IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 04-2461

ZACHARY WILSON,

Appellee,

v.

JEFFREY A. BEARD, Commissioner, Pennsylvania
Department of Corrections and DONALD T. VAUGHN,
Superintendent of the State Correctional Institution at Graterford,

Appellants.

On Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania (Padova, J.), No. 02-CV-0374

BRIEF OF APPELLEE

MICHAEL WISEMAN
Capital Habeas Corpus Unit
Federal Court Division
Defender Association of Philadelphia
Suite 545 West – The Curtis Center
Philadelphia, PA 19106
(215) 928-0520

CHRISTINA A. SWARNS
NAACP Legal Defense &
Education Fund, Inc.
99 Hudson Street
16th Floor
New York, New York 10013
212-965-2267

Co-Counsel for Appellee, Zachary Wilson

Dated: August 31, 2004
Philadelphia, Pennsylvania

PRELIMINARY STATEMENT

All emphasis in this *Brief* is supplied unless otherwise indicated. Parallel citations generally are omitted unless otherwise indicated.

Appellants (Respondents in the District Court) are referred to as "the Commonwealth." Appellee, Zachary Wilson (Petitioner in the District Court), is referred to by name or as Petitioner.

The District Court conducted evidentiary hearings on January 29, 2003 and September 29, 2003. The transcripts of these proceedings are cited as "Tr." followed by the relevant date and page number. The District Court issued two opinions: Wilson v. Beard, No. 02-0374 (E.D. Pa. May 9, 2003) and Wilson v. Beard, 314 F. Supp.2d 434 (E.D. Pa. April 19, 2004), which will be cited as Wilson-1 & Wilson-2 respectively.

The Commonwealth has filed an Appendix which is cited as "A" followed by the page number. Petitioner has filed a short Supplemental Appendix (along with a *Motion* seeking permission to do so), which he will cite as "SA" followed by the page number.

The *Brief for Appellant* is referred to as "Commonwealth's Brief" and is cited as "CB."

Other documents relevant to the issues in this case are discussed in the body of this brief with specific citations.

TABLE OF CONTENTS

Preliminary Statement . . . .

Table of Contents . . . .

Table of Authorities . . . .

Statement of Subject Matter And Appellate Jurisdiction . . . .

Statement of the Issues . . . .

Statement of the Case . . . .

Statement of Related Cases and Proceedings . . . .

Standard of Review . . . .

Summary of Argument . . . .

Argument . . . .

Conclusion . . . .

TABLE OF AUTHORITIES

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The District Court had jurisdiction to grant relief, 28 U.S.C. §§ 2241, 2254, and this Court has appellate jurisdiction, 28 U.S.C. §§ 1291 and 2253.

STATEMENT OF THE ISSUES

The District Court found that Mr. Wilson's claim was before the Court on its merits and that the prosecutor discriminated in jury selection.

The Commonwealth's issues on appeal are:

1. Was the petition timely filed?;
2. Should the District Court have granted an evidentiary hearing?;
3. Did the District Court err in finding that the prosecutor discriminated?;
4. Did the District Court err in rejecting the Commonwealth's "mixed motive" defense?

STATEMENT OF THE CASE

Petitioner was convicted in Philadelphia of firstdegree murder and related offenses in 1984 and was sentenced to life imprisonment; the Superior Court affirmed. Commonwealth v. Wilson, 536 A.2d 830 (Pa.Super. 1987). Post-conviction relief was denied; the Superior Court affirmed, Commonwealth v. Wilson, No. 1421 Philadelphia 1994 (Pa.Super. November 13, 1995); and the Pennsylvania Supreme Court denied allocatur. Commonwealth v. Wilson, 678 A.2d 365 (Pa. 1996).

A second PCRA petition raising the discriminatory jury selection claim was filed on June 2, 1997. This petition was denied on February 10, 1999. The Superior Court affirmed on July 31, 2000, Commonwealth v. Wilson, 764 A.2d 1131 (Pa.Super. 2000). The Pennsylvania Supreme Court denied allocatur on March 21, 2001, Commonwealth v. Wilson, 775 A.2d 806 (Pa. 2001).

The *Petition for Writ of Habeas Corpus* was filed on January 23, 2002. Magistrate Judge Caracappa recommended the petition be dismissed. Petitioner filed *Objections*.

