Africa v. Digulielmo

United States District Court for the Eastern District of Pennsylvania

October 19, 2004, Decided ; October 20, 2004, Filed; October 21, 2004, Entered

CIVIL ACTION NO. 04-451, CIVIL ACTION NO. 04-449, CIVIL ACTION NO. 04-447, CIVIL ACTION NO. 04-448, CIVIL ACTION NO. 04-454, CIVIL ACTION NO. 04-453, CIVIL ACTION NO. 04-450, CIVIL ACTION NO. 04-448

Reporter
2004 U.S. Dist. LEXIS 21220 *

CHARLES SIMS AFRICA v. WARDEN DAVID DIGULIELMO, et al.; JEANINE PHILLIPS AFRICA v. MARILYN BROOKS, et al.; EDWARD GOODMAN AFRICA v. ED KLIEM, et al.; JANET HOLLOWAY AFRICA v. MARILYN BROOKS, et al.; MICHAEL DAVIS AFRICA v. WARDEN DAVID DIGULIELMO, et al.; DELBERT ORR AFRICA v. THOMAS LAVAN, et al.; WILLIAM PHILLIPS AFRICA, v. THOMAS LAVAN, et al.; DEBBIE SIMS AFRICA v. MARILYN BROOKS, et al.

Subsequent History: Adopted by, Writ of habeas corpus denied, Certificate of appealability denied *Africa v. Kiem, 2015 U.S. Dist. LEXIS 60880 (E.D. Pa., Jan. 20, 2015)*

Prior History: *Commonwealth v. Africa, 346 Pa. Super. 630, 499 A.2d 397, 1985 Pa. Super. LEXIS 9518 (June 28, 1985)*

Disposition: Report and recommendation adopted. Petition for writ of habeas corpus denied. Certificate of appealability not granted.

Core Terms

trial court, petitioners', adjudicated, basement, police officer, shots, cross-examination, exculpatory, trial court's opinion, trial counsel, fired, due process, killed, ineffective, state court, disclose, firearms, convictions, presumed, state law, murder, male, fact finding, lack merit, self-defense, sentencing, Street, prior to trial, trial court's decision, court's decision

Case Summary

Procedural Posture

Petitioner inmates filed habeas corpus applications pursuant to *28 U.S.C.S. § 2254*, claiming violations of their constitutional rights in state criminal proceedings. The inmates were members of an organization, and the charges against them arose from an incident at their house in which a police officer was killed and other officers and firefighters were injured. The court referred the matter to a magistrate judge for a report and recommendation.

Overview
The inmates claimed that the evidence was insufficient to support their convictions for third-degree murder, conspiracy, aggravated assault, and attempted murder and that they had received ineffective assistance of counsel. The magistrate found that the destruction of the inmates' house and a tree outside it by police was not a Brady violation because the evidence was not exculpatory. Because the inmates had engaged in disruptive conduct, had used obscene, profane language, and had threatened the judge, the trial court's decision to remove them from the trial and to exclude them from their sentencing was a reasonable application of United States Supreme Court precedent. The inmates had knowingly and intelligently waived their right to a jury trial. The evidence that was sufficient to support the male inmates' convictions was also, necessarily, sufficient to support the female inmates' convictions. The trial court's finding that trial counsel were not ineffective for failing to raise defenses that were not available to the inmates under Pennsylvania law was not contrary to Supreme Court precedent. The trial court had not improperly curtailed the inmates' cross-examination witnesses.

Outcome
The court adopted the magistrate's report and recommendation. The court denied the petitions for a writ of habeas corpus and did not grant a certificate of appealability.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Order & Timing of Petitions > Statute of Limitations > Antiterrorism & Effective Death Penalty Act

Governments > Legislation > Statute of Limitations > Time Limitations

Criminal Law & Procedure > ... > Procedural Defenses > Exhaustion of Remedies > General Overview

Criminal Law & Procedure > ... > Procedural Defenses > Exhaustion of Remedies > Prerequisites

Criminal Law & Procedure > ... > Order & Timing of Petitions > Procedural Default > General Overview

Criminal Law & Procedure > ... > Order & Timing of Petitions > Time Limitations > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN1[] **Statute of Limitations, Antiterrorism & Effective Death Penalty Act**

Since the enactment of the federal Antiterrorism and Effective Death Penalty Act of 1996, habeas petitioners have faced a one year statute of limitations. *28 U.S.C.S. § 2244(d)*. Habeas petitioners are also required to exhaust state remedies before seeking habeas relief. *28 U.S.C.S. § 2254(b)(1)(A)*. Generally, a petitioner exhausts state remedies by presenting his claims to the state's trial court, the state's intermediate appellate court, and the state's highest court. Procedural default is another non-merits reason to prevent review of a claim on its merits.

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > Contrary to Clearly Established Federal Law

Governments > Courts > Judicial Precedent

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > General Overview

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

Governments > Courts > General Overview

HN2[] **Contrary & Unreasonable Standard, Contrary to Clearly Established Federal Law**

Under the federal Antiterrorism and Effective Death Penalty Act of 1996, a federal district court cannot grant habeas relief on a claim that has been adjudicated in the state courts unless the state court's adjudication of the claim was contrary to or an unreasonable application of United States Supreme Court precedent. *28 U.S.C.S. § 2254(d)(1)*. A state court decision is contrary to Supreme Court precedent if the state court has applied a rule that contradicts the governing law set forth in Supreme Court precedent or if the state court confronts a set of facts which are materially indistinguishable from a decision of the Supreme Court and the state court arrives at a different result from the Supreme Court. In determining whether a state court's decision was contrary to Supreme Court precedent, the habeas court should not be quick to attribute error. Instead, state court decisions should be given the benefit of the doubt. In this regard, it is not necessary that the state court cite the governing Supreme Court precedent or even be aware of the governing Supreme Court precedent. All that is required is that neither reasoning nor the result of the state-court decision contradicts Supreme Court precedent.

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

Governments > Courts > Court Personnel

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > General Overview

Governments > Courts > General Overview

Governments > Courts > Judicial Precedent

HN3[] **Review, Standards of Review**

A state court decision constitutes an unreasonable application of United States Supreme Court precedent if the state court correctly identifies the governing legal rule but applies it unreasonably to the facts of a habeas petitioner's case. In making this determination, the habeas court must ask whether the state court's application of Supreme Court precedent was objectively unreasonable. The habeas court may not grant habeas relief simply because it believes the state court's adjudication of the petitioner's claim was incorrect. Instead, the habeas court must be convinced that the state court's adjudication of the claim was objectively unreasonable. When deciding whether a state court's application of Supreme Court precedent was reasonable, it is permissible to consider the decisions of lower federal courts which have applied Supreme Court precedent. In addition, the habeas court must presume as correct any finding of fact made by the state courts, and the petitioner bears the burden of rebutting the presumption by clear and convincing evidence. *28 U.S.C.S. § 2254(e)(1)*. The presumption of correctness applies to findings of fact made by the state's trial or appellate courts.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Duty of Disclosure

HN4 **Brady Materials, Brady Claims**

Under Brady and its progeny, the prosecution has the duty to disclose to a defendant any favorable evidence that is material to guilt or punishment. The prosecutor's duty to disclose includes the duty to learn of and disclose any favorable evidence which others acting on his or her behalf, such as the police, have acquired. In evaluating the prosecutor's failure to disclose favorable evidence, the prosecutor's good faith or bad faith is irrelevant. Evidence is deemed material when there is a reasonable probability that, if the evidence had been disclosed to the defendant, the result of the proceeding would have been different. In order for evidence to be material, it is not necessary that the evidence establish by a preponderance that disclosure of the evidence would have resulted in an acquittal.

Criminal Law & Procedure > Habeas Corpus > Procedure > General Overview

Governments > Courts > Judicial Precedent

HN5 **Habeas Corpus, Procedure**

A state court's decision must be evaluated in light of the United States Supreme Court precedent that was available at the time of the state court's decision.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

HN6 **Discovery & Inspection, Brady Materials**

Evidence which can not successfully impeach a witness is not exculpatory nor material under Brady.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

Criminal Law & Procedure > Trials > Examination of Witnesses > Transmitted & Videotaped Testimony

HN7 **Procedural Due Process, Scope of Protection**

Due process is violated when the prosecution withholds favorable evidence.

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

HN8 **Preservation of Relevant Evidence, Exclusion & Preservation by Prosecutors**

When the prosecution destroys evidence before providing it to a defendant, a court must consider whether the evidence was destroyed in good faith, whether the evidence possessed exculpatory value that was apparent before its destruction, and whether the evidence was of such a nature that the defendant could not obtain comparable evidence by any reasonably

apparent means.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial

HN9[] Criminal Process, Right to Confrontation

A defendant's right to be present during his trial is based upon the *Sixth Amendment's Confrontation Clause*. If a defendant persists in conducting himself in an manner that is disruptive of the trial court's proceedings, it is permissible for the court to remove the defendant from the trial. Once removed, the defendant can be readmitted to his trial if he agrees to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

Criminal Law & Procedure > ... > Exceptions to Default > Cause & Prejudice Standard > General Overview

Evidence > Burdens of Proof > General Overview

Criminal Law & Procedure > ... > Order & Timing of Petitions > Procedural Default > General Overview

Criminal Law & Procedure > ... > Exceptions to Default > Actual Innocence & Miscarriage of Justice > Miscarriage of Justice

HN10[] Exceptions to Default, Cause & Prejudice Standard

A procedurally defaulted claim cannot be reviewed unless a petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice. In order to demonstrate cause, the petitioner must show that some objective factor external to the defense impeded the petitioner's efforts to comply with the state's procedural rule. Examples of cause include: (1) a showing that the factual or legal basis for a claim was not reasonably available; (2) a showing that some interference by state officials made compliance with the state procedural rule impracticable; and (3) attorney error that constitutes ineffective assistance of counsel.

Criminal Law & Procedure > ... > Exceptions to Default > Actual Innocence & Miscarriage of Justice > Exceptions

Criminal Law & Procedure > ... > Exceptions to Default > Actual Innocence & Miscarriage of Justice > General Overview

Criminal Law & Procedure > ... > Exceptions to Default > Actual Innocence & Miscarriage of Justice > Miscarriage of Justice

Criminal Law & Procedure > ... > Exceptions to Default > Actual Innocence & Miscarriage of Justice > Proof of Innocence

Evidence > Burdens of Proof > General Overview

HN11[] Actual Innocence & Miscarriage of Justice, Exceptions

The fundamental miscarriage of justice exception to a procedurally defaulted claim is limited to cases of actual innocence. In order to demonstrate that he is "actually innocent", a petitioner must present new evidence of his innocence. This evidence need not be directly related to the habeas claims the petitioner is presenting because the habeas claims themselves need not demonstrate that he is innocent. The reviewing court must consider the evidence of innocence presented along with all the evidence in the record, even that which was excluded or unavailable at trial. Once all this evidence is considered, the petitioner's defaulted claims can only be reviewed if the court is satisfied that it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt.

Constitutional Law > ... > Fundamental Rights > Criminal Process > General Overview

Criminal Law & Procedure > ... > Defendant's Rights > Right to Jury Trial > Felonies

Criminal Law & Procedure > Juries & Jurors > Waiver of Jury Trial > General Overview

Criminal Law & Procedure > ... > Waiver of Jury Trial > Requirements for Waiver > Knowing &

Voluntary Waivers

HN12 **Fundamental Rights, Criminal Process**

The *Sixth Amendment* guarantees state criminal defendants the right to trial by jury. In order to be valid, a criminal defendant's waiver of his *Sixth Amendment* right to a jury trial must be knowing and intelligent. A knowing and intelligent waiver is required to insure that the defendant can forgo a jury trial when his competent judgment counsels him that his interests are safer in the keeping of the judge than of the jury.

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Criminal Law & Procedure > Appeals > General Overview

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN13 **Review, Standards of Review**

The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction does not require a reviewing court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review, all of the evidence is to be considered in the light most favorable to the prosecution. In addition, where historical facts support conflicting inferences, a habeas court engaging in sufficiency of the evidence review must presume that the trier of fact resolved any such conflicts in favor of the prosecution.

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN14 **Review, Standards of Review**

When applying the sufficiency of the evidence test, a habeas court should look to the evidence the State considers adequate to meet the elements of a crime governed by state law. This must be done because the elements of the criminal offense are defined by state law.

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN15 **Review, Standards of Review**

The Jackson v. Virginia standard is not an exacting one. The evidence presented at trial is viewed in the light most favorable to the prosecution, and the reviewing court must presume that the finder of fact resolved all conflicting inferences raised by the evidence in favor of the prosecution. This leaves little room to find that the evidence was insufficient. Further, the standard of review provided by *28 U.S.C.S. § 2254(d)(1)* restricts even further the ability of a habeas court to grant habeas relief when the state court has adjudicated the merits of a federal claim.

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > General Overview

Criminal Law & Procedure > ... > Murder > Definitions > Malice

Criminal Law & Procedure > ... > Murder > Third-

Degree Murder > General Overview

Criminal Law & Procedure > ... > Murder > Third-Degree Murder > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Criminal Law & Procedure > ... > Use of Weapons > Simple Use > Elements

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Recklessness

HN16 **Accessories, Aiding & Abetting**

Pennsylvania law allows the fact finder to determine that a conspiracy exists based on the relation, conduct or circumstances of the parties, as well as the acts of the parties. The statement of any coconspirator is admissible against all the others. Pennsylvania law holds that all coconspirators are criminally responsible for the acts of any coconspirator. Pennsylvania law also holds accomplices liable for the acts of other accomplices. Only the slightest degree of cooperation is required for conviction as an accomplice. As for third-degree murder, it is necessary to prove malice. Malice exists where a defendant kills someone with the intent to kill, with the intent to inflict serious bodily harm or while acting with conscious disregard of an unjustified and extremely high risk that his actions might cause serious bodily harm. Malice can be inferred from threats made prior to the killing and from the use of a deadly weapon on a vital part of the body.

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

Governments > Courts > Court Personnel

HN17 **Review, Standards of Review**

Whether evidence is sufficient to sustain a conviction, a habeas court should look to the evidence the State considers adequate to meet the elements of a crime governed by state law.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN18 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

Claims of ineffective assistance of counsel must be evaluated against the two-part Strickland test. First, a petitioner must show that counsel's representation fell below an objective standard of reasonableness. In making this determination, a trial court's scrutiny of counsel's performance must be highly deferential. The court should make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. The court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the petitioner must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Second, the petitioner must show that counsel's deficient performance prejudiced the defense by depriving the petitioner of a fair trial, a trial whose result is reliable. The petitioner must show that there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. A reasonable probability is a probability sufficient to undermine confidence in the outcome, but it is less than a preponderance of the evidence.

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN19 **Appeals, Standards of Review**

It is not necessary that a reviewing court evaluate the two parts of the Strickland test in the order of performance first, then prejudice. If a petitioner fails to satisfy either part of the Strickland test, there is no need to evaluate the other part because his claim will fail.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Waiver & Preservation of Defenses

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > General Overview

HN20[] Defenses, Demurrers & Objections, Waiver & Preservation of Defenses

The United States Supreme Court has never held that an attorney can render ineffective assistance for failing to raise a claim or defense that is foreclosed by the law.

Civil Procedure > Judicial Officers > Judges > General Overview

Criminal Law & Procedure > Trials > Bench Trials

Evidence > Inferences & Presumptions > Presumptions

HN21[] Judicial Officers, Judges

It is presumed that trial judges know the law and follow it when making their decisions.

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > General Overview

HN22[] Jurisdiction, Cognizable Issues

28 U.S.C. S. § 2254(d)(2) states that a writ of habeas corpus cannot be granted unless a state court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. As long as there is some evidence which could reasonably support the state court's determination, relief cannot be granted under § 2254(d)(2).

