition became final when "'the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before [the] decision ...' ." Allen v. Hardy, 478 U.S. 255, 258 n.1, 106 S. Ct. 2878,(1986) (per curiam) (quoting Linkletter v. Walker, 381 U.S. 618, 622, 85 S. Ct. 1731 (1965)). That date was October 20, 1997, the when the United States Supreme Court denied *certiorari*. Simmons was decided in 1994, and therefore its rule regarding the life-means-life-without-parole instruction was clearly established at the time Bronshtein's judgment became final three years later.

holding that "whenever future dangerousness is at issue in a capital sentencing proceeding under South Carolina's new scheme, due process requires that the jury be informed that a life sentence carries no possibility of parole." Id. at 1273.

The Supreme Court noted in Simmons that Pennsylvania was one of only three states – along with Virginia and South Carolina – that "have a life-without-parole sentencing alternative to capital punishment for some or all convicted murderers but refuse to inform sentencing juries of this fact." Simmons, 512 U.S. at 168, n.8. In Shafer, the Court observed that since Simmons was decided in 1994, only Virginia had discontinued this practice. See Shafer, 121 S. Ct. at 1271, n.4. Thus, the general practice of not informing the jury of parole ineligibility that the Supreme Court found constitutionally flawed in Simmons and Shafer, is alive and well today in Pennsylvania.[25]

That practice is apparent in this case. First, the petitioner was convicted of first degree murder, and therefore, under Pennsylvania law, would have been ineligible for parole if sentenced to life in prison. See 42 Pa. C.S. § 9756 (c); 61 Pa. C.S. § 331.21; Commonwealth v. Yount, 419 Pa. Super. 613, 622, 615 A.2d 1316 (1992) (holding that section 9756 (c) "unequivocally bars all parole for first degree murderers").

Second, the prosecutor unmistakably placed Bronshtein's future dangerousness at issue at the sentencing phase. On cross-examination, the Commonwealth's attorney had the following exchange with petitioner's psychological expert:

> Q: You have diagnosed an anti-social personality disorder for him; correct?
> A: Yes, I have. ...

[25] The Pennsylvania statute governing sentencings of individuals convicted of first degree murder contains no requirement that the jury be informed that life imprisonment means life without the possibility of parole. See 42 Pa. C.S. § 9711.

Q: One of the features of this is he tends to be irresponsible; correct?
A: Well, one of the features of anti-social personality can be irresponsibility. I don't know if that's necessarily a criteria that fits him. He fits a number of the other criteria.
Q: It can be anti-social behavior; correct?
A: Absolutely.
Q: Including criminal activity; correct?
A: Correct.
Q: Lying?
A: Yes.
Q: Stealing?
A: Yes.
Q: Fighting?
A: Yes.
Q: Being very aggressive; correct?
A: Yes.
Q: They can be prone to being irritable; correct?
A: Yes.
Q: Prone to getting repeatedly into physical fights; correct?
A: Can be. What you're doing is reading from the list of criteria, but many of these do apply to him, yes.
Q: Failure to conform to social norms; correct?
A: That is true.
Q: Repeatedly can perform anti-social acts; correct?
A: Yes.
Q: *And it's something that is sort of a snowball effect: The older they get, they follow down this path, don't they, unless they get treatment*?
A: Well, that's not exactly true. Actually, acting out the part of the anti-social personality tends to burn out in the thirties and into the forties, but the attitudes may still be there.
Q: They also tend to express no remorse, don't they?
A: That's true.
Q: No remorse about the effects of their behavior on other people?
A: They often don't have insight into the effects of their behavior on themselves or other people.
Q: *In other words, a lot of people who have anti-social personality disorders can't play by the rules in a civilized society; correct*?
A: True.