District Judge John R. Padova held an evidentiary hearing on January 29, 2003. He rejected the Magistrate's recommendation and found Petitioner's discrimination claim was timely filed and not defaulted. He ordered a hearing on the merit, and which was held on September 29, 2003, and thereafter found that Petitioner proved his discrimination claim.

The relevant facts are discussed in the body of this brief.

STATEMENT OF RELATED CASES AND PROCEEDINGS

We know of no related cases.

STANDARD OF REVIEW

Mr. Wilson adds the following to complete the standard as stated in the Commonwealth's brief.

The District Court's factual findings will not be reversed unless clearly erroneous. Ipsco Steel v. Blaine, 371 F.2d 141, 146-47 (3d Cir. 2004). Where the district court holds a habeas hearing, this Court reviews the court's findings of fact for clear error. Love v. Morton, 112 F.3d 121, 133 (3d Cir. 1997). The "decision on the ultimate question of discriminatory intent [in jury selection] represents a finding of fact accorded great deference on appeal." Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

Mr. Wilson agrees that plenary review is exercised on issue of law. Ipsco, at 146-47; Love, at 133.

SUMMARY OF ARGUMENT

In the spring of 1997 (during her reelection campaign), Philadelphia District Attorney Lynn Abraham released a videotape made by Jack McMahon, her opponent and Petitioner's trial prosecutor. Reviewing this Tape, the Pennsylvania Supreme Court described McMahon's mindset:

> [T]he purpose of voir dire, namely, to select a fair and impartial jury, is denigrated as "ridiculous," in favor of the selection of jurors who will be biased in favor of conviction; various racial and gender stereotypes are described and offered as reasons to discriminate in the selection of jurors; techniques for accomplishing such discrimination are described in detail, including the maintenance of a running tally of the race of the venire panel and the invention of pretextual reasons for exercising peremptory challenges; and a willingness

to deceive trial courts to manipulate jury panels to these ends is also expressed.

The Tape was the predicate for Petitioner's claim under Batson v. Kentucky, 476 U.S. 79 (1986). At the District Court hearing, McMahon acknowledged that it reflected his views on the role of race in jury selection. Judge Padova properly granted relief.

Judge Padova properly found that Petitioner raised his claim in a timely manner after the Commonwealth finally disclosed the Tape. This determination is neither factually nor legally erroneous.

Judge Padova properly found that Petitioner's claim is not procedurally barred by an "adequate" state court rule. Pennsylvania courts have not applied this procedural bar to other cases in Petitioner's posture, but have ruled on the merits in cases prosecuted by McMahon where a post-conviction Batson claim was raised after release of the Tape. Petitioner's case is a paradigmatic example of an inconsistent, and therefore "inadequate," state procedural ruling, which cannot be used to deny relief on federal habeas. The merits of the Batson issue therefore were before the federal court. Judge Padova properly held an evidentiary hearing to resolve contested facts and to consider all of the evidence from the parties. Judge Padova properly found that McMahon discriminated in jury selection at Petitioner's trial. McMahon admitted to Judge Padova that he always followed the discriminatory approach he espoused on the

Tape. Judge Padova's findings of discriminatory intent and actions by McMahon are not clearly erroneous. They have ample record support and flowed from a correct application of the law. They are not overcome by the Commonwealth's current scattershot arguments.

The Tape provides a *prima facie* case of discrimination on "step-one" of the Batson three-step test. Every court addressing it has so found, as did Judge Padova. The Commonwealth does not challenge this finding on appeal.

On "step-two" of Batson, McMahon could provide no racially-neutral explanation for striking at least 8 African-Americans here. (He tried to give a reason for one African-American juror while the race 7 other jurors he struck is unknown and cannot be reconstructed). Judge Padova could have stopped right there and granted relief under the applicable law. However, he gave the Commonwealth the benefit of the doubt, taking the view that he would consider any "reason" McMahon gave on the Tape for striking any juror, even though McMahon could provide no actual race-neutral "reason" at the hearing. Even after giving the Commonwealth this benefit, Judge Padova ultimately found discrimination. The Commonwealth's attempt to blame Petitioner for McMahon's current inability to state anything race-neutral, when for a decade the Commonwealth itself withheld the Tape and the discrimination it establishes, does not overcome Judge Padova's findings.

Finally, on "step-three" of Batson, Judge Padova heard McMahon's testimony, assessed his credibility and considered all the evidence. He expressly found that race discrimination was the reason why McMahon struck African-Americans in Petitioner's trial.