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Tests for Prosecutorial Misconduct

Legal Ethics > Prosecutorial Conduct

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > General Overview

HN23[] Procedural Due Process, Scope of Protection

A prosecutorial misconduct claim requires a reviewing court to determine whether the prosecutor's improper acts so infected the trial with unfairness that the resulting conviction constitutes a denial of due process. Although both Brady and prosecutorial misconduct claims are based on due process, the actual elements of the claims are distinct.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > General Overview

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

Criminal Law & Procedure > Defenses > Right to Present

HN24[] Criminal Process, Right to Confrontation

The Sixth Amendment guarantees criminal defendants the right to confront adverse witnesses. This right encompasses the right to cross-examine adverse witnesses. Defendants have a due process right to present a defense. That right focuses on a defendant's affirmative right to present witnesses on his behalf. The right of cross-examination is guaranteed by the Confrontation Clause.

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination

Evidence > ... > Examination > Cross-Examinations > Scope

Governments > Courts > Judicial Precedent

Constitutional Law > Bill of Rights > State Application

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

HN25[] Examination of Witnesses, Cross-Examination

The *Sixth Amendment's Confrontation Clause* is applicable to the states. In turn, the *Confrontation Clause* includes a defendant's right to cross-examine the witnesses which are arrayed against him at trial. Cross-examination is important because it helps insure the accuracy of the truth-determining process. However, the right of confrontation and cross-examination is not absolute. Specifically, the Supreme Court has never held that a defendant has a *Sixth Amendment* right to pursue cross-examination to present a state law defense that is barred by state law. The scope of a defendant's *Confrontation Clause* rights can be limited by state limitations concerning what issues are properly raised in a given case.

Criminal Law & Procedure > Trials > Bench Trials

HN26[] Trials, Bench Trials

A judge sitting as the trier of fact in a bench trial is presumed to be able to disregard inadmissible evidence and other improper matters.

Criminal Law & Procedure > Defenses > Self-Defense

Criminal Law & Procedure > Defenses > General Overview

HN27[] Defenses, Self-Defense

Under Pennsylvania law, a claim of self-defense is not permissible where a defendant refuses to admit that he killed the victim.

Criminal Law & Procedure > Habeas Corpus > Appeals > Certificate of Appealability

Criminal Law & Procedure > Habeas Corpus > Appeals > General Overview

HN28[] Appeals, Certificate of Appealability

In order for habeas petitioners to be able to appeal the denial of their habeas petitions, a district court must grant them a certificate of appealability. *28 U.S.C.S. § 2253(c)*. For claims that the court has resolved on their merits, a certificate of appealability (COA) can only be granted if jurists of reason could find the court's determination of the merits of the claims was debatable or wrong. Where the court resolves the petitioners' claims on procedural grounds such as procedural default, lack of cognizability, or counsel's failure to adequately present the claims, a COA can issue if jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and if jurists of reason would find it debatable whether the district court is correct in its procedural ruling. Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist can not conclude either that the district court erred in dismissing the petition or that the petitioners should be allowed to proceed further. In such a circumstance, no appeal will be warranted. Because the petitioners must make showings with respect to both the procedural issue and the underlying, constitutional issue, a court may resolve the COA question if either showing is lacking.

Counsel: **[*1]** For CHARLES SIMS AFRICA, Petitioner: PAUL J. HETZNECKER, PHILADELPHIA, PA.

For DAVID DIGUGLIELMO, WARDEN, JEFFREY BEARD, SUPERINTENDANT, THE DISTRICT ATTORNEY OF THE COUNTY OF LYNN ABRAHAM, THE ATTORNEY GENERAL OF THE STATE OF JERRY PAPPERT, Respondents: J. HUNTER BENNETT, THOMAS W. DOLGENOS, DISTRICT ATTORNEY'S OFFICE, PHILADELPHIA, PA.

Judges: DIANE M. WELSH, UNITED STATES MAGISTRATE JUDGE. BARTLE, J.

Opinion by: DIANE M. WELSH

Opinion

REPORT AND RECOMMENDATION

DIANE M. WELSH

UNITED STATES MAGISTRATE JUDGE

I. Introduction

The eight petitioners have filed habeas corpus petitions pursuant to *28 U.S.C. § 2254*. In the 1970's, all of them became members of an organization known as MOVE. MOVE members had disputes with their neighbors and city officials throughout the 1970's. These disputes eventually led to the events of August 8, 1978. On that day, the Philadelphia police attempted to serve arrest warrants on several MOVE members at their residence. The police were not able obtain the peaceful surrender of the MOVE members. Instead, an altercation ensued which culminated in a fusillade. As a result of the heavy gunfire, one police officer, James **[*2]** Ramp, was killed and seven other police officers and firefighters were wounded.

The petitioners were apprehended on August 8, 1978 and were charged with offenses related to the death of Officer Ramp and the injuries to the other police officers and to firefighters. There is no dispute that, after the petitioners were apprehended and removed from the MOVE house, the police demolished the house as well as the structures surrounding the house and any trees or other foliage. [1]

In late 1978 and 1979, several, lengthy, pre-trial hearings were conducted in the Court of Common Pleas for Philadelphia County. **[*3]** The petitioners' joint, bench trial finally commenced in December 1979 and lasted for many months. At the conclusion of trial in May 1980, the petitioners were convicted of third degree murder, criminal conspiracy, attempted murder, aggravated assault and battery. On August 4, 1981, the petitioners were each sentenced to terms of incarceration totaling 30 to 100 years. All of them are currently imprisoned in state correctional institutions.

All the petitioners are now represented by the same attorney, Paul J. Hetznecker, and all of them filed identical habeas corpus petitions. In addition, they have filed a joint memorandum of law supporting their 18 claims for relief. The District Attorney for Philadelphia County has filed a single response to the original habeas petitions as well as a single response to the petitioners' joint memorandum. Thus, the court will file a single opinion to address all eight habeas petitions.

II. Claims Presented

The petitioners' 18 claims for relief are the following. First, the petitioners were denied due process when the trial court denied their motion to dismiss the charges, or in the alternative to preclude the Commonwealth from introducing **[*4]** certain evidence, based on the destruction of the MOVE house and other evidence by the police. Second, the petitioners were denied due process when they were removed from the courtroom during the trial and were thereby denied the right to proceed pro se. Third, the petitioners were denied due process because their waiver of a jury trial was invalid. Fourth, the petitioners were denied due process because the evidence presented at trial was insufficient to support their convictions for third degree murder, conspiracy, aggravated assault and attempted murder. Fifth, the petitioners were denied their *Sixth Amendment* right to the effective assistance of counsel when trial counsel failed to request a change of venue based on the extreme and prejudicial pretrial publicity. Sixth, the petitioners were denied their *Sixth Amendment* right to the effective assistance of counsel when trial counsel failed to pursue evidence that Officer James Ramp's injuries were inconsistent with the medical examiner's report and for failing to present expert evidence indicating that the injuries suffered by the four, wounded firemen could not have been caused by the petitioners. Seventh, the petitioners were **[*5]** denied their *Sixth Amendment* right to the effective assistance of counsel when trial counsel failed to investigate and present a claim of self-defense. Eighth, the petitioners were denied their *Sixth Amendment* right to the effective assistance of counsel when trial counsel undermined the petitioners' rights to a fair trial by publicly stating during the trial that the trial court could not find the

[1] There is a dispute between the parties concerning the reason the MOVE house was demolished. The petitioners maintain that the MOVE house was demolished to destroy evidence which they believe might have proven to be exculpatory. The District Attorney maintains, in accordance with the findings of the state court, that the MOVE house was demolished for a number of reasons, one of which was that it was a health hazard.

petitioners innocent of the charges. Ninth, the petitioners were denied their *Sixth Amendment* right to the effective assistance of counsel when appellate counsel failed to argue that the trial court was prejudiced by the presentation of the petitioners' arrest photos during the trial. Tenth, the petitioners were denied their *Sixth Amendment* rights and their right to due process by the prosecution's failure to disclose that the police had developed a plan to attack the MOVE house as early as February 1977. Eleventh, the petitioners were denied their *Sixth Amendment* rights and their right to due process by the prosecution's failure to disclose a police department memo which revealed that the police considered the deluge gun to be an offensive weapon. Twelfth, the petitioners were denied their **[*6]** *Sixth Amendment* rights and their right to due process by the prosecution's failure to disclose the statements of several witnesses who lived across the street from the MOVE house as well as screens from the windows at 3300 Bearing Street. Thirteenth, the petitioners were denied their due process rights to a fair trial and to an impartial trier of fact by the trial court's acting as an advocate for the prosecution during the trial. Fourteenth, the petitioners were denied their *Sixth Amendment* and due process rights by the trial court's decision to restrict their cross-examination of Commonwealth witnesses concerning whether the police had conspired to attack the MOVE house to destroy it and its occupants and thereby prevent the petitioners from developing a defense. Fifteenth, the petitioners were denied due process at sentencing because they were not allowed to appear for sentencing and were, therefore, denied the right of allocution prior to sentencing. Sixteenth, the petitioners were denied due process when the trial court allowed the police officers who had been involved in the events of August 8, 1978 to serve as guards in the courtroom. Seventeenth, the petitioners were denied **[*7]** due process when the trial court denied a mistrial based upon the prosecution's firearms expert testifying that his lab was visited by a firearms expert retained by the defendants. Eighteenth, the petitioners were denied due process when the trial court prevented the cross-examination of prosecution witnesses regarding the amount of force used on August 8, 1978 and then later ruled that the petitioners had failed to present evidence of self-defense so that self-defense would not be considered.

III. Procedural Issues

HN1[↑] Since the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), habeas petitioners have faced a one year statute of limitations. See *28 U.S.C. § 2244(d)*. In the responses the District Attorney has filed, she does not argue that the habeas petitions were untimely.

Habeas petitioners are also required to exhaust state remedies before seeking habeas relief. See *28 U.S.C. § 2254(b)(1)(A)*. Generally, a petitioner exhausts state remedies by presenting his claims to the state's trial court, the state's intermediate appellate court and the state's highest court. See *Evans v. Court of Common Pleas, Delaware County, 959 F.2d 1227, 1230 (3d Cir. 1992).* **[*8]** The District Attorney also does not argue that any of the petitioners' claims are unexhausted.

Procedural default is another non-merits reason to prevent review of a claim on its merits. See *Lines v. Larkins, 208 F.3d 153, 160 (3d Cir. 2000)*. The District Attorney does maintain that the petitioners have procedurally defaulted some of their claims. Finally, the majority of the petitioners' claims are based on the federal constitution and are, therefore, cognizable. See *28 U.S.C. § 2254(a)*. The court will consider each claim individually. Where procedural default, cognizability or some other procedural issue arises, it will be addressed.

IV. Standard of Review

In addressing the merits of the petitioners' claims, the court is constrained by the amendments to the habeas statute that were enacted by the AEDPA. ***HN2***[↑] Under the AEDPA, the court cannot grant habeas relief on a claim that has been adjudicated in the state courts unless the state court's adjudication of the claim was contrary to or an unreasonable application of United States Supreme Court precedent. See *Williams v. Taylor, 529 U.S. 362, 412, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000)*; **[*9]** *28 U.S.C. § 2254(d)(1)*.

A state court decision is contrary to Supreme Court precedent if the state court has applied a rule that contradicts the governing law set forth in Supreme Court precedent or if the state court confronts a set of facts which are materially indistinguishable from a decision of the Supreme Court and the state court arrives at a different result from the Supreme Court. *Williams v. Taylor, 529 U.S. at 405-06*. In determining whether a state court's decision was contrary to Supreme Court precedent, the habeas court should not be quick to attribute error. See *Woodford v. Visciotti, 537 U.S. 19, 24, 154 L. Ed. 2d 279, 123 S. Ct. 357 (2002)* (per

curiam). Instead, state court decisions should be "given the benefit of the doubt." Id. In this regard, it is not necessary that the state court cite the governing Supreme Court precedent or even be aware of the governing Supreme Court precedent. *Early v. Packer, 537 U.S. 3, 8, 154 L. Ed. 2d 263, 123 S. Ct. 362 (2002)* (per curiam). All that is required is that "neither reasoning nor the result of the state-court decision contradicts" Supreme Court precedent. Id.

HN3[↑] A state **[*10]** court decision constitutes an unreasonable application of Supreme Court precedent if the state court correctly identifies the governing legal rule but applies it unreasonably to the facts of the habeas petitioner's case. *Williams v. Taylor, 529 U.S. at 407-08*. In making this determination, the habeas court must ask whether the state court's application of Supreme Court precedent was objectively unreasonable. *Id. at 409*. The habeas court may not grant habeas relief simply because it believes the state court's adjudication of the petitioner's claim was incorrect. *Id. at 411*. Instead, the habeas court must be convinced that the state court's adjudication of the claim was objectively unreasonable. Id. When deciding whether a state court's application of Supreme Court precedent was reasonable, it is permissible to consider the decisions of lower federal courts which have applied Supreme Court precedent. *Marshall v. Hendricks, 307 F.3d 36, 71 n.24 (3d Cir. 2002)*; *Moore v. Morton, 255 F.3d 95, 104 n.8 (3d Cir. 2001)*.

In addition, the habeas court must presume as correct any finding of fact made by the **[*11]** state courts and the petitioner bears the burden of rebutting the presumption by clear and convincing evidence. See *28 U.S.C. § 2254(e)(1)*. The presumption of correctness applies to findings of fact made by the state's trial or appellate courts. See *Affinito v. Hendricks, 366 F.3d 252, 256 (3d Cir. 2004)*. As will be seen, many of the petitioners' claims must fail because the petitioners have failed to rebut the presumption of correctness attached to state court fact findings.

V. Discussion A.

First Claim

The petitioners' first claim is that they were denied due process when the trial court denied their motion to dismiss the charges, or in the alternative to preclude the Commonwealth from introducing certain evidence, based on the destruction of the MOVE house and other evidence by the police. The petitioners maintain that the destruction of this evidence violated *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)* because the evidence was exculpatory. [2]

[*12] *HN4*[↑] Under Brady and its progeny, the prosecution has the duty to disclose to the defendant any favorable evidence that is material to guilt or punishment. See *Kyles v. Whitley, 514 U.S. 419, 432-33, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995)*. The prosecutor's duty to disclose includes the duty to learn of and disclose any favorable evidence which others acting on his or her behalf, such as the police, have acquired. See *id. at 437*. In evaluating the prosecutor's failure to disclose favorable evidence, the prosecutor's good faith or bad faith is irrelevant. See *id. at 437-38*. Evidence is deemed material when there is a reasonable probability that, if the evidence had been disclosed to the defendant, the result of the proceeding would have been different. *Id. at 433-34*. In order for evidence to be material, it is not necessary that the evidence establish by a preponderance that disclosure of the evidence would have resulted in an acquittal. *Id. at 438*.

In the joint memorandum, the petitioners do not explain why the demolition of the MOVE house and the tree outside one of the basement windows caused them to lose exculpatory **[*13]** evidence. However, this claim was presented prior to the petitioners' trial [3] and it was addressed in the trial court's August 25, 1982 "Opinion Sur Denial of Defendants' Post Trial Motions." The opinion reveals that the petitioners had several theories concerning why the evidence that was lost might have been exculpatory. For one, the petitioners believed that the tree outside the 33rd Street basement window of the MOVE house could have provided for impeachment of

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[2] In their joint memorandum, the petitioners do not address their alternative argument that the trial court should have prevented the Commonwealth from introducing certain evidence. Indeed, they do not even identify what evidence they believe the Commonwealth should have been barred from presenting. Since the petitioners have made no effort to develop or support this alternative argument, it will not be addressed further.

[3] Prior to trial, the Honorable Merna Marshall conducted hearings concerning the demolition of the MOVE house and whether the evidence that was lost in the demolition was material under Brady. However, Judge Marshall passed away before being able to issue a written opinion and so the issue was addressed by the trial court in its August 25, 1982 opinion.

Police Officer Robert Hurst if the tree did not have any bullets lodged within it because Officer Hurst testified that he saw four of five bullets fired from the 33rd Street basement window strike the tree. For another, the petitioners believed that the demolition of the house prevented them from independently testing whether the bullets which struck the injured police officers and firefighters came from the basement of the MOVE house. The petitioners also believed that the demolition of the MOVE house prevented them from impeaching the testimony of prosecution witnesses who were inside the MOVE house on August 8, 1978 and who testified that: (1) shots were fired from the basement into the first floor where the witnesses **[*14]** were standing; (2) they observed some of the defendants in the basement with firearms; and (3) they saw a platform in the basement with weapons on it.