(Sentencing Transcript, April 22, 1994, at 101-104 (emphasis added).) The only issue before the jury was whether Bronshtein deserved a life sentence or execution. This line of questioning clearly could have been viewed by the jury as an attempt to portray Bronshtein as not only a past but a future menace to society. Viewed in the context of the choice facing the jury – life imprisonment or death – the list of negative character traits, reference to repeated social acts, the comment on the "snowball effect," and the mention of petitioner's inability to "play by the rules in a civilized society" would unquestionably designed to evoke in a reasonable juror's mind the

potential danger he would pose to society in the event of his release on parole. The sentencing statute's list of aggravating factors – to which the Commonwealth is limited in seeking a death sentence – contains no mention of the defendant's anti-social behavior or propensity for violence. Thus, there would appear to be little purpose for this line of questioning during the penalty phase of the trial other than to cause the jury to dwell on Bronshtein's future in society.

The prosecutor reminded the jury of this issue in his closing statement at the sentencing phase:

> Ladies and gentlemen, the medical testimony in this case was significant because it tells you something about the psyche and persona of this man. He can't conform to what is required in society. The doctors have told you that he's anti-social. He's prone to lying. He's prone to stealing. He's prone to living a life of crime.
>
> Whatever the seeds were that got him there, they're planted, and that tree has grown. He's grown into a twenty-two-year-old person now regardless of how the seeds were planted.
>
> You have to take a look at what effect that has had and what effect it had at the time he committed these crimes. The doctors have told you he's a man that can't conform to the needs of society. He's going to lie. And worse of all, he feels like everybody is trying to blame him for something.

(Sentencing Transcript, at April 22, 1994, at 142-43.) Surely the prosecutor's words relate to past conduct of the defendant and his conduct at the time of the crimes. However, the references to Bronshtein's inability to "conform to what is required in society" and the fact that he was "anti-social," in the context of the present and the future by reference to what Bronshtein is "going to" and "prone to" do, make it clear that the Commonwealth was suggesting to the jury that it should impose the death penalty because of Bronshtein's inability to function in society in the future. The prosecutor's assertion that petitioner was "prone to living a life of crime," when placed in the context of the stark choice of life in prison or death, would suggest to any juror that petitioner would pose a danger to society if he was released from prison. The none-too-subtle

implication of these arguments is that Bronshtein should be put to death because if he were ever released, he could not "conform to the needs of society," and was "going to" continue "living a life of crime" and engaging in dangerous, violent conduct. Thus, I conclude that Bronshtein's future dangerousness was placed squarely at an issue in his sentencing.

Finally, despite the fact that the Commonwealth placed petitioner's future dangerousness at issue during the sentencing phase, it is clear from the record that the jury was not informed that a sentence of life imprisonment would mean that Bronshtein would never be released from prison on parole.

This case thus fits the very circumstances that the Supreme Court of the United States found violated the Fourteenth Amendment in Simmons and Shafer.[26]

Also instructive is the decision of the Supreme Court of Pennsylvania in Commonwealth v. Trivigno, 561 Pa. 232, 750 A.2d 243 (2000). In that first degree murder case, the prosecutor encouraged the jury at the sentencing phase to use the defendant's past convictions as a "weather vane" and as an indication of where the defendant was "going." See id. at 253. The majority inferred from those comments that "the arguments of the Commonwealth reasonably infer that the jury was being asked to consider the future dangerousness of Trivigno as an aggravating factor." Id. The defendant never requested a Simmons instruction. Rather, when the jury asked whether a life sentence included a possibility of parole, the trial court told the jury "that is not for

[26] The Due Process violation is caused by depriving a criminal defendant an opportunity to rebut evidence advanced by the state by showing that a life sentence was without parole, a fact so important to the jury's consideration that it goes to the heart of the balancing task of the jury between life and death. Thus, by refusing to give the Simmons instruction, Bronshtein was deprived of an essential means to counter the implications of the future dangerousness arguments by persuading the jury that life imprisonment was a more appropriate sentence than death. See Simmons, 512 U.S. at 164 (citing Skipper v. South Carolina, 476 U.S. 1, 5 n.1, 9, 106 S. Ct. 1669 (1986)).

your consideration."[27] The supreme court held that the trial court had erred in failing to inform the jury that life meant life without the possibility of parole under Simmons, observing, "We now hold that when a Simmons instruction is required because the prosecution has argued the defendant's future dangerousness, the trial court ... should inform the jury that a life sentence means that a defendant is not eligible for parole ... ." Id. at 254, 256.