The Commonwealth's brief does not even acknowledge the clearly erroneous standard of review, and makes no effort to explain why Judge Padova's findings are clearly erroneous.

Rather, the Commonwealth asserts that Judge Padova made no finding of discrimination as to a specific juror, even though Judge Padova found that discriminatory intent was the reason McMahon struck at least one, if not all, of 8 African-Americans in this case. Judge Padova found that any other suggestion would be pretext. He also found as a fact against the Commonwealth's belated "dual motive" suggestion.

Judge Padova's findings about McMahon's discrimination are not clearly erroneous. His findings and rulings that this claim is timely raised, that it should not be procedurally barred and that relief is appropriate ought not be disturbed. Judge Padova did not err procedurally, factually or legally.

ARGUMENT

I. THE HABEAS PETITION WAS TIMELY.

When District Attorney Abraham released the McMahon Tape in 1997, Petitioner was not represented on this case.[1] He was represented on a separate capital case. The capital case lawyer (Billy H. Nolas) was sent a letter from Deputy District Attorney Raymond J. Harley, notifying that Petitioner was prosecuted by McMahon and enclosing a copy of the McMahon Tape ("Notification Letter") (Dist. Ct. Exh. P-2, admitted Tr. 1/29/03 at 45-46). The letter was dated April 3, 1997.

The District Court correctly found that Petitioner's one year filing period under 28 U.S.C. § 2244(d)(1)(D) began to run after the Notification Letter, which represented when the claim could have been discovered through the exercise of due diligence. Applying settled principles of time computation to the date of the Notification Letter, the Court found that the habeas petition in this case was timely.

The Commonwealth disagrees with Judge Padova's findings on time calculation.

A. Judge Padova's Calculation Was Correct.

Judge Padova applied the correct law, which requires that the petition be filed within one year from "the date on which the factual predicate of the claim or claims could have been discovered through the exercise of due diligence." Wilson-1 at 5

[1]The Tape and a transcript were admitted below. Tr. 9/29/03 at 5, 10. Copies are included in Petitioner's Supplemental Appendix.

(quoting 28 U.S.C. § 2244(d)(1)(D)).

Judge Padova found that the McMahon Tape was this "factual predicate" because it:

> provides evidence of Jack McMahon's discriminatory intent in the form of his own admission that he **always** engages in such [discriminatory] practices, [and] therefore represents a separate factual predicate on which discriminatory intent under Batson, may be established.

Id. at 9. Without the Tape, Petitioner had no way of knowing that this prosecutor "always" discriminated in voir dire.

Having identified the Tape as the "factual predicate" for Petitioner's claim, the Court next determined when this predicate "either was or could have been discovered through the exercise of due diligence." Id. at 9. This analysis had two separate components: 1) when did Petitioner actually learn of the Tape's existence, and 2) did due diligence require Petitioner to have learned of the Tape's existence at an earlier time?

The Court held an evidentiary hearing to answer these questions. It credited Petitioner's testimony and his other proof demonstrating that he first learned of the Tape through a telephone call from attorney Christina Swarns, which was made after

Mr. Nolas' receipt of the April 3, 1997 letter.[2] Id. at 14-17 ("The Court **finds as fact** that Ms. Swarns' phone call to Petitioner occurred after the McMahon Tape was first publicized, and sometime between April 5, 1997 and June 2, 1997.") Petitioner's testimony that he did not see any news reports about the Tape prior to his phone call with Ms. Swarns was also credited by the Court. Id. at 15 ("There is no evidence in the record to suggest that Petitioner ever watched any of the local news broadcasts, either occasionally or on a regular basis.").

Based on these findings, Petitioner's testimony, and documents introduced by the Commonwealth and Petitioner, the Court made additional factual findings relevant to due diligence. The Court found Petitioner was "socially isolated" from other prisoners because of his "fear" of jailhouse informants. The Court found that it was "highly unlikely" that Petitioner would have learned of the Tape from "other prisoners,

---

[2]In 1997 Mr. Nolas was employed by a non-profit organization representing defendants in capital cases. He represented Mr. Wilson in state post-conviction proceedings on his capital case.

In 1997, Mr. Wiseman and Ms. Swarns were employed by the Capital Habeas Corpus Unit of the Federal Court Division of the Defender Association of Philadelphia (i.e., the Federal Public Defender), and in that capacity assisted Mr. Nolas on Mr. Wilson's capital post-conviction case.