The trial court addressed each of these arguments and found them to be without merit. See Commonwealth v. Goodman, September Term 1978, Nos. 101-28, 129-56, 157-84, 185-212, 1473-92, 1513-32, 1533-52, 1553-72, 1573-92, slip op. at 6-15 (Phila. Co. Aug. 25, 1982) ("Trial court opinion"). When the petitioners appealed to the Superior Court of Pennsylvania, that court adopted the trial court's adjudication of the Brady claim in the two consolidated appeals it heard. See Commonwealth v. Africa, No. 2182 Philadelphia 1981, **[*15]** No. 2420 Philadelphia 1981, No. 2337 Philadelphia, 1981, No. 2338 Philadelphia 1981, slip op. at 3 (Pa. Super. undated) ("Direct Appeal Superior Court opinion I"); Commonwealth v Africa, No. 2031, Philadelphia 1981, No. 2234 Philadelphia 1981, No. 2284 Philadelphia 1981, No. 2115 Philadelphia 1981, No. 2116 Philadelphia 1981, slip op. at 2 (Pa. Super. June 28, 1985) ("Direct Appeal Superior Court opinion II"). As such, the trial court's opinion is the one to which the AEDPA standard of review applies.

When the trial court rendered its decision in 1982, it did not have the benefit of the Supreme Court's more recent Brady cases such as *United States v. Bagley, 473 U.S. 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)* nor *Kyles v. Whitley, 514 U.S. 419, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995)*. Williams v. Taylor teaches that ***HN5***[⬆] a state court's decision must be evaluated in light of the Supreme Court precedent that was available at the time of the state court's decision. See *Williams v. Taylor, 529 U.S. at 412*. Review of the trial court's opinion reveals that the trial judge **[*16]** did apply the relevant, available Supreme Court precedent, including *Brady, Giglio v. United States, 405 U.S. 150, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972)*, and *United States v. Agurs, 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976)*. See Trial court opinion at 6, 10-11, 13-14. Since the trial court identified the relevant Supreme Court precedent and applied that precedent, its decision cannot be found to be contrary to that precedent. See *Williams v. Taylor, 529 U.S. at 406*. Instead, under *§ 2254(d)(1)*, the appropriate question presented is whether the trial court's decision was an unreasonable application of Supreme Court precedent. See *id. at 407*.

As noted above, the petitioners provide several arguments for why they believe the demolition of the MOVE house deprived them of exculpatory evidence in violation of their rights under Brady and its progeny. The court will address each argument in turn as well as the trial court's disposition of it.

The petitioners first argue that the tree outside the 33rd Street basement window of the MOVE house could have provided for impeachment of Police Officer Robert Hurst if the tree did not **[*17]** have any bullets lodged within it because Officer Hurst testified that he saw four of five bullets fired from the 33rd Street basement window strike the tree. The trial court found this argument to be without merit for two reasons. First, Officer Hurst testified about the gunfire that took place before the police ordered a cease-fire. See Trial court opinion at 11. Officer Hurst's testimony did not concern the second round of gunfire during which Officer Ramp was killed and the other police officers and firefighters were wounded. Id. In the trial court's view, since Officer Hurst's testimony related to events that were not the actual basis for the petitioners' convictions, impeaching his testimony could hardly be regarded as exculpatory. Id. Second, the trial court noted that, at the time Officer Hurst claimed to have seen the shots come from the basement and strike the tree, a fire hose was pumping water into the basement window. Id. at 12. The videotapes played at trial showed that four shots fired from the basement passed through fire hose's water stream and struck the tree. Id. In the trial court's view, the videotapes were sufficient to provide the petitioners **[*18]** with a basis to test Officer Hurst's credibility. Id.

For the reasons which follow, the court finds that, based on the unrebutted findings of fact made by the trial court, the petitioners' claim concerning the tree lacks merit. First, after viewing videotapes of the incident, the trial court found as a fact that shots were fired from the basement of the MOVE house and struck the tree. Further, the trial court found that the shots were fired at the same time that Officer Hurst said that they were.

These fact findings must be presumed to be correct. [4] See 28 U.S.C. § 2254(e)(1). Further, these findings of fact indicate that impeachment of Officer Hurst in the area the petitioners would have liked to pursue would have been futile because he testified truthfully about the matter. Certainly, HN6[↑] evidence which could not successfully impeach a witness is not exculpatory nor material under Brady. [5]

[*19] The petitioners next argue that the demolition of the MOVE house prevented them from independently testing whether the bullets which struck the injured police officers and firefighters came from the basement of the MOVE house. The trial court adjudicated the claim by noting that, in Pennsylvania, when evidence that was destroyed is claimed to have been exculpatory, the suppression court must hear testimony from all available witnesses and review all other available sources to reconstruct the evidence as it existed prior to its destruction. See Trial court opinion at 13. Once this is done, there must be some assurance that the destroyed evidence was exculpatory. Id. The trial court found that the late Judge Marshall had complied with this procedure. Id. The trial court then explained that the available evidence did not demonstrate that it was impossible for the police officers and firemen to have been shot from the basement and so the petitioners' inability to independently test the lines of fire was not a Brady violation. Id.

At the time the trial court issued its decision, the Supreme Court had not yet issued its first decision concerning the prosecution's destruction **[*20]** of evidence. Up until, then, all of the Supreme Court cases involved the prosecution's failure to disclose existing evidence. The seminal case is California v. Trombetta, 467 U.S. 479, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984). Since Trombetta was not decided prior to the time the trial court issued its decision, it would appear that Trombetta cannot constitute clearly established Supreme Court precedent for the purpose of applying 28 U.S.C. § 2254(d)(1). See Williams v. Taylor, 529 U.S. at 412. Instead, the court must consider the Supreme Court precedent that existed in August 1982.

As noted above, all of the Supreme Court's Brady decisions before August 1982 involved existing evidence that the prosecution had failed to disclose. Because the evidence existed, it was possible to evaluate its significance to the guilt or innocence of the defendant so that one could determine whether the omitted evidence was exculpatory and material. However, when the evidence has been destroyed before its significance has been determined, it is likely to be impossible to determine whether the evidence was exculpatory or material. As will be seen, **[*21]** such is not the case here.

The prosecution's version of events is that the police officers and firemen who were struck by bullets were shot from the basement. The petitioners maintain that, instead, the police officers and firemen were struck by stray bullets fired by police officers. If the MOVE house had not been demolished, the petitioners believe they could have hired an expert who would have reviewed the sight lines and testified that the bullets which struck the police officers and firefighters could not have come from the MOVE house.

The trial court adjudicated this claim by noting that the videotapes of the confrontation had been reviewed by the suppression court and the suppression court had heard testimony from witnesses at the scene concerning the events that transpired. See Trial court opinion at 14. The trial court found that there was no evidence that it was impossible for the shots which struck the police officers and firefighters to have come from the basement of the MOVE house. Id. For this reason, the trial court found the claim to be without merit. Id.

The court notes that the trial court had earlier found that the videotape testimony indicated that **[*22]** gunshots did come from the basement of the MOVE house and did strike the tree outside the MOVE house. See Trial court opinion at 12. This finding of fact makes it clear that it was not impossible for shots to have come from the MOVE house and to have struck the police officers and firefighters, who were in the vicinity of the tree. Thus, the demolition of the MOVE house did not cause the petitioners to be unable to secure favorable expert testimony. Rather, favorable expert testimony was not available in light of the videotape evidence. Since the destruction of the MOVE house did not deprive the

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[4] The petitioners have made no effort to rebut the presumption of correctness.

[5] Because the court has found that the petitioners' claim concerning the tree lacks merit under de novo review (circumscribed by the presumption of correctness for the trial court's findings of fact), the court declines to employ § 2254(d)(1)'s unreasonable application analysis. Since that analysis is more deferential than the pre-AEDPA independent review the court has employed, see Woodford v. Visciotti, 537 U.S. 19, 24, 154 L. Ed. 2d 279, 123 S. Ct. 357 (2002) (per curiam), it is unnecessary to employ it here.

petitioners of favorable evidence, there would be no Brady violation. See *Brady, 373 U.S. at 87* (holding that ***HN7***[] due process is violated when the prosecution withholds favorable evidence).

Even if the court were to apply Trombetta, the petitioners' claim would still lack merit. Trombetta teaches that, ***HN8***[] when the prosecution destroys evidence before providing it to the defendant, the court must consider whether the evidence was destroyed in good faith, whether the evidence possessed exculpatory value that was apparent before its destruction and whether the evidence **[*23]** was of such a nature that the defendant could not obtain comparable evidence by any reasonably apparent means. *Trombetta, 467 U.S. at 488-89*. In its opinion, the trial court found as a fact that the MOVE house was destroyed in good faith because the City had long-standing health and safety reasons to demolish the house as well as good reasons which arose because of the August 8, 1978 confrontation with MOVE. See Trial court opinion at 8. This finding of fact must be presumed to be correct, see *28 U.S.C. § 2254(e)(1)*, and the petitioners have made no effort to rebut the presumption. Further, since that the police were the ones who had been fired upon by the MOVE members from the basement, it cannot reasonably be argued that the police (or the prosecution) could have perceived that the MOVE house had the exculpatory value of proving that they could not be fired upon from the basement. In addition, the trial court found that the suppression court had made efforts to reconstruct the evidence that was destroyed by the police. See Trial court opinion at 12-13. Thus, two of the three Trombetta factors clearly do not support the petitioners' **[*24]** claim and the third factor is inconclusive. Further, as explained above, the MOVE house did not actually possess the exculpatory value the petitioners attribute to it. Thus, even considering Trombetta, the petitioners' claim fails.

The petitioners also argue that the demolition of the MOVE house prevented them from impeaching the testimony of prosecution witnesses who were inside the MOVE house on August 8, 1978 and who testified that: (1) shots were fired from the basement into the first floor where the witnesses were standing; (2) they observed some of the petitioners in the basement with firearms; and (3) they saw a platform in the basement with weapons on it.

The trial court adjudicated these three claims as follows. As to the first claim, the trial court noted that the petitioners had not been charged with crimes resulting from shooting at the police officers from the basement through the first floor of the MOVE house. Trial court opinion at 14. Thus, impeaching these officers would not have yielded exculpatory evidence. Id. As to the second claim, the petitioners maintain that the demolition of the MOVE house prevented them from testing the lighting conditions in the **[*25]** basement, which would have permitted them to impeach the testimony of police officers outside the MOVE house who testified they had seen some of the petitioners in the basement with firearms. The trial court adjudicated this claim by noting that the police officers who observed the MOVE members in the basement with firearms were only a few feet away from the basement windows and that there was abundant sunlight in the morning when the police officers made the observations. Trial court opinion at 14. The trial court also noted that the police officers were cross-examined at trial concerning the lighting conditions in the basement. Id. As to the last claim, the trial court noted that it lacked merit because the platform which was covered with firearms had been photographed by the police after the MOVE members were arrested and the photographs were introduced at trial by the prosecution. Id. at 15.

The trial court adjudicated the first claim by finding that, given the charges brought against the petitioners, impeachment of the police officers who were shot at on the first floor of the MOVE house would not have been exculpatory. The court finds that this is a reasonable application **[*26]** of Brady and its progeny. The trial court adjudicated the second claim by finding that preservation of the MOVE house would not have yielded evidence with which to impeach the police officers who had been fired upon outside the house. In the course of adjudicating the claim, the trial court found as a fact that there was an abundance of sunshine on the day in question. This finding of fact must be presumed to be correct. See *28 U.S.C. § 2254(e)(1)*. In light of the trial court's finding of fact, it cannot be said that it unreasonably applied Brady and its progeny. Finally, the trial court adjudicated the last claim by finding that photographs taken by the police revealed whether the platform had firearms on it when the police made it down to the basement. In addition, the trial court found as a fact that there were a large number of firearms in the basement of the MOVE house. Trial court opinion at 5. This finding of fact must be presumed to be correct. See *28 U.S.C. § 2254(e)(1)*. Preserving the MOVE house would not have changed this fact to provide exculpatory evidence. Thus, the court finds that the trial court's adjudication **[*27]** of the last Brady claim was a reasonable application of Brady and its progeny.

B. Second Claim

The petitioners' second claim is that they were denied due process when they were removed from the courtroom during their trial and were thereby denied the right to proceed pro se. The petitioners further argue that the trial court deprived them of due process by placing arbitrary conditions for their return to the trial.

The trial court reviewed this claim and found that the petitioners had been removed from the courtroom because of their "numerous episodes of outrageous behavior" which the court described as "obscene, profane and scatological." Trial court opinion at 18. The trial court then described the procedure by which it asked the petitioners whether they wished to return to the trial. Id. at 19. In the end, the court wrote the petitioners a letter describing what they needed to do in order to be readmitted to the trial. Id. The letter (which was attached to the trial court's opinion) indicated that, to be readmitted to the trial, the petitioners had to promise that they would "behave and obey the orders of the court." Id. at iii (Letter dated March 20, 1980). **[*28]** The trial court noted that the petitioners never promised to behave and obey the trial court's orders. Id. at 19. For this reason, the petitioners were never readmitted to their trial.

In the course of adjudicating the petitioners' claim, the trial court cited *Illinois v. Allen, 397 U.S. 337, 25 L. Ed. 2d 353, 90 S. Ct. 1057 (1970)*. See Trial court opinion at 18-19. Illinois v. Allen is the lead Supreme Court case which addresses how a trial court is to deal with a defendant who is disruptive. Since the trial court did cite Illinois v. Allen, its decision cannot be contrary to Supreme Court precedent. See *Williams v. Taylor, 529 U.S. at 406*. Instead, under *§ 2254(d)(1)*, the appropriate question to decide is whether the trial court's decision was an unreasonable application of Supreme Court precedent. See *id. at 407*.

Illinois v. Allen notes that ***HN9***[⬆] a defendant's right to be present during his trial is based upon the *Sixth Amendment's confrontation clause*. *Id., 397 U.S. at 338*. The Court went on to hold that, if a defendant persists in conducting himself in an manner that is disruptive of the court's proceedings, **[*29]** it is permissible for the court to remove the defendant from the trial. *Id. at 343*. Once removed, the defendant can be readmitted to his trial if he agrees "to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." Id.

In this case, the trial court found that the petitioners had engaged in disruptive conduct and had used obscene, profane and scatological language. Trial court opinion at 18. Under Illinois v. Allen, it was permissible for the trial court to remove the petitioners from the trial because of their behavior. See *Illinois v. Allen, 397 U.S. at 343*. Thus, it is apparent that the decision to do so was a reasonable application of Supreme Court precedent. Further, the trial court informed the petitioners that they could return to the trial if they promised to behave and to obey the orders of the court. These conditions are consistent with Illinois v. Allen. See *id. at 343*. Thus, the trial court's conditions for return were also a reasonable application of Supreme Court precedent. Accordingly, the petitioners cannot prevail based upon their second claim.

[*30] C. Third Claim

The petitioners argue that they were denied due process because their waiver of their right to a jury trial was invalid. The petitioners admit that, prior to trial, all of them asked to be tried without a jury. See Joint memorandum of law at 13. However, they take the position that the trial court subsequently failed to inform them of the rights they were losing by waiving a jury trial so that the trial court could ascertain whether their waiver was knowing, intelligent and voluntary.

The court notes that the petitioners raised a different argument before the trial court. After their conviction, the petitioners argued that their waiver of a jury trial was invalid because they had refused to sign a waiver form as required by Pennsylvania Rule of Criminal Procedure 1100. See Trial court opinion at 22. The trial court noted that "no challenge is advanced that this jury waiver was not made knowingly, intelligently and voluntarily, but reliance is placed solely upon the omission of defendants' signature to the form. Id.

It is apparent that the claim the petitioners presented in the trial court is different from the claim they present here. Indeed, the **[*31]** claim presented in the trial court was not based upon the federal constitution at all but, instead, was based upon an alleged violation of state procedural law.