Trivigno is virtually indistinguishable from this case. The prosecutor's comments at Bronshtein's sentencing phase were, while not explicit in their references to future dangerousness, were at least as evocative of future dangerousness as in Trivigno if not more. As in Trivigno, Bronshtein's attorney never requested a life-means-life-without-parole instruction. And in both cases, the trial court did not give a Simmons instruction. I concur with the Supreme Court of Pennsylvania's determination in Trivigno that a failure to give a Simmons instruction under such circumstances is an error of constitutional magnitude.[28]

The state court's jury instructions were legal determinations that are entitled to no deference under pre-AEDPA standards. I conclude that as a matter of law, the sentencing instructions regarding life imprisonment, or lack thereof, were erroneous and violated the Due Process Clause of the Fourteenth Amendment. Furthermore, I cannot conclude that the error was harmless; it is clear that there very well could have been a different outcome absent this error.

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[27] Even when the jury inquired about the meaning of life without parole, clearly signaling that a Simmons instruction was in order, defense counsel still neglected to request a Simmons instruction on the basis of the Commonwealth's future dangerousness argument. Instead, defense counsel stated that the jury's question should be answered. See Trivigno, 561 Pa. at 264 (Castille, J., dissenting). Thus, Simmons was never invoked by defense counsel at trial, nonetheless, the Supreme Court of Pennsylvania in its holding found merit in his Simmons claim on direct appeal. Likewise, though Bronshtein's counsel never raised Simmons at trial, I nevertheless find that his Simmons claim has merit.

[28] I note that to date, the Court of Appeals for the Third Circuit has not yet had occasion to consider the merits of a Simmons-based claim in a federal habeas petition.

Moreover, under similar circumstances in Simmons and Trivigno, the Supreme Court of the United States and the Supreme Court of Pennsylvania sent the cases back for new sentencings without conducting a harmless error review, thus indicating that an instructional error under these circumstances is never harmless. Therefore, petitioner is entitled to habeas relief on this claim.

3. Invalid Aggravating Factor

Bronshtein also challenges the application of the aggravating factor set forth in 42 Pa. C.S. § 9711 (d) (6) during the sentencing phase of his trial. Section 9711 (d) (6) allows the jury to consider as an aggravating factor militating in favor of the death penalty the fact that the "defendant committed a killing while in the perpetration of a felony." Petitioner contends that the evidence presented at trial supported only accomplice or co-conspirator liability, and thus § 9711 (d) (6) is inapplicable because there was insufficient proof that he "committed" the killing. He also argues that the instructions given to the jury regarding § 9711 (d) (6) were flawed.

Bronshtein relies on Commonwealth v. Lassiter, 554 Pa. 586, 722 A.2d 657 (1998), in which the Supreme Court of Pennsylvania considered the case of a defendant sentenced to death on evidence that pointed to an accomplice theory of liability. The defendant argued that because the evidence did not show that she actually pulled the trigger, the aggravating factor of § 9711 (d) (6) could not apply to her, as it applies only when one "commit[s]" a killing. The Supreme Court carefully analyzed the language of § 9711 and concluded that subsection (d) (6) "may not be applied to an accomplice who does not 'commit' the killing in the sense of bringing it to completion or finishing it." See id. at 595.

Lassiter can only assist Bronshtein if the evidence presented at his trial pointed to an accomplice or co-conspirator theory of liability. A review of the evidence that indicates that

Bronsthein was the actual killer reveals its weaknesses. While witnesses and fingerprints placed him at the scene of the murder, there was no evidence that Bronsthein carried a weapon into the store, no evidence connecting him to any weapon found at the scene, and the murder weapon was never recovered. Witnesses placed another individual at the scene with Bronshtein, and there was evidence that a piece of a gun was found at the scene was linked to that individual, not Bronshtein. Bronsthein's fingerprints were not found in the area where the body was discovered.