Thus, when the Notification Letter was sent to Mr. Nolas, Mr. Wilson was unrepresented on this, his non-capital case, inasmuch as state post-conviction litigation had concluded years before the release of the McMahon Tape (see Commonwealth v. Wilson, No. 1421 Philadelphia 1994 (Pa.Super. November 13, 1995)), and Mr. Wilson had not sought federal habeas corpus relief.

family or friends," due to the conditions of SCI-Graterford's death row, where prisoners are "entirely isolated from each other," have contact with only one other inmate for one hour per day during "exercise," legal calls are the only incoming phone calls permitted, outgoing calls are limited to four per month, and visits are limited to one per week. Wilson-1 at 15, n.13. The Court also found Petitioner did not have a subscription to any newspapers or other periodicals in April, 1997. Id. at 15.

In its appeal, the Commonwealth does not contest any of Judge Padova's factual findings that Petitioner did not learn of the Tape before being told of its existence by Ms. Swarns, after the release of the Tape. The Commonwealth admitted at the hearing that it did not contend that Petitioner "actually" saw media accounts of the release of the Tape. Instead, the Commonwealth contended that Mr. Wilson should have seen the media accounts that Judge Padova found he did not see:

> Mr. Bennett: [T]he Commonwealth's argument is not necessarily that Mr. Wilson actually saw the news, our argument is that petitioner could have seen the news –
>
> * * *
>
> Court: [L]et's make the record clear, the Commonwealth is not arguing that Zachary Wilson saw the TV coverage and therefore knew of the McMahon Tape either on March 31, April 1st or April 2nd?
>
> Mr. Bennett: Yes.
>
> Court: Okay, that's out of the case, okay, actual knowledge is out of the

case.

Mr. Bennett: What we are arguing, your Honor, is that had Mr. Wilson been reasonably diligent or exercised due diligence, to use the exact phrase used in 2244(d)(1), then he could have learned of the existence of the McMahon videoTape prior to April 5, 1997.

Tr. 1/29/03 at 63-64. Having determined that Petitioner did not have actual knowledge of the Tape until he was told of it by Ms. Swarns, and given the Commonwealth's concession that actual knowledge was not an issue in the case, Judge Padova next addressed whether Petitioner should have learned of it earlier through the exercise of due diligence.

As Judge Padova correctly saw it, this determination boiled down to whether due diligence under § 2244(d)(1)(D) "requires a prisoner residing on death row at Graterford Prison to monitor Philadelphia television new broadcasts searching for the presence of new information that could possibly be relevant to that prisoner's case." Judge Padova found it did not. Wilson-1 at 17, 19: "The Court therefore finds that Petitioner did not fail to exercise due diligence by failing to learn of the McMahon Tape through media accounts."

In light of these findings – no actual knowledge before he spoke with Ms. Swarns and no breach of due diligence – Judge Padova concluded that the proper date for starting the calculation would be after the Notification Letter sent by the District

Attorney to Mr. Nolas. Noting that habeas corpus proceedings are controlled by the civil rules under Fed.R.Civ.P. 81(a)(2), see Wilson-1 at 21, Judge Padova then applied Rules 6(a) and (e) of the Federal Rules of Civil Procedure, which govern time computation. As the letter was dated April 3, 1997, and **served by mail**, the Court applied Rule 6(e), which assumes receipt three days after mailing. He then applied Rule 6(a) to exclude the date of presumed receipt, and found that Petition was timely:

> Utilizing both Rule 6(a) and Rule 6(e), the Petition is timely. Pursuant to Rule 6(e), the date on which the factual predicate for Petitioner's claim could have been discovered is April 6, 1997, three days after the McMahon Tape was mailed to Petitioner. Pursuant to Rule 6(a), the statute of limitations began to run on April 7, 1997, and ran for 57 days until June 2, 1997, the date that Petitioner filed his second PCRA Petition in state court. 28 U.S.C. § 2244(d)(2). The statute of limitations remained tolled until March 23, 2001, the day after the Pennsylvania Supreme Court denied allocatur of the Superior Court's decision affirming the denial of Petitioner's second PCRA petition. 28 U.S.C. § 2244(d)(2); Fed. R. Civ. P. 6(a). The limitations period then ran for 307 more days until January 23, 2002, the date that the instant Petition was filed. Petitioner therefore used 364 days of the one year statute of limitations period, and his Petition is timely.