On direct appeal to the Superior Court of Pennsylvania, only four petitioners (William Phillips Africa, Janet Holloway Africa, Edward Goodman Africa and Charles Sims Africa) pursued a claim concerning their waiver of a jury trial. See Commonwealth v. Africa, No. 2182 Philadelphia 1981, No. 2420 Philadelphia 1981, No.

2337 Philadelphia, 1981, No. 2338 Philadelphia 1981, slip op. at 3 (Pa. Super. undated) ("Direct Appeal Superior Court opinion I"). Although the Superior Court's discussion of the claim is quite brief, it does appear that, in addition to the state law issue that had been presented to the trial court, the four petitioners were also raising a federal constitutional claim that their jury trial waiver colloquies did not establish that they knowingly, intelligently and voluntarily waived their rights to a jury trial. See id., slip op. at 3-4.

For the four petitioners who did raise a federal constitutional claim in the Superior Court, it can be said that they **[*32]** properly exhausted their claim and committed no procedural default. The District Attorney does not argue otherwise. See Response to Petitions for Writ of Habeas Corpus at 15. As for the other four petitioners (Jeanine Phillips Africa, Michael Davis Africa, Delbert Orr Africa and Debbie Sims Africa), the District Attorney argues that they did commit a procedural default. Id.

The failure of four petitioners to raise their claim to the trial court and on direct appeal to the Superior Court means that the claim could only have been presented to the state supreme court in a petition for allowance of appeal, which is a discretionary appeal. See Pennsylvania Rule of Appellate Procedure 1114. This means that, for those four petitioners, the claim was not exhausted on direct appeal. *Castille v. Peoples, 489 U.S. 346, 351, 103 L. Ed. 2d 380, 109 S. Ct. 1056 (1989)* (holding that presenting a claim for the first time to the state's highest court on discretionary review does not satisfy the exhaustion requirement). Further, the claim was not presented in the PCRA [6] petition the petitioners have already filed and the time for them to file another PCRA petition has expired. See **[*33]** *42 Pa. C.S.A. § 9545(b)*. Therefore, the claim is procedurally defaulted. See *Keller v. Larkins, 251 F.3d 408, 415 (3d Cir. 2001)*.

HN10[↑] A procedurally defaulted claim cannot be reviewed unless "the [petitioner] can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[] will result in a fundamental miscarriage of justice." *Coleman v. Thompson, 501 U.S. 722, 750, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991)*. In order to demonstrate cause, the petitioner must show that "some objective factor external to the defense impeded [the petitioner's] efforts to comply with the state's procedural rule." *Id. at 753* (citation omitted). Examples of cause include: (1) a showing that the factual or legal basis for a claim was not reasonably available; **[*34]** (2) a showing that some interference by state officials made compliance with the state procedural rule impracticable; (3) attorney error that constitutes ineffective assistance of counsel. *Id. at 753-54*.

HN11[↑] The fundamental miscarriage of justice exception is limited to cases of "actual innocence". *Schlup v. Delo, 513 U.S. 298, 321-22, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995)*. In order to demonstrate that he is "actually innocent", the petitioner must present new evidence of his innocence. *Id. at 316-17*. This evidence need not be directly related to the habeas claims the petitioner is presenting because the habeas claims themselves need not demonstrate that he is innocent. See *id. at 315*. The court must consider the evidence of innocence presented along with all the evidence in the record, even that which was excluded or unavailable at trial. *Id. at 327-28*. Once all this evidence is considered, the petitioner's defaulted claims can only be reviewed if the court is satisfied "that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id. at 327.*

[*35] The four petitioners (Jeanine Phillips Africa, Michael Davis Africa, Delbert Orr Africa and Debbie Sims Africa) have made no effort to demonstrate cause and prejudice to excuse their default, nor have they provided any new evidence of their innocence. For this reason, those four petitioners cannot obtain relief based upon the third claim. The court will review the claim for the benefit of the other four petitioners (William Phillips Africa, Janet Holloway Africa, Edward Goodman Africa and Charles Sims Africa).

The Superior Court adjudicated the claim as follows:

> Our study of the record reveals that the trial judge conducted a quite exhaustive jury waiver colloquy during which appellants availed themselves of the opportunity to ask questions concerning the waiver. We are of the view, therefore, that appellants knowingly and intelligently waived their rights to a jury trial.

Direct Appeal Superior Court opinion I at 4.

HN12[↑] The *Sixth Amendment* guarantees state criminal defendants the right to trial by jury. See *Duncan*

[6] PCRA refers to Pennsylvania's Post Conviction Relief Act, *42 Pa. C.S.A. § 9541 et seq.*

v. Louisiana, 391 U.S. 145, 159, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968). In order to be valid, a criminal defendant's waiver of his Sixth Amendment right to **[*36]** a jury trial must be knowing and intelligent. See Adams v. United States ex rel. McCann, 317 U.S. 269, 278-81, 87 L. Ed. 268, 63 S. Ct. 236 (1942). A knowing and intelligent waiver is required to insure that the defendant can forgo a jury trial "when his competent judgment counsels him that his interests are safer in the keeping of the judge than of the jury." Id. at 278.

In its adjudication of the claim, the Superior Court did not cite Adams or any other United States Supreme Court precedent. [7] Yet, the Superior Court did find that the petitioners' waiver of their right to a jury trial was knowing and intelligent, which is what Adams requires. Thus, in the court's view, the Superior Court's adjudication of the claim was not contrary to Supreme Court precedent.

[*37] The Superior Court found that trial court had an extensive waiver colloquy prior to accepting the petitioners' waiver and that the petitioners had the opportunity to ask the trial court questions concerning their waiver of a jury trial and that the petitioners did ask questions. In the Superior Court's view, this was sufficient to insure that their waiver was knowing and intelligent. For the petitioners to prevail, the court must determine that this conclusion constituted an unreasonable application of Supreme Court precedent.

The trial transcript reveals that each defendant requested to waive his or her right to a jury trial. (N.T. 12/11/79 at 2.73, 2.83, 2.90, 2.97, 2.105, 2.109, 2.131-2.132, 2.138-2.139). Thereafter, the trial court did in fact have a fairly extensive colloquy with the petitioners. (N.T. 12/11/79 at 2.139-2.145). During this colloquy, the trial court told the petitioners many things, including how the jury panel was selected, that the petitioners would have the right to participate in the selection of the jury through the exercise of causal and peremptory challenges, that in a waiver trial the judge would be the sole finder of fact, that, by contrast, a jury must **[*38]** be unanimous to render a verdict, and that, if the jury was not unanimous, a mistrial would be declared with a retrial to follow. Id. The defendants then asked two questions, only one of which actually implicated the decision to waive a jury trial. [8] Id. at 2.145-47. The trial court then addressed other aspects of the decision to waive a jury trial, including asking the petitioners whether any threats or promises had been made to them to induce them to waive their right to a jury trial. Id. at 2.148-149. Charles Sims Africa then responded on behalf of all the petitioners; he stated that the petitioners did not yield to threats and that, if any threats had been made, they were not the cause of the decision to waive a jury trial. Id. at 2.149. The trial court then reminded the petitioners that it had earlier defined the various charged offenses to them as well as the penalties that could result. Id. The trial court then informed the petitioners that any sentences imposed if they were convicted could be consecutive. [9] Id. at 2.150. The trial court then concluded that the petitioners' decision to waive a jury trial was voluntary, knowing and intelligent. Id. **[*39]** at 2.150-2.151.

It is true that the Superior Court's adjudication of the petitioners' claim was quite brief, and **[*40]** it did not cite any Supreme Court precedent. However, review of the record the trial court created when conducting the waiver colloquy, certainly supports the Superior Court's conclusion the petitioners knowingly and intelligently waived their right to a jury trial. Indeed, it was reasonable for the Superior Court to reach the conclusion it did. Thus, the Superior Court's conclusion survives the "unreasonable application" prong of the test established by 28 U.S.C. § 2254(d)(1) and the petitioners cannot obtain habeas relief. See Woodford v. Visciotti, 537 U.S. 19, 27, 154 L. Ed. 2d 279, 123 S. Ct. 357 (2002) (per curiam).

D. Fourth Claim

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[7] The Superior Court's failure to cite Supreme Court precedent does not cause its adjudication of the petitioners' claim to be contrary to Supreme Court precedent. See Early v. Packer, 537 U.S. 3, 8, 154 L. Ed. 2d 263, 123 S. Ct. 362 (2002) (per curiam).

[8] The question which did not pertain to the decision to waive a jury trial was: "If you are saying that we are presumed innocent until proven guilty, how come we have been in jail sixteen months?" (N.T. 12/11/79 at 2.145). The question which did pertain to the decision to waive a jury concerned whether people who did not vote could be on the panel of prospective jurors. Id. at 2.146. The trial court reiterated that non-voters would not be on the panel of prospective jurors. Id. Delbert Orr Africa then explained that such a method of jury selection was biased and that MOVE members had no interest in having a jury that was selected in this fashion. Id. at 2.146-2.147.

[9] Earlier in the day, during the waiver of counsel colloquy, the trial court had defined the charged offenses and indicated what the maximum penalties were for the charged offenses. (N.T. 12/11/79 at 2.22-2.27).

The petitioners argue that were denied due process because the evidence presented at trial was insufficient to support their convictions for third degree murder, conspiracy, aggravated assault and attempted murder. They maintain that the evidence presented at trial was insufficient to prove the gunshots which killed Officer Ramp and wounded the other victims came from the MOVE house. They also maintain that, even if one assumes the shots did come from the MOVE house, there was insufficient evidence of shared criminal **[*41]** intent presented at trial. In that regard, the petitioners take the position that there was no evidence presented that the women in the basement of the MOVE house, Janet Holloway Africa, Jeanine Phillips Africa and Debbie Sims Africa, shared any criminal intent with the men.

The petitioners' claim that the evidence presented at trial was insufficient to support their convictions for third degree murder, conspiracy, aggravated assault and attempted murder is governed by *Jackson v. Virginia[[, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)*. Under Jackson:

> ***HN13***[] The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction … does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt'. . . . Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt . . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to **[*42]** weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review, all of the evidence is to be considered in the light most favorable to the prosecution.

Jackson v. Virginia, 443 U.S. at 318-319 (citations omitted) (emphasis as in original). In addition, where historical facts support conflicting inferences, the habeas court engaging in sufficiency of the evidence review must presume that the trier of fact resolved any such conflicts in favor of the prosecution. *Id. at 326*. Finally, the Third Circuit has explained that, ***HN14***[] when applying the sufficiency of the evidence test, the habeas court should "look to the evidence the state considers adequate to meet the elements of a crime governed by state law." *Jackson v. Byrd, 105 F.3d 145, 149 (3d Cir. 1997)*. This must be done because the elements of the criminal offense are defined by state law. See *Jackson v. Virginia, 443 U.S. at 324 n.16*.

At the outset, it **[*43]** must be acknowledged that ***HN15***[] the Jackson v. Virginia standard is not an exacting one. The evidence presented at trial is viewed in the light most favorable to the prosecution and the reviewing court must presume that the finder of fact resolved all conflicting inferences raised by the evidence in favor of the prosecution. This leaves little room to find that the evidence was insufficient. Further, the standard of review provided by *28 U.S.C. § 2254(d)(1)* restricts even further the ability of this court to grant habeas relief when the state court has adjudicated the merits of a federal claim. Given the restrictive standards of review imposed upon the court, it should come as little surprise to the parties that the court finds it cannot grant habeas relief based on this claim.

The trial court began its consideration of the petitioners' claim by summarizing the evidence produced at trial. See Trial court opinion at 32-33. After doing so, the trial court stated its conclusion that the evidence presented at trial was sufficient to sustain the petitioners' convictions for third degree murder, conspiracy, aggravated assault and attempted murder. Id. at 33. **[*44]** The trial court then stated the Pennsylvania test for sufficiency of the evidence. Id. The trial court then went on to explain why it believed the convictions could be sustained based on the theories of co-conspirator and accomplice culpability. Id. at 33-36.

Although it is true that the trial court did not cite Jackson v. Virginia, that alone is not sufficient to find that its adjudication of the sufficiency claim was contrary to Supreme Court precedent. See *Early v. Packer, 537 U.S. 3, 8, 154 L. Ed. 2d 263, 123 S. Ct. 362 (2002)* (per curiam). Instead, the court must focus on whether the reasoning and result of trial court's decision contradicted Supreme Court precedent. See id. Thus, the court must look at the state law test the trial court applied.

The trial court described the state law test for sufficiency of the evidence as follows:

> In determining whether the evidence presented is sufficient to sustain the conviction, the test is whether, accepting as true all of the evidence of the Commonwealth and all of the reasonable inferences arising therefrom, upon which, if

believed, a fact finder could properly have based its verdict, it is sufficient **[*45]** in law to prove the elements of the crime in question beyond a reasonable doubt.

Trial court opinion at 33 (citing *Commonwealth v. Bradley, 481 Pa. 223, 392 A.2d 688 (Pa. 1978)*, cert. denied, *440 U.S. 938, 59 L. Ed. 2d 498, 99 S. Ct. 1286 (1979)*). This test is similar to the Jackson v. Virginia test because it also requires viewing the evidence in the light most favorable to the prosecution, drawing all reasonable inferences in favor of the prosecution and then determining whether the evidence, so viewed, could sustain the elements of each offense. Since it is similar to Jackson v. Virginia, it cannot be said that the trial court's reasoning contradicted Jackson v. Virginia. Further, the petitioners have not cited, nor is the court aware of, any Supreme Court decision concerning sufficiency of the evidence which reaches a result which the state court's decision contradicts. Thus, the trial court's adjudication of the petitioners' claim is not contrary to Supreme Court precedent. See *Early v. Packer, 537 U.S. at 8*.

The question remains whether the trial court's adjudication of the petitioners' claim was an unreasonable application **[*46]** of Supreme Court precedent. The court will consider the male petitioners first.

HN16[↑] Pennsylvania law allows the fact finder to determine that a conspiracy exists based on the "relation, conduct or circumstances of the parties," as well as the acts of the parties. Trial court opinion at 34. The statement of any co-conspirator is admissible against all the others. Id. Pennsylvania law holds that all co-conspirators are criminally responsible for the acts of any co-conspirator. Id. Pennsylvania law also holds accomplices liable for the acts of other accomplices. Id. at 35. Only "the slightest degree of cooperation," is required for conviction as an accomplice. Id. As for third degree murder, it is necessary to prove malice. Id. Malice exists where the defendant kills someone with the intent to kill, with the intent to inflict serious bodily harm or while acting with conscious disregard of an unjustified and extremely high risk that his actions might cause serious bodily harm. Id. Malice can be inferred from threats made prior to the killing and from the use of a deadly weapon on a vital part of the body. Id. at 36.

The trial court also **[*47]** considered the relevant evidence presented at trial. Early in its opinion, the trial court recounted the events which led to Officer Ramp's death and the wounding of the other police officers and firemen. First, the trial court noted that, early in the morning of August 8, 1978, when the police attempted to execute arrest warrants for MOVE members, all the petitioners were advised by the police that, if they vacated the premises peacefully, they would not be harmed. Trial court opinion at 5. Thereafter, a priest and a community activist issued the same assurances. Id. The trial court noted that the "entreaties were ignored and were met by the customary obscene rejoinders for which this group is noted." Id. The trial court also noted that all MOVE members retreated to the basement of the MOVE house, which contained an arsenal of firearms and ammunition. Id. Deluge fire hoses were trained on the basement windows in an effort to remove the MOVE members. Id. Shots were fired from the basement of the MOVE house, some of which were seen traversing through the streams of water. Id. The police returned fire. Id. After a time, a cease fire order was issued by a deputy **[*48]** police commissioner. Id. During the cease fire, more shots came from the MOVE house. Id. It was this gunfire which killed Officer Ramp and wounded the other police officers and firemen. Id.

The trial court also noted that evidence was presented indicating that each of the five male petitioners had held firearms during the confrontation with the police on August 8, 1978. Id. at 32. The trial court noted as well that evidence had been presented which indicated that Delbert Orr Africa and Charles Sims Africa had threatened to kill police officers on August 8, 1978. Id. Further, the trial court found as a fact that the weapon used to kill Officer Ramp and to wound two other police officers was found in the basement of the MOVE house. Trial Court opinion at 36. This was the same type of weapon that William Phillips Africa and Delbert Orr Africa had been seen handling during the confrontation with the police. Id. at 32, 36.