Even more compelling than the lack of evidence – or perhaps because of it – was the jury's finding at the sentencing phase that there was a possibility that Bronshtein had not pulled the trigger. The jury's finding was revealed during the following colloquy between the trial court and the presiding juror at the close of the sentencing phase:

COURT:	Would you state for the record, please, what mitigating circumstances you found.
JUROR:	Yes.
COURT:	Or whatever you found.
JUROR:	For mitigating circumstances we found extreme mental or emotional disturbance, poor childhood upbringing, and a *possibility that defendant did not pull the trigger*.

(Sentencing Transcript, April 22, 1994, at 205 (emphasis added).) The last finding fell under the statutory mitigating circumstance set forth in § 9711 (e) (8): "Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." Under Pennsylvania's statutory procedures in cases involving first degree murder, the jury may only find a mitigating circumstance when the defendant has proved that circumstance by a preponderance of the evidence. See 42 Pa. C.S. § 9711 (c) (1) (iii). This means that the jury found that Bronshtein had proved by a preponderance of the evidence that there was a possibility that he did not actually commit the killing. This finding strongly indicates that the jury believed that there was a reasonable doubt as to whether Bronshtein pulled the trigger, and that the jury's

guilty verdict rested on a finding that he more likely was an accomplice or co-conspirator to the killing than the actual killer.

The Commonwealth contends that the jury finding that there was a possibility that petitioner did not commit the murder should not be accorded significant weight, because it merely indicates that one juror had "residual doubt" as to whether petitioner was the actual killer. (Commonwealth's Response, at 67.) That argument ignores the finding of the entire jury reported by the presiding juror (not merely one juror) that Bronshtein had proved by a preponderance of the evidence that it was possible that he did not pull the trigger.[29] The Commonwealth's argument may be an inelegant attempt to suggest that without conclusive proof that Bronshtein did not pull the trigger, Lassiter does not apply here. It is true that in Lassiter, the evidence clearly indicated, and there was little dispute, that defendant was at best an accomplice. However, in many ways, the evidence of the defendant's involvement and conduct in Lassiter was far more substantial and compelling than in this case. The evidence in Lassiter included great detail about the defendant's conduct and motives leading up to and following the killing as well as the killing itself, and demonstrated that the defendant had knowingly and wilfully lured the victim to a particular location where the triggerman laid in wait. By contrast, there is little evidence of what actually took place in this case, and the evidence at best places Bronshtein at the scene and leaves considerable doubt as to how the killing took place, and thus doubt that Bronshtein pulled the trigger. Thus, the evidence that Bronshtein was an accomplice or co-conspirator is not as strong as it was in Lassiter.

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[29] As reflected in the quotation from the record above, the foreperson used the word "we" to characterize the jury's finding of mitigating factors, making it clear that the findings were those of the jury, not merely one juror. (Sentencing Transcript, April 22, 1994, at 205.)

Even if that the accomplice liability in this case was less clear than in Lassiter, I do not believe Lassiter is limited only to cases in which accomplice or co-conspirator liability is unmistakable or undisputed. To hold otherwise would be to force a petitioner to prove a very elusive negative at the sentencing phase. It seems clear that the reasoning of Lassiter is intended to remove the *possibility* that § 9711 (d) (6) would be applied as an aggravating factor in a case resting on a theory of accomplice or co-conspirator liability. Absent a specific jury questionnaire that distinguishes between direct and accomplice liability, there is no means in a criminal case such as this to determine whether a jury has convicted on the basis of accomplice or co-conspirator liability.[30] The only tools that can be relied upon in determining whether an individual was convicted on the basis of accomplice or co-conspirator liability are the evidence presented at trial and other jury findings that point the way. Here, the evidence of direct liability was weak and the foreperson reported a jury finding that Bronshtein had proved to the satisfaction of the jury, by a preponderance of the evidence, that there was a possibility that he did not commit the killing. This finding compels the conclusion that there was some doubt as to whether petitioner actually committed the killing. Therefore, the application to Bronshtein of an aggravating factor that applies only when an individual actually committed the killing was erroneous.