Wilson-1 at 25.[3]

The Commonwealth now complains that the limitations period should have run from the date District Attorney Abraham released the Tape to the media, on or about

---

[3]The 1997 state court petition Judge Padova referred to included the McMahon-based Batson claim.

April 1, 1997. It also complains that the Court should not have applied Rules 6(a) & (e). These contentions are meritless.

B. Due Diligence did not Require Mr. Wilson to Monitor the Media for McMahon-Related News Stories.

As noted, the District Court found as a fact that Petitioner did not have "actual knowledge" of the Tape until he received a phone call from Attorney Swarns sometime after April 5, 1997, and found there was no diligence breach before that. See Wilson-1 at 14-19). The Commonwealth did not contend below that Petitioner had actual knowledge and it does not appeal Judge Padova's finding that Petitioner did not have actual knowledge.

The Court acknowledged that Petitioner had access to television at the time that the Tape was released and that the release was "well publicized." Id. at 17. However, it found against the Commonwealth's contention that due diligence required that Petitioner "watch the local news on a regular basis, in order to keep abreast of new factual developments that might somehow have been relevant to his case." Id. The Court found that it is not "logical or fair to read the concept of due diligence as imposing upon a criminal defendant the duty of continually monitoring the local news for a period of 12 or more years in the hope of possibly learning facts which would be helpful to his case." Id. at 19.

The Commonwealth maintains that even though Petitioner did not actually see the news accounts about the release of the Tape, due diligence required that he should have seen them as soon as they came out around April 1, 1997, as opposed to April 6, 1997 (the calculated date of receipt of the Notification Letter). The Commonwealth's argument – that the running of a limitations period is immediately triggered by media accounts of an event – has long met with disapproval. This is especially so when the location of the potential plaintiff is known and the plaintiff received actual notice by other means. After all, the "traditional purpose of statutes of limitations [is to insure the] . . . assertion of claims within a specified period of time after notice of the invasion of legal rights," Urie v. Thompson, 337 U.S.163, 170 (1949), and the "touchstone" of whether notice is adequate to trigger a limitations period is whether the notice was "reasonably calculated, under all the circumstances, to apprise interested parties of the [relevant information] and afford them an opportunity to present their objections," United States v. One Toshiba Color Television, 213 F.3d 147, 149 (3d Cir. 2000) (en banc) quoting Mullane v. Central Hanover Bank, 339 U.S. 306, 314 (1950).

The Supreme Court has long held that "newspaper publications . . . [do] not measure up to the quality of notice which the Due Process Clause of the Fourteenth Amendment requires . . .[and] notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable." Schroeder v.

City of New York, 371 U.S. 208, 211-13 (1962). In One Toshiba Color Television, this Circuit held that publication in a general circulation newspaper was inadequate notice to start the limitations period to challenge a forfeiture, where the government knew of the prisoner's location and failed to notify him by mail. Id., 213 F.3d at 155. The reasons for this rule are obvious:

> Newspaper articles . . . do not necessarily place citizens on notice when there is **no evidence that these articles were read**. . . . The extent of the articles' reach, the popularity of the paper, the ability of the plaintiffs to follow daily public events . . . are all issues difficult to discern. **Without actual notice or without having read the articles it would go too far to state that the statute of limitations began to run when the articles were published.**

Orlikow v. United States, 682 F.Supp. 77, 87 (D.D.C. 1988). See also Heinrich v. Sweet, 44 F.Supp.2d 408, 417 (D. Mass. 1999) (tort limitations period did not commence before plaintiffs' actual discovery of injuries and due diligence did not require that plaintiffs read journals or media accounts publicizing a Congressional report – discovery rules do not require "every potential claimant" to examine every potentially useful document).

In this case, Petitioner's name and location were obviously available to the Commonwealth, which mailed the April 3, 1997 Notification Letter to his counsel in a different case. Certainly, the actual notice accomplished by the Notification Letter was more likely than media accounts to apprise Petitioner of the violation of his rights

– in this Circuit's words, the letter was "reasonably calculated to ensure that" notice was given. One Toshiba Color Television, 213 F.3d at 155.