Based on the evidence the trial court considered and based on the requirement that reasonable inferences be drawn in favor of the prosecution, a reasonable factfinder could easily find that some of the male petitioners **[*49]** had threatened to kill police officers on August 8, 1978, that all the male petitioners had the means to do so, that all of them choose to stay in the basement of the MOVE house even though they could have left without incident, that, while all were in the basement, some of them (perhaps all of them) fired at the police, that one (perhaps more than one) of the male petitioners fired the shots that had killed Officer Ramp and wounded two other police officers, and that one (or perhaps more than one) of the other male MOVE

members fired the shots that wounded the other police officers and firemen. Based on these findings, it can easily be inferred that the male petitioners entered into an illicit agreement to cause seriously bodily harm or death to police officers and firemen that were on the scene. It can also easily be inferred that there was more than a slight degree of cooperation between the male petitioners. In addition, it can easily be inferred that one or more of the male petitioners fired the shots which killed Officer Ramp and wounded the other police officers and firefighters. In short, there was sufficient evidence to find that the male petitioners were guilty of third degree **[*50]** murder, conspiracy, aggravated assault and attempted murder. It was certainly reasonable for the trial court to have so determined and, therefore, the trial court's conclusion was not an unreasonable application of Supreme Court precedent. See *Early v. Packer, 537 U.S. at 11*.

The trial court's consideration of the female petitioners' claim was different. Unlike with the men, the trial court did not cite any evidence which indicated that the women brandished or handled firearms on August 8, 1978. The trial court also did not seriously consider whether any of the women actually shot at any police officer or fireman. Instead, their culpability primarily arose from the existence of a conspiracy to commit murder and seriously bodily harm. The trial court considered as part of the evidence of this conspiracy, events that took place on May 20, 1977 and June 4, 1977. [10] The events of May 20, 1977 and June 4, 1977 are quite important as to the culpability of the female petitioners because, as noted above, there was little evidence of precisely what aggressive actions they may have taken on August 8, 1978.

[*51] The trial court noted that, on May 20, 1977, Janet Holloway Africa, and four of the men, were observed brandishing firearms on a platform outside the MOVE house. Trial court opinion at 25 & n.5. While they were doing so, Delbert Orr Africa warned Inspector George Fencl that any attempt to remove MOVE members from the house would be resisted with firearms and explosives. Id. at 25. Similar threats were made by Janet Holloway Africa and the other three men. Id. On June 4, 1977, the police attempted to serve arrest warrants on the five petitioners who had brandished weapons and had made threats on May 20. Id. All three of the female petitioners and four other petitioners met the police in front of the MOVE house. Id & n.7. Janet Holloway Africa, Delbert Orr Africa and Michael Davis Africa were armed with clubs and they threatened to kill any police officers who came nearer. Id. at 25-26. The trial court noted that, under Pennsylvania law, this evidence was relevant to prove the petitioners' motive and intent with respect to the events of August 8, 1978. Id. at 26-27. The trial court specifically found that, under Pennsylvania law, this evidence was relevant to **[*52]** prove both that the petitioners had the requisite intent to commit murder, attempted murder and aggravated assault as well as to prove that they had the intent to conspire to commit these crimes. Id. at 27, 29-31.

When the trial court adjudicated the female petitioners' sufficiency of the evidence claim, it relied upon the following:

> All female defendants were present in the house and joined the men in the basement. At the onset of the police efforts to reduce the defendants to custody, all defendants were afforded numerous opportunities to vacate the premises without harm. None of the women complied and all joined their male counterparts where the arms and ammunition were stored. All of the women were involved in one or both of the May 20 and June 4, 1977 incidents and joined in the uttering of threats and the brandishing of weapons. It should not be overlooked that the defendants, during the various colloquies and throughout the trial, frequently proclaimed that they were a "family" and acted in unity.

Id. at 32-33.

It must be remembered that the question this court must answer is whether the trial court's adjudication of the female petitioners' claim was **[*53]** a reasonable application of the Supreme Court's sufficiency of the evidence precedent. In making this determination, it is permissible for the court to consider decisions of lower federal courts which have applied Supreme Court precedent. See *Marshall v. Hendricks, 307 F.3d 36, 71 n.24 (3d Cir. 2002)*; *Moore v. Morton, 255 F.3d 95, 104 n.8 (3d Cir. 2001)*. One such decision is Jackson v. Byrd, which teaches that, when deciding ***HN17*** [⬆] whether evidence is sufficient to sustain a conviction, this court should "look to the evidence the state considers adequate to meet the elements of a crime

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[10] The trial court determined that evidence concerning what occurred on May 20, 1977 and June 4, 1977 was relevant and admissible under state law. See Trial court opinion at 25-31. This court cannot reexamine that determination and must accept it. See *Estelle v. McGuire, 502 U.S. 62, 67-68, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991)*.

governed by state law." *Jackson v. Byrd, 105 F.3d 145, 149 (3d Cir. 1997)*. [11] In the context of this case, this means the court must consider the events of May 20, 1977 and June 4, 1977 as relevant evidence with respect to all the charges for which the female petitioners were convicted.

[*54] The evidence of May 20, 1977 and June 4, 1977 is particularly relevant with respect to the female petitioners because, on those days, the women participated with the men in brandishing weapons and threatened to kill or otherwise harm police officers if they attempted to arrest MOVE members. It would be reasonable for a factfinder to consider this evidence and, based on it, to determine that the female petitioners entered into a conspiracy with the men to kill or injure police officers on May 20, 1977 and June 4, 1977. Therefore, the trial court's finding that the evidence was sufficient to support the female petitioners' conviction for conspiracy to kill or injure police officers was a reasonable application of Supreme Court precedent.

Once the female petitioners were part of the conspiracy, Pennsylvania law establishes that they would be held culpable for the acts the male petitioners performed on August 8, 1978. As the court has explained above, there was sufficient evidence for a reasonable factfinder to determine that the male petitioners committed third degree murder, attempted murder and aggravated assault on August 8, 1978. Thus, since the female petitioners are culpable for **[*55]** the acts of the male co-conspirators, the evidence which was sufficient to support the male petitioners' convictions for third degree murder, attempted murder and aggravated assault was also, necessarily, sufficient to support the female petitioners' convictions for third degree murder, attempted murder and aggravated assault. This court must respect Pennsylvania's determination of what evidence should be considered adequate to satisfy the elements of Pennsylvania crimes. *Jackson v. Byrd, 105 F.3d 145, 149 (3d Cir. 1997)*. Therefore, the court finds that the trial court's conclusion that there was sufficient evidence to support the female petitioners' convictions for third degree murder, attempted murder and aggravated assault was also a reasonable application of Supreme Court precedent.

E. Fifth Claim

The petitioners argue they were denied their *Sixth Amendment* right to the effective assistance of counsel when their trial counsel failed to request a change of venue based on the extreme and prejudicial pretrial publicity. The petitioners mention several media reports prior to trial which they believe rendered the possibility of obtaining a fair and unbiased **[*56]** factfinder in Philadelphia quite unlikely.

The petitioners claim that counsel were ineffective for failing to request a change of venue prior to trial. However, they fail to note that, prior to trial and into the first month of trial, they represented themselves; counsel had stand-by status. Because the petitioners were representing themselves, they, not stand-by counsel, were responsible for the failure to file a pretrial motion for change of venue. *Faretta v. California, 422 U.S. 806, 834, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975)*. Further, the petitioners cannot argue that the decisions they made prior to trial amounted to ineffective assistance of counsel. *Id. at 834 n.46*.

When the Superior Court adjudicated the petitioners' claim, it also found that the claim lacked merit because the petitioners were pro se at the time a pretrial motion for change of venue should have been filed. See *Commonwealth v. Africa, 790 A.2d 335, (Pa. Super. 2001)* ("Superior Court PCRA opinion"). As noted above, this is a correct application of Supreme Court precedent. Since the Superior Court's adjudication of the petitioners claim correctly **[*57]** applied Supreme Court precedent, a fortiori, the adjudication of the claim was also not contrary to nor an unreasonable application of Supreme Court precedent. See *Weeks v. Angelone, 528 U.S. 225, 237, 145 L. Ed. 2d 727, 120 S. Ct. 727 (2000)*.

F. Sixth Claim

The petitioners argue that they were denied their *Sixth Amendment* right to the effective assistance of counsel when trial counsel failed to pursue evidence that Officer James Ramp's injuries were inconsistent with the medical examiner's report and for failing to present expert evidence indicating that the injuries suffered by the four, wounded firemen could not have been caused

[11] It is true that Jackson v. Byrd was decided many years after the trial court adjudicated the petitioners' claim. However, that does not affect the propriety of considering that decision as an indication of what courts would view as a reasonable application of Supreme Court precedent. See *Fischetti v. Johnson, 384 F.3d 140, 2004 WL 2102711, *10 n.5 (3d Cir. 2004)*.

by the petitioners. This claim actually raises two distinct claims and the court will address them separately starting with the claim concerning Officer Ramp.

1. Officer Ramp

The petitioners maintain that, prior to trial, a Daily News article stated that Officer Ramp had been killed by a shot to the head. Further, prior to trial, the Police Commissioner stated that Officer Ramp had been shot in the head. Yet, the medical examiner's report states that Officer Ramp was killed by a shot to the left side of the chest. The petitioners argue **[*58]** that this inconsistency should have been pursued by counsel at trial and that counsel were ineffective for having failed to do so.

HN18[] Claims of ineffective assistance of counsel must be evaluated against the two-part test announced in *Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)*. First, the petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id. at 688*. In making this determination, the court's scrutiny of counsel's performance must be "highly deferential." *Id. at 689*. The court should make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. In short, the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

Second, the petitioner must show that counsel's deficient performance **[*59]** "prejudiced the defense", by, "depriving the [petitioner] of a fair trial, a trial whose result is reliable." *Id. at 687*. That is, the petitioner must show that "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id. at 695*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome," *id. at 694*, but it is less than a preponderance of the evidence. *Id. at 693, 694*.

HN19[] It is not necessary that the reviewing court evaluate the two parts of the test in the order suggested above, that is, performance first, then prejudice. *Id. at 697*. Finally, if the petitioner fails to satisfy either part of the Strickland test, there is no need to evaluate the other part as his claim will fail. Id.

The Superior Court adjudicated the petitioners' claim as follows:

> While the precise nature of their claim is obscure, we note that the trial court saw a videotape of Officer Ramp's murder and saw a bullet come from MOVE headquarters and strike Officer Ramp, who was shot during a police cease **[*60]** fire. Appellants refer to no evidence that changes this fact. We also note that during Appellants' direct appeal, we rejected a challenge to the sufficiency of the evidence supporting the convictions. Hence, this claim entitles them to no relief.

Superior Court PCRA opinion at 10-11.

The Superior Court's adjudication of the petitioners' claim is rather terse and does not explicitly mention the inquiry required by Strickland[[. It appears that the Superior Court had difficulty understanding the precise nature of the petitioners' claim and so the basis for its adjudication of the claim is somewhat unclear. In light of what the Superior Court did discuss, it appears that it believed the petitioners had failed to establish prejudice. However, rather than attempt to fit the Superior Court's adjudication within the framework Strickland has established and then attempt to determine whether the Superior Court's adjudication was contrary to or an unreasonable application of Strickland, the court will simply review the claim de novo because it will still fail.

This court agrees with the Superior Court's observation that the petitioners' claim is very poorly stated, **[*61]** yet it appears that the petitioners believe that trial counsel should have used the Daily News article and the Police Commissioner's statement as a starting point to locate other evidence that could have cast doubt upon the medical examiner's opinion that Officer Ramp's death was caused by a gunshot wound to the left side of the chest.

The problem with this claim is that the petitioners have failed to demonstrate that there is any reason to believe that trial counsel could have found other, favorable evidence. Even now, the petitioners have not presented any evidence to support their contention that trial counsel failed to uncover favorable evidence. They could have done so in this court by submitting affidavits to support their claim. They have not. In the absence of any indication that trial counsel could have found favorable evidence, it is not possible to determine that their performance fell below an objective standard of

reasonableness. Further, since the petitioners have not produced the evidence they assert trial counsel should have discovered, there is no way to find that they were prejudiced by what the court assumes was counsel's failure to look for the evidence. [12] Since **[*62]** the petitioners have failed to provide any basis to satisfy either part of the Strickland test, their claim must fail. *Strickland, 466 U.S. at 697*.

2. The Firemen

The petitioners maintain that the four firemen were injured by shotgun pellets. Further, they argue that only two shotguns were recovered from the MOVE house and both were fully loaded. In addition, they contend that no spent shotgun shells were recovered from the MOVE house. They argue that these combined facts indicate that the firemen were not injured by shotguns fired from the MOVE house and that trial counsel were ineffective for having failed **[*63]** to present expert testimony to that effect.

This claim was raised in the petitioners' Superior Court brief but it was not adjudicated by the Superior Court. However, the claim was adjudicated by the PCRA court. It is that decision which the court will consider.

The PCRA court adjudicated the petitioners' claim as follows:

> Defendants also claim that back-up counsel was ineffective for failing to present expert testimony about the shooting of the four firefighters during the confrontation on August 8, 1978. They allege that because no fired shotgun shell casings were found in the MOVE basement, it is unlikely that any of the firefighters wounded by shotgun pellets were shot by MOVE members. Defendants have supplied the affidavit of Mr. George E. Fassnacht, a forensic consultant in firearms, ammunition and explosive ordinance, to support their claim about the firefighters' injuries. Mr. Fassnacht states "the absence of any fired shotgun shells indicated that the recovered shotguns [from the MOVE house basement] were not fired during the incident." Affidavit of Mr. George Fassnacht, August 10, 1999. This is an assumption, not irrefutable proof that the defendants did not shoot **[*64]** and wound the firemen in question. Mr. Fassnacht's statement is not sufficient evidence for this court to believe that backup counsel's alleged ineffectiveness so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. Since defendants were representing themselves, it was their burden to obtain expert evidence prior to trial. As such, this claim is meritless.

Commonwealth v. Africa, September Term 1978 Nos. 101, 129, 157, 185, 1473, 1513, 1533, 1573, slip op. at 21 (Phila. Co. Sept. 20, 2000) ("PCRA court opinion").

To the extent the petitioners contend that trial counsel were ineffective prior to trial for failing to have obtained expert evidence concerning the firemen's injuries, the claim is foreclosed by the fact that they were pro se prior to trial and into the first few weeks of trial. During the time the petitioners were representing themselves, they, and not stand-by counsel, were solely responsible for obtaining evidence and the consequences that flow from the failure to do so. *Faretta v. California, 422 U.S. at 834*. Further, the petitioners may not argue that they rendered ineffective **[*65]** assistance to the themselves by failing to obtain the evidence. *Id. at 834 n.46*. The PCRA court so held and its decision in this regard was not contrary to nor an unreasonable application of Supreme Court precedent. See *Weeks v. Angelone, 528 U.S. at 237*.

The petitioners' claim can also be understood to challenge trial counsel's performance once the petitioners were removed from the courtroom and counsel took over the trial of the case. The PCRA court adjudicated this aspect of the petitioner's claim by finding that the failure to obtain expert evidence prior to trial was the responsibility of the petitioners inasmuch as they were pro se at that time and that their failure to obtain expert evidence prior to trial absolved counsel of the responsibility to do so once counsel took over the trial. The PCRA court also found that the petitioners failed to demonstrate prejudice. [13] The court will

[12] The Superior Court did not determine whether trial counsel ever attempted to locate favorable evidence. Further, since there has been no evidentiary hearing in this court, the court does not know whether trial counsel made the attempt. Solely for the purpose of adjudicating the petitioners' claim, the court assumes that not even one of the petitioners' attorneys made the effort.

[13] The PCRA court concluded that the petitioners had failed to demonstrate "that backup counsel's alleged ineffectiveness so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place."

consider whether the PCRA court's adjudication of the claim was contrary to or an unreasonable application of Supreme Court precedent. In doing so, the court will first consider whether counsel can be found ineffective in the circumstances that arose in this **[*66]** case.