I do not today attempt to delineate the minimum amount of evidence or articulate every kind of jury finding required to trigger the Lassiter rule barring the application of § 9711 (d) (6). Rather, I focus on the record of this case, which includes weak evidence that petitioner pulled the

[30] The Commonwealth, by its closing argument in the penalty phase of this case, conceded that there is no way to derive from the jury's conviction for first degree murder whether Bronshtein was convicted as an accomplice, co-conspirator, or the actual shooter. (Sentencing Transcript, April 22, 1994, at 137.)

trigger and a clear jury finding that there was a possibility that Bronshtein did not actually kill the victim. The most reasonable inference that can be drawn from this jury finding is that proof was lacking with respect to whether Bronshtein himself committed the killing. I conclude that the real possibility, based upon the paucity of the evidence as illuminated by this finding, that Bronshtein was convicted as an accomplice or co-conspirator is enough to trigger protections of Lassiter and render the application of § 9711 (d) (6) to Bronshtein erroneous and invalid.

The Supreme Court of the United States has held that in a "weighing" state such as Pennsylvania,[31] "there is Eighth Amendment error when the sentencer weighs an 'invalid' aggravating circumstance in reaching the ultimate decision to impose a death sentence." Sochor v. Florida, 504 U.S. 527, 532, 112 S. Ct. 2114 (1992) (citing Clemons v. Mississippi, 494 U.S. 738, 752, 110 S. Ct. 1441 (1990)). The Supreme Court has long held that the Eighth Amendment, requires both "measured consistent application and fairness to the accused." Eddings v. Oklahoma, 455 U.S. 104, 110-112 , 102 S. Ct. 869 (1982); Lockett v. Ohio, 438 U.S. 586, 601-605, 98 S. Ct. 2954 (1978) (plurality opinion), and that applying an invalid aggravating factor violates the Eighth Amendment in that it "'creates the possibility of ... randomness' by placing a 'thumb [on] death's side of the scale.'" Sochor, 504 U.S. at 532 (citations omitted).

The decision of the Supreme Court of Pennsylvania in Lassiter makes it clear that § 9711 (d) (6) is invalid when applied to a case based substantially on an accomplice or co-conspirator liability theory. There is no question that in this case, § 9711 (d) (6) was applied to petitioner,

[31] "Weighing states" are states in which the death-penalty law sets forth aggravating and mitigating circumstances, and the jury decides which aggravating circumstances exist and which mitigating circumstances exist and imposes life imprisonment if it decides that the mitigating circumstances outweigh the aggravating circumstances or it imposes death if it decides that the aggravating circumstances outweigh the mitigating circumstances. See Jermyn v. Horn, No. 97-634, 1998 U.S. Dist. LEXIS 16939, at *7 (M.D. Pa. 1998).

and there are clear indications that the jury considered him to be merely an accomplice or co-conspirator or that there was reasonable doubt that he actually shot and killed the victim. Therefore, I conclude that the sentencer in Bronshtein's case weighed an invalid aggravating circumstance in deciding to impose the death sentence, and therefore the sentence violated his rights under the Eighth Amendment.

The state court's jury instructions were legal determinations or mixed considerations of law and fact that are entitled to no deference under pre-AEDPA standards.[32] I conclude that as a matter of law, the sentencing instructions regarding aggravating and mitigating favors were erroneous and violated the Eighth Amendment. I cannot conclude that this error was harmless; the jury found two aggravating factors and three mitigating factors; it seems axiomatic that *sans* one of those aggravating factors, the balance could very well have tipped in favor of Bronshtein and resulted in a sentence that would have spared his life. Therefore, petitioner is entitled to habeas relief on this claim.[33]

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[32] At most, the trial court's failure to adhere to the dictates of Lassiter presents a mixed question of law and fact, which again is reviewed *de novo* under pre-AEDPA standards.