The petitioners have not cited, nor has the court found, any Supreme Court decision which is factually analogous to this one. That is, the petitioners have not cited, nor has the court found, any Supreme Court ineffective assistance decision where the defendant was pro se prior to trial and into the beginning of trial and had stand-by counsel throughout, where, thereafter, the defendant lost both the right to continue pro se and the right to attend the trial, where stand-by counsel took over the defense, and where it is claimed that counsel was ineffective **[*67]** for having failed to obtain evidence. In the absence of closely analogous Supreme Court precedent, this court simply cannot find that the PCRA court's decision was contrary to Supreme Court precedent. *See Fischetti v. Johnson, 384 F.3d 140, 2004 WL 2102711, *8 (3d Cir. Sept. 22, 2004)*.

The question remains whether the PCRA court's decision was an unreasonable application of Supreme Court precedent. In making this determination it is permissible to consider the decisions of the lower federal courts. *384 F.3d 140, [WL] at *7*. The court's research has only discovered one case which is, to a limited degree, helpful. The case is *Abu-Jamal v. Horn, 2001 U.S. Dist. LEXIS 20813, Civ. A. No. 9905089, 2001 WL 1609690 (E.D. Pa. Dec. 18, 2001)*. In Abu-Jamal, the defendant had been pro se and had the assistance of stand-by counsel before trial and during jury selection. However, the defendant's pro se status was terminated on the first day of trial. *2001 U.S. Dist. LEXIS 20813, [WL] at *62*. In spite of losing his pro se status, the defendant nonetheless retained control over trial strategy. *2001 U.S. Dist. LEXIS 20813, [WL] at *54*. When the court reviewed claims that trial counsel rendered ineffective assistance by failing to investigate, prepare **[*68]** and present an affirmative defense, counsel's conduct was reviewed under Strickland, with due regard for the defendant's control over trial strategy. *Abu-Jamal, 2001 U.S. Dist. LEXIS 20813, 2001 WL 1609690, *58*.

There is one clear distinction between *Abu-Jamal* and this case. In Abu-Jamal, the defendant maintained control over trial strategy even after he lost his pro se status. That was not the case here because all petitioners were removed from trial once they lost their pro se status and there is no indication that they exercised any control over what took place at trial once they were removed. This is an important fact and the court finds that Abu-Jamal provides little guidance concerning whether the PCRA's court decision was an unreasonable application of Supreme Court precedent.

In the court's view, there is both an absence of Supreme Court precedent and an absence of lower federal court precedent that is analogous to the factual circumstances that occurred in this case. Faced with the complete absence of any analogous federal precedent, this court cannot say that the PCRA court unreasonably applied Supreme Court when it concluded that the petitioners' failure to **[*69]** obtain expert evidence at the pre-trial stage absolved their counsel of responsibility for the failure to obtain expert evidence once the petitioners lost their pro se status and trial counsel took over responsibility for the defense. Accordingly, the court finds that the petitioners cannot be afforded habeas relief on the claim. [14]

G. Seventh Claim

The petitioners argue that they were denied their *Sixth Amendment* right to the effective assistance of counsel when trial counsel failed to investigate and present a claim of self-defense. They contend that trial counsel should have presented evidence of acts of police brutality committed against MOVE prior to **[*70]** August 8, 1978 as well as evidence of the state of mind of the petitioners during the August 8, 1978 confrontation.

The Superior Court adjudicated the petitioners' claim as follows:

> Appellants argue that trial counsel were ineffective for failing to present claims of self-defense with respect to the murder of Officer Ramp. However, as Appellants continually concede, their defense at trial was that police bullets were responsible for

PCRA court opinion at 21. The Supreme Court has described prejudice as existing where the attorney's error causes the result of the trial to be unreliable. See *Strickland, 466 U.S. at 687*.

[14] There is no need to consider the PCRA court's alternative holding that the affidavit of George E. Fassnacht failed to establish prejudice. See *Strickland, 466 U.S. at 697* (holding that, if a defendant fails to establish either part of the Strickland test, there is no need to consider the other part and the claim fails).

> Officer Ramp's death and the injuries to the other officers; indeed they continue to maintain this position in their appellate briefs. A claim of self-defense is not available to one who denies committing the act. *Commonwealth v. Mayfield[[, 401 Pa. Super. 560, 585 A.2d 1069 (Pa. Super.]]1991)*.

Superior Court PCRA opinion at 11 (emphasis as in original).

The Superior Court adjudicated the petitioners' claim by finding that trial counsel were not ineffective for failing to raise a defense that was not available to the petitioners under Pennsylvania law. The Superior Court's conclusion, that, under Pennsylvania law, the petitioners could not raise a claim of self defense because they declined to admit they had **[*71]** killed Officer Ramp, is one which this court cannot reexamine. See *Estelle v. McGuire, 502 U.S. 62, 67-68, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991)*. Thus, for this court, the question presented is whether the Superior Court's conclusion that trial counsel could not be ineffective for failing to raise a claim or defense that is foreclosed by Pennsylvania law, is contrary to or an unreasonable application of Supreme Court precedent.

HN20[↑] The Supreme Court has never held that an attorney could render ineffective assistance for failing to raise a claim or defense that is foreclosed by the law. Thus, the Superior Court's adjudication of the petitioners' claim is not contrary to Supreme Court precedent. See *Williams v. Taylor, 529 U.S. at 405-06*. Finally, in accordance with the Superior Court's reasoning, the Third Circuit has held that an attorney cannot be ineffective for failing to raise a claim or defense that lacks merit. See *Parrish v. Fulcomer, 150 F.3d 326, 328-29 (3d Cir. 1998)* (citing *Moore v. Deputy Commissioners of SCI Huntingdon, 946 F.2d 236, 245 (3d Cir. 1991))*. Accordingly, the Superior Court's adjudication of the petitioners' **[*72]** claim is not an unreasonable application of Supreme Court precedent. See *Moore v. Morton, 255 F.3d at 104 n.8* (indicating that the decisions of the lower federal courts can provide guidance concerning whether a state court's application of Supreme Court precedent was reasonable).

H. Eighth Claim

The petitioners argue that they were denied their *Sixth Amendment* right to the effective assistance of counsel when trial counsel undermined the petitioners' rights to a fair trial by publicly stating during the trial that the trial court could not find the petitioners innocent of the charges. The petitioners note that their attorneys were interviewed by a Philadelphia Inquirer reporter on the last week of February 1980 and that the interview appeared in print on March 2, 1980. The trial was ongoing at this time. The petitioners also argue the article reveals that their attorneys believed, based on the trial court's off-the-record comments, that the trial court had already made up its mind to convict the petitioners in spite of the fact that all the prosecution's evidence had not yet been presented. The petitioners argue their attorneys rendered ineffective assistance **[*73]** by not moving for a mistrial based upon the trial court's statements which had led them to believe that the trial court had already decided to convict them.

The first part of the petitioners' claim was adjudicated by the Superior Court as follows:

> Appellants argue that trial counsel were ineffective when they indicated in a newspaper interview that they doubted whether their clients would be found innocent. While the statements indicate a pessimistic outlook for their clients' chances for success, there is no indication that counsel did anything other than represent Appellants in accordance with their legal obligations. Since, in this portion of their briefs, Appellants point to no specific instances of conduct that would require the grant of a new trial due to trial counsels' ineffectiveness, and merely are upset with their lawyers' correct and professional assessment of their chances at success, we decline to grant a new trial on the basis of the newspaper interviews.

Superior Court PCRA opinion at 11. The second part of the petitioners claim was not adjudicated by the Superior Court but it was adjudicated by the PCRA court. The PCRA court's adjudication was as follows: **[*74]**

> Defendants also claim that the Inquirer article indicates that Judge Malmed made statements to back-up counsel during the trial which led them to believe that he had made up his mind to convict the male defendants before all the evidence was presented. Defendants argue that back-up counsel should have moved for a mistrial at this time based on Judge Malmed's alleged statements. Nowhere in this article, or in defendants' PCRA petition is it alleged that Judge Malmed actually told back-up counsel before the trial ended that he had made an

> irreversible decision about any of the defendants' guilt. Neither the article, nor defendants' PCRA petition either quotes or paraphrases a single statement from Judge Malmed on this issue. Defendants' PCRA petition does not contain any affidavits which show that Judge Malmed ever stated that he had decided that the male defendants were guilty before the trial was completed. The fact that Judge Malmed may have expressed his own opinion as to how the trial was going at the time the Inquirer article was published is not a basis for a mistrial. There is no evidence that Judge Malmed's opinion at this juncture deprived defendants of a fair trial. . **[*75]** . . In addition, defendants' claims lack any arguable merit because they are not supported by any evidence.

PCRA court opinion at 24-25 (citations omitted).

The first part of the petitioners' claim involves their assertion that their trial counsel rendered ineffective assistance by granting a newspaper interview in which some of them expressed the view that it was very likely that the trial court would convict at least the men of all charges. [15] The petitioners fail to explain how this opinion, which was expressed by only some of their attorneys, constituted proof that all of their attorneys' representation had fallen below an objective standard of reasonableness and how it prejudiced the petitioners. The Superior Court's analysis of the claim seems to have concluded that the petitioners failed to make either showing.

The petitioners do not cite a single Supreme Court **[*76]** decision which holds that counsel's representation falls below an objective standard of reasonableness when he grants a newspaper interview during the trial and he expresses the view that the trial is likely to result in a conviction. Nor have the petitioners cited a single Supreme Court decision which holds that prejudice is established when an attorney grants a newspaper interview during the trial and he expresses the view that the trial is likely to result in a conviction. In the absence of such precedent, the Superior Court's adjudication of the petitioners' claim cannot be contrary to Supreme Court precedent. See *Williams v. Taylor, 529 U.S. at 405-06*;*Fischetti v. Johnson, 384 F.3d 140, 2004 WL 2102711, *8 (3d Cir. Sept. 22, 2004)*.

The petitioners have also failed to cite any lower federal court decision which supports the conclusion that their attorneys' decisions to grant a newspaper interview during the trial and express the view that the trial is likely to result in a conviction either caused their attorneys' representation to fall below an objective standard of reasonableness or that it prejudiced them. See *Moore v. Morton, 255 F.3d at 104 n.8* **[*77]** (indicating that the decisions of the lower federal courts can provide guidance concerning whether a state court's application of Supreme Court precedent is reasonable). Since they have not cited any precedent to support their claim, the court will not find that the Superior Court's adjudication of their claim was an unreasonable application of Supreme Court precedent.

The second part of the petitioners' claim involves the assertion that the comments of some their attorneys indicated that those attorneys, based upon off-the-record statements the trial court had allegedly made, believed that the trial court had already decided that the petitioners were guilty before all the evidence had been presented. The petitioners argue that their attorneys should have filed a motion for a mistrial based on their belief that the trial court had already decided the petitioners were guilty. The PCRA court adjudicated this claim by noting that the petitioners had failed to present any evidence, by way of affidavit, to support their contention that the trial court had, in fact, decided the question of the petitioners' guilt by the time the March 2, 1980 interview was published. In the absence of any **[*78]** evidence, the PCRA court concluded that the petitioners could not establish that their trial had been unfair.

The PCRA court's adjudication of the petitioners' claim was based on their failure to provide factual support for it. The performance of counsel is presumed to be reasonable, see *Strickland, 466 U.S. at 689*, and it is the defendant who must overcome the presumption. See id. The defendant also has the burden to prove prejudice. See *id. at 693*. Thus, it was correct for the PCRA court to place the burden of persuasion on the petitioners. Since the PCRA court correctly allocated the burden of persuasion to the petitioners, its adjudication of the petitioners' claim was not contrary to nor an unreasonable application of Supreme Court precedent. [16] See *Weeks v. Angelone, 528 U.S. at 237*.

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[15] The court has read the article in question. The petitioners submitted a copy of it as Exhibit 3 to their joint memorandum of law.

[16] To the extent the PCRA court's conclusion relied upon a finding of fact that the petitioners had failed to provide support for their claim, that finding of fact must be presumed to be correct. See *28 U.S.C. § 2254(e)(1)*. The petitioners bear the

[*79] I. Ninth Claim

The petitioners argue that they were denied their *Sixth Amendment* right to the effective assistance of counsel when appellate counsel failed to argue that the trial court was prejudiced by the presentation of the petitioners' arrest photos during the trial. The petitioners maintain that the prosecutor used these arrest photos in an attempt to introduce evidence of prior crimes and thereby undermine the petitioners' rights to a fair trial.

The Superior Court adjudicated this claim by holding that the trial court was presumed to have ignored any improper prior crimes evidence when it reached its verdict; therefore, no new trial was warranted. Superior Court PCRA opinion at 12 (citing *Commonwealth v. Harvey, 514 Pa. 531, 526 A.2d 330, 333 (Pa. 1987)*). The Superior Court's adjudication of the ineffective assistance claim is based upon the underlying claim lacking merit. As noted previously, the Supreme Court has never held that an attorney can render ineffective assistance for failing to raise a claim that lacks merit. This means that the Superior Court's adjudication of the ineffective assistance claim cannot be contrary to Supreme Court precedent. **[*80]** See *Williams v. Taylor, 529 U.S. at 405-06*. As the court has also noted, the Third Circuit has held that an attorney cannot be ineffective for failing to raise a claim that lacks merit. See *Parrish v. Fulcomer, 150 F.3d 326, 328-29 (3d Cir. 1998)* (citing *Moore v. Deputy Commissioners of SCI Huntingdon, 946 F.2d 236, 245 (3d Cir. 1991)*). This means the Superior Court's adjudication of the petitioners' ineffective assistance claim is not an unreasonable application of Supreme Court precedent. See *Moore v. Morton, 255 F.3d at 104 n.8*.

The question which remains is whether the Superior Court's conclusion that the underlying claim lacked merit was contrary to or an unreasonable application of Supreme Court precedent. The Superior Court determined that it could presume that the trial judge was able to disregard any improper inferences that might arise from the prosecution's use of the prior arrest photos in reaching the verdict. The Supreme Court has frequently noted that it also ***HN21***[↑] presumes that trial judges know the law and follow it when making their decisions. See e.g. *Woodford v. Visciotti, 537 U.S. 19, 24, 154 L. Ed. 2d 279, 123 S. Ct. 357 (2002)* **[*81]** (per curiam) (citing cases); *Lambrix v. Singletary, 520 U.S. 518, 532 n.4, 137 L. Ed. 2d 771, 117 S. Ct. 1517 (1997)* (citing *Walton v. Arizona, 497 U.S. 639, 653, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990)*). Since the Supreme Court applies a presumption that is similar to the one which the Superior Court applied in this case, it cannot be said that the Superior Court's adjudication of the underlying claim was contrary to or an unreasonable application of Supreme Court precedent. Instead, it was a reasonable application of the principle contained in Supreme Court decisions such as Woodford and Lambrix.

J. Tenth and Eleventh Claims

The petitioners argue that they were denied their *Sixth Amendment* rights and their right to due process by the prosecution's failure to disclose that the police had developed a plan to attack the MOVE house as early as February 1977 and by the prosecution's failure to disclose an April 28, 1978 police department memo which revealed that the police considered the deluge gun to be an offensive weapon. The petitioners argue that the plan to attack the MOVE house is disclosed in two police department reports dated February 15, 1977 and April 28, 1978. They **[*82]** contend that the prosecution failed to disclose these reports to them prior to trial in violation of *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*. The petitioners believe that the reports are exculpatory in that they could have been used to support a claim of self defense. [17]

The Superior Court adjudicated these claims by finding **[*83]** that the February 15, 1977 and the April 28, 1978 reports did not indicate that the police planned to attack the MOVE house on August 8, 1978 and that the reports were not exculpatory. Superior Court PCRA opinion at 12. Instead, the Superior Court concluded that the two reports revealed the police department's

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burden of rebutting the presumption of correctness by clear and convincing evidence, see id., and they have not attempted to do so.

[17] The *Sixth Amendment* component of this claim involves an allegation of ineffective assistance of prior counsel for having failed to raise the Brady claim during the trial or the direct appeal. The ineffective assistance component of the claim was not adjudicated by the state courts and the petitioners do not actually press the issue here. For these reasons, the ineffective assistance component of the claim will not be considered. In any event, it is difficult to see how prior counsel could have been ineffective inasmuch as the prosecution declined to produce the reports to them and, therefore, prior counsel could not have known the reports existed.

assessment of the situation at the MOVE house, the weapons available to MOVE and "an outline of how to eject Appellants from the building through non-deadly means that would least harm the occupants." Id.

As noted previously, under Brady and its progeny, the prosecution has the duty to disclose to the defendant any favorable evidence that is material to guilt or punishment. See *Kyles v. Whitley, 514 U.S. 419, 432-33, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995)*. The prosecutor's duty to disclose includes the duty to learn of and disclose any favorable evidence which others acting on his or her behalf, such as the police, have acquired. See *id. at 437*. In evaluating the prosecutor's failure to disclose favorable evidence, the prosecutor's good faith or bad faith is irrelevant. See *id. at 437-38*. Evidence is deemed material when there **[*84]** is a reasonable probability that, if the evidence had been disclosed to the defendant, the result of the proceeding would have been different. *Id. at 433-34*. In order for evidence to be material, it is not necessary that the evidence establish by a preponderance that disclosure of the evidence would have resulted in an acquittal. *Id. at 438*.

The Superior Court's adjudication of the claims indicates that it found the February 15, 1977 report and the April 28, 1978 report were not exculpatory, that is, the reports were not favorable to the defense. Thus, under Brady and its progeny, the prosecution did not have a duty to disclose the report. See *Kyles v. Whitley, 513 U.S. at 432-33* (noting that the prosecution has the duty to disclose favorable evidence). To that extent, the Superior Court's adjudication of the petitioners' claim was correct and so it was not contrary to nor an unreasonable application of Supreme Court precedent. See *Weeks v. Angelone, 528 U.S. at 237*.

The question remains of how to review the Superior Court's conclusion that the February 15, 1977 report and April 28, 1978 report were not exculpatory. **[*85]** To the extent this could be viewed as a finding of fact, it must be presumed as correct. See *28 U.S.C. § 2254(e)(1)*. Further, the petitioners have the burden to rebut the presumption of correctness by clear and convincing evidence, see id., and they have not done so.

It could also be argued that the Superior Court's conclusions should be reviewed under *28 U.S.C. § 2254(d)(2)*, which ***HN22***[↑] states that the writ of habeas corpus cannot be granted unless the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The Third Circuit has indicated that, so long as there is some evidence which could reasonably support the state court's determination, relief cannot be granted under *28 U.S.C. § 2254(d)(2)*. See *Campbell v. Vaughn, 209 F.3d 280, 291 (3d Cir. 2000)*.

The Superior Court found that the two reports were not exculpatory because they provide an assessment of the situation and weapons available to MOVE as well as "an outline of how to eject Appellants from the building through non-deadly means that would **[*86]** least harm the occupants." Superior Court PCRA opinion at 12. The court has read the February 15, 1977 report and the April 28, 1978 report. [18] The February 15, 1977 report describes police personnel and equipment that would be used to "stakeout" the MOVE house. The report raises the inference that the police were concerned about the conditions at the MOVE house and the hazards MOVE had created, for example by keeping approximately 40 dogs on the property. See February 17, 1977 report at 2. In the court's view, the report could also reasonably be understood as expressing a component of the police department's assessment of the situation at the MOVE house and the neighboring properties. In neither case is the report exculpatory. Therefore, the report could reasonably be considered not to be exculpatory and the petitioners cannot be granted habeas relief under *28 U.S.C. § 2254(d)(2)*. See *Campbell v. Vaughn, 209 F.3d at 291*.

[*87] The April 28, 1978 report described several exercises the police department had run on April 27, 1978 in an effort to determine whether certain tactics would be successful in gaining entry to the MOVE house. The report explains the relative usefulness of the fire department's water deluge gun, smoke projectiles and grenades and gas impact projectiles. See April 28, 1978 report at 1. [19] The report also expresses concerns about using each of these entry modalities. Id. at 1-2. With respect to the deluge gun, the report states that it could harm children or adults if the water stream hits them and, if used on the upper floors, it could cause the floors to collapse from the weight of the water. Id. at 1. The report goes on to address problems with using smoke projectiles or grenades. Id. at 2. The report

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[18] The petitioners attached the two reports to their joint memorandum of law as Exhibits 4 and 5.

[19] The pages of the April 28, 1978 report are not numbered. The report is only two pages long.

closes by expressing concern that MOVE members may shoot at the police, thereby causing the need to use tear gas. Id. The report states that it is important to forewarn MOVE members about the effect police tactics, such as the use of tear gas will have on them. Id. In the court's view the report does express a police motivation to seek ways to remove MOVE members **[*88]** from the house in a manner the is least harmful to them. It was reasonable for the Superior Court to have read the report in that fashion. Therefore, the petitioners cannot be granted relief under *28 U.S.C. § 2254(d)(2)*. See *Campbell v. Vaughn, 209 F.3d at 291*.

K. Twelfth Claim

The petitioners argue that they were denied their *Sixth Amendment* [20] rights and their right to due process by the prosecution's failure to disclose the statements of several witnesses who lived across the street from the MOVE house as well the screens from windows at 3300 Bearing Street. [21] According to the petitioners, 3300 Bearing Street is an address which is across the street from where the MOVE house once stood. The petitioners argue that, if prosecution had provided the screens to the defense, the screens could have been tested to demonstrate whether the bullet holes in them came from the **[*89]** outside in (thereby indicating that the shots came from the MOVE house) or from the inside out (thereby indicating that the police shot at the MOVE house from that location). The petitioners believe that shots from the inside out would have been exculpatory and material under Brady v. Maryland.

[*90] The Superior Court adjudicated the petitioners' claim as follows:

> we have examined the portion of Appellants' brief relating to the non-disclosure of test results. Their true complaint appears to be that the Commonwealth should have given the defense a screen from a window across the street from the compound. ***See*** Appellants' brief at 49-51. This claim concerns the following. The Commonwealth presented a photograph of a screen from a building on Baring Street located across from the Move headquarters. The Commonwealth presented the photograph to establish that the bullet holes in the screen came from the direction of the Move complex and not the Baring Street building. The defense objected since the screen was not available for inspection, and the trial court sustained the objection, disallowing introduction of the photograph. Despite this ruling, Appellants contend that the damage had been done since the trial court saw the photograph. However, as noted above, the trial court is presumed to have disregarded the improper evidence and followed its decision in it rulings. ***Harvey***. Hence, this issue is of no merit.

Superior Court PCRA opinion at 12-13.

[*91] It would appear that the Superior Court did not adjudicate a Brady v. Maryland claim. Instead, the Superior Court appears to have adjudicated a prosecutorial misconduct claim by relying upon the state law presumption that, in a bench trial, the trial judge is able to disregard evidence improperly introduced by the prosecutor as well as improper closing argument made by the prosecutor. See *Commonwealth v. Harvey, 514 Pa. 531, 526 A.2d 330, 333 (Pa. 1987)*. However, the claim before this court is a Brady claim, not a prosecutorial misconduct claim. [22] Since the Superior

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[20] The *Sixth Amendment* component of this claim involves an allegation of ineffective assistance of prior counsel for having failed to raise the Brady claim during the trial or the direct appeal. The ineffective assistance component of the claim was not adjudicated by the state courts and the petitioners do not actually press the issue here. For these reasons, the ineffective assistance component of the claim will not be considered.

[21] In the petitioners' statement of their claim, they refer to the prosecution failing to disclose the results of tests performed on the screens. However, when they develop their claim, the petitioners focus on the screens themselves rather than any test results. For this reason, the court has re-stated the claim to only mention the screens themselves. In addition, the petitioners mention the prosecution's failure to disclose witness statements when they state their claim. However, when they develop their claim in the joint memorandum of law, they make no mention of witness statements and, instead, solely focus on the window screens. Since the petitioners do not pursue the witness statement claim, it will not be addressed any further.

[22] A Brady claim requires the court to determine whether the evidence not disclosed by the prosecution was favorable and material, that is, whether it raises a reasonable probability that, if the evidence had been disclosed to the defendant, the result of the proceeding would have been different. *Kyles v. Whitley, 513 U.S. at 433-34*. On the other hand, ***HN23***[⬆] a prosecutorial misconduct claim requires the court to determine whether the prosecutor's improper acts so infected the trial with unfairness that the resulting conviction constitutes a denial of due process. *Donnelly v. DeChristoforo, 416 U.S.*

Court did not adjudicate the claim that is before the court, the court may exercise de novo review over the claim. See *Chadwick v. Janecka, 312 F.3d 597, 606 (3d Cir. 2002)*.

[*92] For the purpose of adjudicating the petitioners' claim, the court will assume that the holes in the screens came from the inside out, thereby supporting an inference that the police fired upon the MOVE house from that direction. Such an inference is unremarkable because the trial court found that the police did fire upon the MOVE house. Trial court opinion at 5. Thus, it would be expected that, if police were in 3300 Bearing Street, they might have fired through the screens toward the MOVE house. The petitioners simply ignore this and they fail to explain how, in light of the undisputed fact that the police did fire on the MOVE house, evidence that the police fired on the MOVE house from 3300 Bearing street was exculpatory. Instead, the evidence of shots fired from 3300 Bearing Street would seem to be cumulative of other evidence presented at trial. The court fails to see how such evidence could be exculpatory and material. Accordingly, the court finds the petitioners' claim lacks merit.

L. Thirteenth Claim

The petitioners argue that they were denied their due process rights to a fair trial and to an impartial trier of fact by the trial court's acting as an advocate for the **[*93]** prosecution during the trial. The petitioners maintain that the trial court's bias was revealed by the court's curtailment of their cross-examination of prosecution witnesses to "protect [the] prosecution's theory of the case. More importantly, the judge established an arbitrary rule in order to deny the re-entry of Petitioner back into the courtroom." Joint Memorandum at 34. [23]

[*94] The Superior Court adjudicated the petitioners' claim by first noting that the trial court's decision to remove the petitioners from trial was found to be proper by the trial court and by the Superior Court on direct appeal. Superior Court PCRA opinion at 15. The Superior Court then stated that the petitioners had failed to elaborate on the curtailment of cross-examination issue and that their failure to elaborate "prevents our review." Id. The claim was, therefore, rejected. Id.

In the course of addressing the petitioners' second claim, this court has explained why the trial court's decision to remove the petitioners from trial and the conditions placed upon their re-admission to the trial were not contrary to nor an unreasonable application of *Illinois v. Allen, 397 U.S. 337, 25 L. Ed. 2d 353, 90 S. Ct. 1057 (1970)*. Since the petitioners cannot be afforded habeas relief based on the trial court's decision to exclude them from the trial nor based on the conditions required for their re-admission to the trial, they also cannot be afforded habeas relief by attempting to argue that the trial court's decisions in these regards constituted evidence of bias against them.

With **[*95]** respect to the petitioners' claim concerning the curtailment of their cross-examination, it is not clear that the Superior Court actually adjudicated the claim on its merits. The Superior Court found that the petitioners had failed to elaborate on their claim and so the court could not review it. Superior Court PCRA opinion at 15. This appears to constitute a rejection of the claim for a procedural reason, rather than based on its substance. If so, the Superior Court's rejection of the claim is not an adjudication on the merits to which the *28 U.S.C. § 2254(d)(1)* standard of review would apply. See *Rompilla v. Horn, 355 F.3d 233, 247 (3d Cir. 2004)* (citing *Sellan v. Kuhlman, 261 F.3d 303, 311 (2d Cir. 2001)*; *Neal v. Puckett, 286 F.3d 230, 235 (5th Cir. 2002))*. Given the uncertainty concerning the basis for the Superior Court's adjudication of this aspect of the petitioners' claim, the court will not apply the *28 U.S.C. § 2254(d)(1)* standard of review and, instead, will apply de novo review.

In this court, the petitioners have failed to provide even one citation to the trial transcript **[*96]** where the trial court improperly curtailed their cross-examination of a prosecution witness. The trial transcript in this case is

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637, 643, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974). Although both Brady and prosecutorial misconduct claims are based on due process, the actual elements of the claims are distinct.

[23] The petitioners also appear to argue that the trial court's bias can be inferred from statements the court made to the press. See Joint Memorandum at 38. However, this issue was not presented to the state courts during direct appeal or during the PCRA proceedings. The claim is, therefore, not exhausted. The claim can no longer be exhausted because the time for the petitioners to file a PCRA petition has expired. See *42 Pa. C.S.A. § 9545(b)*. Since the PCRA statute of limitations has expired for the petitioners, their claim is procedurally defaulted. See *Keller v. Larkins, 251 F.3d 408, 415 (3d Cir. 2001)*. Further, since the petitioners' have not demonstrated cause and prejudice nor shown that the failure to review the claim will result in a fundamental miscarriage of justice, the claim cannot be reviewed. See *id. at 416*.

quite voluminous as the petitioners' counsel is well aware. It is not this court's role to search the voluminous record for the places where the trial court curtailed the petitioners' cross-examination of prosecution witnesses and then to determine whether each curtailment was improper. [24] Instead, it was the role of the petitioners' counsel to search the record and to identify the specific cross-examination questions posed by the petitioners which he and the petitioners believe the trial court improperly prevented. Counsel has failed to do so, just as he failed to do so in the state courts. Accordingly, the petitioners will not obtain relief based upon their curtailment of cross-examination argument.

[*97] M. Fourteenth Claim

The petitioners argue that they were denied their *Sixth Amendment* [25] and due process rights [26] **[*98]** by the trial court's decision to restrict their cross-examination of Commonwealth witnesses concerning whether the police had conspired to attack the MOVE house to destroy it and its occupants and thereby prevent the petitioners from developing a defense. [27] In their brief to the Superior Court, the petitioners identified specific places in the record where they believe the trial court improperly curtailed their cross-examination of prosecution witnesses.

The Superior Court adjudicated the petitioners' claim by first noting that the petitioners believed their cross-examination could have raised a claim of self-defense. Superior Court PCRA petition at 16. The Superior Court noted that the petitioners could not raise self-defense because they refused to concede that they had fired the shots which had killed Officer Ramp. Id. (citing *Commonwealth v. Mayfield, 401 Pa. Super. 560, 585 A.2d 1069 (Pa. Super. 1991)*). Thus, the petitioners' claim lacked merit. Id.

This court may not re-examine the Superior Court's determination **[*99]** that the petitioners were barred by state law from pursuing self-defense because they refused to concede that they had fired the shots which had killed Officer Ramp. Indeed, it is well-established that habeas courts may not re-examine state court determinations of state law questions. *Estelle v. McGuire, 502 U.S. 62, 67-68, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991)*. Thus, the question presented is whether the petitioners' *Sixth Amendment* right to confrontation was violated when the trial court prevented them from pursuing cross-examination that would yield evidence that was not germane to any issue that state law permitted them to raise.

The Supreme Court has held that ***HN25***[↑] the *Sixth Amendment's Confrontation Clause* is applicable to the states. *Pointer v. Texas, 380 U.S. 400, 403, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965)*. In turn, the *Confrontation Clause* includes the defendant's right to cross-examine the witnesses which are arrayed against him at trial. *Id. at 404*. Cross-examination is important because it helps insure the "'accuracy of the truth-determining process.'" *Chambers v. Mississippi, 410 U.S. 284, 295, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973)* (quoting *Dutton v. Evans, 400 U.S. 74, 89, 27 L. Ed. 2d 213, 91 S. Ct. 210 (1970)*). **[*100]** However, the right of confrontation and cross-examination is not absolute. *Id. at 295*. Specifically, the Supreme Court has never held that a

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[24] To the extent any of the curtailment of the petitioners' cross-examination was based on the trial court's application of state evidentiary law, this court is not permitted to re-examine those rulings. *Estelle v. McGuire, 502 U.S. 62, 67-68, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991)*.