[33] Bronshtein has raised a number of other claims in his petition. Specifically, he has claimed that (1) the jury instruction as to specific intent was erroneous; (2) evidence that another person committed the crime was improperly excluded; (3) evidence that he committed another crime was improperly admitted; (4) prosecutorial misconduct rendered the guilt phase of the trial unfair; (5) the only juror of a similar ethnic background to petitioner was improperly excluded; (6) the prosecutor engaged in unconstitutional misconduct during the sentencing phase; (7) the instruction on aggravating and mitigating factors impermissibly undermined the importance of mitigating factors; (8) an aggravating factor was based on an invalid prior felony conviction; (9) the aggravating factor involving prior felony conviction involving threat or use of violence is unconstitutionally vague; (10) the Supreme Court of Pennsylvania violated petitioner's right to meaningful appellate review in its proportionality review; (11) counsel were ineffective; and (12) cumulative constitutional errors during trial and sentencing warrant relief. Because I have concluded that there are three claims upon which petitioner is clearly entitled to relief in the form of a new trial and sentencing, I need not and do not reach any conclusions as to the merits of these other claims.

Conclusion

The foregoing analysis demonstrates that petitioner's claims are not procedurally barred, and that he is entitled to habeas relief under 28 U.S.C. § 2254 on a number of grounds. Both petitioner's conviction and sentencing for first degree murder were the product of state jury instructions that contained errors of a constitutional magnitude.[34] There is no relief short of a new trial and sentencing that would remedy these constitutional errors. Therefore, I will vacate the conviction and sentencing of defendant for first degree murder[35] and, unless the Commonwealth grants Bronshtein a new trial and sentencing in 180 days, the writ shall issue.

An appropriate Order follows.

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[34] Federal courts have the discretion of whether or not to grant hearings on petitions filed under 28 U.S.C. § 2254. See Campbell v. Vaughn, 209 F.3 280, 287 (3d Cir. 2000). Because the issues have been comprehensively briefed and because the material facts are not in dispute and no further evidence is required for the Court to reach its conclusions on the claims addressed herein, I concluded a hearing would not be necessary or helpful in reaching a decision on the merits of petitioner's claims. Therefore, in the exercise of my discretion, I will not hold such a hearing.

[35] The petitioner does not argue that his convictions for robbery, theft, and conspiracy were constitutionally flawed, and therefore the Court does not consider those convictions today.

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

ANTUAN BRONSHTEIN,	:	**CIVIL ACTION**
	:	**THIS IS A CAPITAL CASE**
Petitioner,	:	
	:	
v.	:	
	:	
MARTIN HORN, Commissioner Designate, Pennsylvania Department of Corrections,	:	
	:	
Respondent.	:	**NO. 99-2186**

O R D E R

AND NOW, this 5th day of July, 2001, upon consideration of the Petition of Antuan Bronshtein for a Writ of Habeas Corpus (Document No. 11), the response of the Commonwealth of Pennsylvania response, the reply of petitioner, all documents filed in support thereof and in opposition thereto, and the record of petitioner's case in state court, and having concluded, for the reasons set forth in the foregoing memorandum, that petitioner is entitled to relief under 28 U.S.C. § 2254, **IT IS HEREBY ORDERED** that the petition for a writ of habeas corpus is **GRANTED** Bronsthein's conviction and sentencing for first degree murder are **VACATED**. The execution of the writ of habeas corpus, however, is **STAYED** for 180 days from the date of this order to permit the Commonwealth of Pennsylvania to grant petitioner a new trial and sentencing. If petitioner is not granted a new trial and sentencing within the time specified, the writ shall issue.

Any party requiring a certificate of appealability under 28 U.S.C. § 2253 may file a motion requesting the issuance of such a certificate no later than August 3, 2001.

LOWELL A. REED, JR., S.J.