[25] ***HN24***[↑] The *Sixth Amendment* guarantees criminal defendants the right to confront adverse witnesses. The Supreme Court has held that this right encompasses the right to cross-examine adverse witnesses. See *Pointer v. Texas, 380 U.S. 400, 403-05, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965)*.

[26] The Supreme Court has expressed the view that defendants have a due process right to present a defense. See *Washington v. Texas, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967)*. That right focuses on a defendant's affirmative right to present witnesses on his behalf. See *id. at 16-17, 19*. On the other hand, the right of cross-examination is guaranteed by the *Confrontation Clause*. See *Pointer v. Texas, 380 U.S. at 403-05*. In this claim, the petitioners are complaining about the trial court's restriction of their right to pursue cross-examination, rather than any restriction on their ability to present direct evidence to support some defense or explanation of the facts that is consistent with innocence. For this reason, the court believes the *Confrontation Clause*, not the *Due Process Clause*, governs their claim.

[27] The petitioners also appear to complain again about the trial court's decision to remove them from trial and to place requirements on their re-admission to the trial. In the course of addressing the petitioners' second claim, this court has explained why the trial court's decision to remove the petitioners from trial was not contrary to nor an unreasonable application of *Illinois v. Allen, 397 U.S. 337, 25 L. Ed. 2d 353, 90 S. Ct. 1057 (1970)*. That discussion is sufficient and will not be repeated.

defendant has a *Sixth Amendment* right to pursue cross-examination to present a state law defense that is barred by state law. In the absence of such precedent, the Superior Court's adjudication of the petitioners' claim is not contrary to Supreme Court precedent. See *Williams v. Taylor, 529 U.S. at 405-06*.

The question remains whether the Superior Court's adjudication of the petitioners' *Confrontation Clause* claim was an unreasonable application of Supreme Court precedent. That determination is guided by *Mancusi v. Stubbs, 408 U.S. 204, 33 L. Ed. 2d 293, 92 S. Ct. 2308 (1972)*. In that case, the habeas petitioner, William Stubbs, had been tried and convicted in 1954 on charges that he had kidnapped Mr. and Mrs. Alex Holm, had assaulted Mr. Holm with the intent to kill him and had killed Mrs. Holm. *Id. at 207-08*. Mr. Holm testified at the trial and he was cross-examined by Mr. Stubbs' trial counsel. *Id. at 208, 214-16*. Mr. Stubbs' conviction was overturned nine years later and the state of **[*101]** Tennessee subsequently sought to retry Mr. Stubbs in 1964. *Id. at 209*. Tennessee discovered that Mr. Holm had re-located to Sweden, his native country. *Id. at 209*. At trial, the state called Mr. Holm's son to testify that his father had in fact relocated to Sweden. Id. The trial court then allowed Mr. Holm's prior trial testimony to be read to the jury. Id. Mr. Stubbs was again convicted. Id.

On habeas corpus review, the Second Circuit [28] **[*103]** , concluded that Mr. Stubbs' *Confrontation Clause* rights had been violated because the cross-examination of Mr. Holm had been inadequate at the first trial. *Stubbs, 408 U.S. at 215*. The Second Circuit believed it was inadequate because prior counsel had not adequately explored whether during the long span of time Mr. Stubbs was with Mr. and Mrs. Holm, he had become their guest such that the kidnapping charge was not viable. Id. In the Second Circuit's view, this issue was important and could be exculpatory in the event the jury made certain findings. Specifically, if Mr. Stubbs had become the guest of Mr. and Mrs. Holm before the time of the shooting and if the jury found he shot **[*102]** them accidentally, then a felony murder conviction would be foreclosed. Id. The Supreme Court rejected this approach because the trial court, in accordance with Tennessee law, had not charged the jury that kidnapping could be a predicate offense for felony murder. Id. & n.4. The Court held that the failure of Mr. Stubbs' prior counsel to have cross-examined Mr. Holm on the question of whether Mr. Stubbs had become his quest prior to the shooting could not have prejudiced Mr. Stubbs. *Id. at 216*. Thus, Stubbs stands for the proposition that the scope of a defendant's *Confrontation Clause* rights can be limited by state limitations concerning what issues are properly raised in a given case. [29]

In the court's view, Stubbs permits the result the Superior Court reached in this case. Under Stubbs, it is permissible to conclude that a defendant's *Confrontation Clause* rights are not violated when he is prevented from pursuing cross-examination to support a defense which is foreclosed to him by state law. Stubbs supports such a conclusion and, therefore, the Superior Court's adjudication of the petitioners' claim was a reasonable application of the Supreme Court's *Confrontation Clause* precedent.

N. Fifteenth Claim

The petitioners argue that they were denied due process at sentencing because they were not allowed to appear for sentencing and were, therefore, denied the right of allocution prior to sentencing. The petitioners also argue that the trial court violated state law by not considering all the factors state law requires **[*104]** when sentencing criminal defendants. This latter argument is simply not cognizable in habeas corpus. *Estelle v. McGuire, 502 U.S. 62, 67, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991)*. Therefore, it will not be considered further. [30]

The Superior Court adjudicated the petitioners' cognizable claim by holding that the trial court had found

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[28] Tennessee is within the Sixth Circuit's territorial jurisdiction. See *28 U.S.C. § 41*. However, Mr. Stubbs was challenging a sentence imposed upon him by a New York state court, which had used the 1964 Tennessee conviction when it sentenced him as a prior offender. *Stubbs v. Mancusi, 408 U.S. 204, 205, 33 L. Ed. 2d 293, 92 S. Ct. 2308 (1972)*. Mr. Stubbs was trying to invalidate the Tennessee conviction. Id. Since Mr. Stubbs had filed his habeas petition in a United States District Court in New York, his appeal was properly taken to the Second Circuit. See *28 U.S.C. § 41*.

[29] Indeed, the Supreme Court has acknowledged that Stubbs indicates that the *Sixth Amendment* rights to confrontation and cross-examination are not absolute. See *Chambers v. Mississippi, 410 U.S. 284, 295, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973)*.

[30] The court notes that the PCRA court adjudicated this latter claim by finding that it was not a cognizable basis for relief under the PCRA. PCRA court opinion at 15-16.

that the petitioners were properly excluded from their trial. Superior Court PCRA opinion at 15. The Superior Court concluded that the claim had, therefore, been previously [31] litigated on direct appeal and could not be raised in a PCRA petition. Id. (citing *42 Pa. C.S.A. §§ 9543(a)(3)*, *9544(a)(2)*).

[*105] The court has already explained why the trial court's decision to exclude the petitioners from trial based on their conduct was not contrary to nor an unreasonable application of the governing Supreme Court precedent. To the extent the petitioners' exclusion from their sentencing procedure was based upon their failure to give the assurances the trial court had required in its March 20, 1980 letter to them, their exclusion was not contrary to nor an unreasonable application of Supreme Court precedent.

The record also reveals that, on August 4, 1981, the day of sentencing, each petitioner was individually brought into the courtroom and given the opportunity to provide assurances to the court that he or she would behave properly so that he or she could attend the sentencing hearing. (N.T. 8/4/81 at 14-83). All of the petitioners entered the courtroom and engaged in disruptive behavior, using vulgar and obscene language. In addition, many of the petitioners also expressly stated their wish that the trial judge's heart would burst or be ripped out of his chest and that MOVE would make him pay for his decisions during the trial. See e.g. N.T. 8/14/81 at 14-15 (Edward Goodman Africa), **[*106]** at 22-23 (Charles Sims Africa), at 28-29 (Delbert Orr Africa), at 64-65 (Debbie Sims Africa), at 82-83 (Janet Holloway Africa). For these reasons, each petitioner was removed from the courtroom shortly after entering and did not attend the sentencing hearing. The court will not repeat the vulgar and obscene language used by the petitioners when they appeared in court on August 4, 1981. The language they used is shocking, not only in that it was disruptive of the dignity of the court but also in that it constituted express threats to the physical well-being of the judge. Such language and threats amply support the trial court's decision that the petitioners be excluded from their sentencing under Illinois v. Allen.

[31] The Superior Court actually wrote that it believed the claim was "finally" litigated. However, the PCRA statute speaks of claims being "previously" litigated. See *42 Pa. C.S.A. §§ 9543(a)(3)*, *9544(a)*. Therefore, the court assumes the Superior Court intended to write that the claim was previously litigated.

O. Sixteenth Claim

The petitioners argue that they were denied due process when the trial court allowed the police officers who had been involved in the events of August 8, 1978 to serve as guards in the courtroom. The petitioners believe that the presence of these police officers in the courtroom was an attempt to intimidate them and the trial court in order to deny them a fair trial.

The Superior Court adjudicated this claim by noting that the petitioners **[*107]** had failed to cite any authority to support their claim and by finding that there was no indication the trial court found the police presence to be a threat. Superior Court PCRA opinion at 16. The Superior Court's finding that the trial court was not threatened by the police presence is a finding of fact which must be presumed correct. See *28 U.S.C. § 2254(e)(1)*. The petitioners have the burden to rebut the presumption by clear and convincing evidence. Id. They have not attempted to do so; therefore, the court will presume this finding of fact is correct. This finding of fact defeats the factual predicate for any claim that the trial court might have been unable to render a fair verdict. Therefore, that portion of the petitioners' claim lacks merit.

The petitioners also argue that the police presence intimidated them and thereby denied them a fair trial. Just as in the state court, the petitioners, through their counsel, have failed to cite any authority to support their contention. This court will not conduct legal research on behalf of the petitioners in order to determine whether there is Supreme Court precedent to support their claim. Their counsel **[*108]** had to duty to perform that research in the first instance. Since the joint memorandum of law fails to indicate that counsel performed such research, the claim is deemed to lack merit.

P. Seventeenth Claim

The petitioners argue that they were denied due process when the trial court denied a mistrial based upon the prosecution's firearms expert testifying that his lab was visited by a firearms expert retained by the defendants. The petitioners believe that the trial court could infer that, if called to testify, their firearms expert would have corroborated the prosecution's expert.

The Superior Court adjudicated this claim as follows:

> Appellants' next argument is that they are entitled to a new trial because the trial court heard evidence that it specifically stated it would disregard as inadmissible and stated that it would remove from its consideration. Appellants contend, "Once the trier of fact is tainted with prejudicial information it is humanly impossible to dispel such prejudice from one's mind." Appellant's brief at 75. We disagree. ***Commonwealth v. Harvey, supra,*** *514 Pa. 531, 526 A.2d 330 (Pa. 1987).*

Superior Court PCRA opinion at 16. [32] The Superior Court's reference to ***Harvey*** **[*109]** is *Commonwealth v. Harvey, 514 Pa. 531, 526 A.2d 330, 333 (Pa. 1987)*, a case which holds that ***HN26***[⬆] a judge sitting as the trier of fact in a bench trial is presumed to be able to disregard inadmissible evidence and other improper matters.

The question presented is whether the Superior Court's conclusion that the petitioners' claim lacked merit because of the state law presumption that trial judges in bench trial can disregard inadmissible evidence or other improper matters is contrary to or an unreasonable application of Supreme Court precedent. The Supreme Court has frequently noted that it also presumes that trial judges know the law and follow it when making their decisions. See e.g. *Woodford v. Visciotti, 537 U.S. 19, 24, 154 L. Ed. 2d 279, 123 S. Ct. 357 (2002)* **[*110]** (per curiam) (citing cases); *Lambrix v. Singletary, 520 U.S. 518, 532 n.4, 137 L. Ed. 2d 771, 117 S. Ct. 1517 (1997)* (citing *Walton v. Arizona, 497 U.S. 639, 653, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990)*). Since the Supreme Court applies a presumption that is similar to the one which the Superior Court applied in this case, it cannot be said that the Superior Court's adjudication of the underlying claim was contrary to or an unreasonable application of Supreme Court precedent. Instead, it was a reasonable application of the principle contained in Supreme Court decisions such as Woodford and Lambrix. [33]

Q. Eighteenth Claim

Finally, the petitioners argue that they were denied due process when the trial court prevented the cross-examination of prosecution witnesses **[*111]** regarding the amount of force used on August 8, 1978 and then later ruled that the petitioners had failed to present evidence of self-defense so that self-defense would not be considered. The petitioners maintain that the trial court's decisions in this regard constitute evidence of bias against the petitioners.

The Superior Court adjudicated this claim by noting that it had previously explained that, ***HN27***[⬆] under Pennsylvania law, a claim of self-defense is not permissible where the defendant refuses to admit that he killed the victim. Superior Court PCRA opinion at 16 (citing *Commonwealth v. Mayfield, 401 Pa. Super. 560, 585 A.2d 1069 (Pa. Super. 1991))*. The Superior Court then noted that the petitioners denied having shot anyone and so it was proper for the trial court to have held that self-defense was not presented. Id.

This court may not re-examine the Superior Court's determination that the petitioners were barred by state law from pursuing self-defense because they refused to concede that they had shot anyone. Indeed, it is well-established that habeas courts may not re-examine state court determinations of state law questions. *Estelle v. McGuire, 502 U.S. 62, 67-68, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991).* **[*112]** Based on the Superior Court's application of state law, the court must presume that the petitioners were the ones who prevented self-defense from being raised at trial by their failure to concede that they had shot anyone. Therefore, their claim that the trial court prevented them from presenting evidence of self-defense because of bias against them must fail.

VI. Certificate of Appealability

HN28[⬆] In order for the petitioners to be able to appeal the denial of their habeas petitions, the court must grant them a certificate of appealability. *28 U.S.C. § 2253(c)*. For the claims the court has resolved on their merits, which are the majority of the claims, a certificate of appealability ("COA") can only be granted if jurists of reason could find the court's determination of the merits of the claims was debatable or wrong.

See *Slack v. McDaniel, 529 U.S. 473, 484, 146 L. Ed.*

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[32] Although the Superior Court does not specifically mention that the evidence at issue involves the petitioners' firearms expert, it specifically cited page 75 of the petitioners' appellate brief. The firearms expert claim is addressed at pages 73 to 75 of their appellate brief.

[33] The Superior Court's failure to cite Supreme Court cases applying this principle does not require that its decision be reversed. See *Early v. Packer, 537 U.S. 3, 8, 154 L. Ed. 2d 263, 123 S. Ct. 362 (2002)* (per curiam).

2d 542, 120 S. Ct. 1595 (2000).

On the other hand, the court resolved a few of the petitioners' claims on procedural grounds such as procedural default, lack of cognizability or counsel's failure to adequately present the claims. A COA can issue with respect to these claims if: **[*113]** "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [if] jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. In Slack, the Supreme Court went on to explain that:

> Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted.

Id. Further, the Supreme Court indicated that, since the petitioner must make showings with respect to both the procedural issue and the underlying, constitutional issue, a court may resolve the COA question if either showing is lacking. Id. at 484-85.

The court has written a lengthy opinion explaining why it has found that the petitioners' claims lack merit or will not be reviewed based on procedural grounds. The court's disposition of the vast majority of the petitioners' claims is based on well-established Supreme **[*114]** Court or Third Circuit precedent. Therefore, the court believes that reasonable jurists would not disagree with those determinations and the court will not recommend granting a COA with respect to those claims. The court did not cite authority for its decision to dispose of some claims based on counsel's failure to provide factual support for them or legal authority for them. The court is of the view that reasonable jurists would not disagree that it was counsel's duty, and not the court's duty, to identify factual support and legal authority for the petitioners' claim. For this reason, the court will not recommend granting a COA with respect to those claims either.

The court's recommendation follows.

RECOMMENDATION

AND NOW, this 19th day of October, 2004, for the reasons contained in the preceding Report, it is hereby RECOMMENDED that the petitions for a writ of habeas corpus be DENIED. It is further RECOMMENDED that a certificate of appealability not be granted.

DIANE M. WELSH

UNITED STATES MAGISTRATE JUDGE

ORDER AND NOW, this 19th day of October, 2004, after careful and independent consideration of the petitions for a writ of habeas corpus, the petitioners' joint **[*115]** memorandum of law the responses thereto and after review of the Report and Recommendation of Diane M. Welsh, United States Magistrate Judge, it is hereby ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED;

2. The petition for a writ of habeas corpus is DENIED; and

3. A certificate of appealability is not granted.

BY THE COURT:

BARTLE, J.

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