The Commonwealth cites two cases for its argument against Judge Padova's findings and Third Circuit law. First, in Sorce v. Artuz, 73 F.Supp.2d 292, 298 (E.D.N.Y 1999) (CB at 15-17), a petitioner made what the court found to be "the bald and unsupported claim" that the factual predicate for his habeas petition could not have been discovered until "now." The allegedly "new" facts were a co-defendant's lawyer's affirmation and newspaper articles published almost a decade earlier. Id. However, in Sorce, unlike here, there was proof that the facts were not "new" because they were earlier in the petitioner's possession, as shown by the petitioner's own filing in a separate court action years before the federal filing. Sorce does not show that due diligence somehow required Petitioner to be aware of news accounts of which he had no actual knowledge.

The second case the Commonwealth relies on, Rolax v. Whitman, 2002 WL 31528790, 53 Fed.Appx. 635 (3d Cir. 2002) (non-precedential) (CB at 17-18), is also distinguishable. The plaintiff in Rolax filed a civil rights suit in 2001 after the newspaper publication in 2000 of pictures of New Jersey Governor Whitman frisking him in 1996. The Court rejected the plaintiff's contention that the statute of limitations began to run when the newspaper accounts were published, and instead held that the

plaintiff had "knowledge of the event necessary to establish a claim" in 1996, when he himself was frisked. Petitioner's case is far different because here the District Court found that the predicate for Petitioner's claim (the Tape) was not available to Petitioner.

C. The District Court Correctly Applied Rules 6(a) & (e).

The District Court correctly applied Rules 6(a) & (e) in calculating the limitations period. The Rules of Civil Procedure "are applicable to . . . habeas corpus" proceedings. Fed.R.Civ.P. 81(a)(2); see also Hilton v. Braunskill, 481 U.S. 770, 775-76 & n.5 (1987) ("Our decisions have consistently recognized that habeas corpus proceedings are civil in nature. . . Where [] the need is evident for principles to guide the conduct of habeas proceedings, it is entirely appropriate to 'use . . . [civil] rules by analogy or otherwise'") (quoting Harris v. Nelson, 394 U.S. 286, 294 (1969)); Gaugler v. Brierley, 477 F.2d 516, 523 (3d Cir. 1973) ("federal habeas corpus proceedings are civil . . . in nature. They are governed by the Federal Rules of Civil Procedure."); Rule 11, RULES GOVERNING HABEAS CORPUS CASES UNDER SECTION 2254 ("The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.").

Further, when a federal statute does not contain its own rules for time computation, the Federal Rules of Civil Procedure are routinely applied. See Frey v.

Woodard, 748 F.2d 173, 174-75 (3d Cir. 1984) (applying Rule 6(a) to calculation of statute of limitations under Federal Tort Claim Act because the Act "does not contain a time computation rule [and application of Rule 6] provides certainty . . . and uniformity"); Monkelis v. Mobay Chemical, 827 F.2d 937 (3d Cir. 1987) (acknowledging applicability of Rule 6 to calculating limitations period in ERISA litigation); Hart v. United States, 817 F.2d 78 (9th Cir. 1987) (same).[4]

Since neither the habeas statute (28 U.S.C. § 2241, et seq.) nor the RULES GOVERNING HABEAS CORPUS CASES UNDER SECTION 2254 have their own rules regarding time computation, the District Court correctly applied Rules 6(a) and (e) to its calculation of the limitations period.

Although this Court has not had occasion to consider whether Rules 6(a) or (e) apply to the calculation of AEDPA's statute of limitations, there is ample authority supporting their application to this calculation.

---

[4] Accord In re National Health and Safety Corp. v. Premium Holdings, Inc., 2001 WL 1677028, at *4, n.18 (Bankr.E.D. Pa. Nov. 19, 2001) ("Application of the computation-of-time rule is appropriate when the statute itself does not address" such computation); Smith v. National Flood Insurance Program, 156 F.Supp.2d 520 (E.D. Pa. 2001) (applying Rule 6(a) to time calculation under National Flood Insurance Act limitations period); Doshi v. Resolution Trust Corporation, 815 F.Supp. 837, 839 n.4 (E.D. Pa. 1993) ("Courts in this circuit have repeatedly employed the reasoning of Frey and applied Rule 6(a) to other statutes").

1. Application of Rule 6(a).

Ten Courts of Appeal have found that Rule 6(a) applies to the calculation of the AEDPA limitations period.[5] Judge Padova, mindful of this consistent authority, (Wilson-1 at 21-22), quite properly applied Rule 6(a) here.

The Commonwealth nevertheless argues that *dicta* from Burns v. Morton, 134 F.3d 109 (3d Cir. 1997), prohibits application of Rule 6(a) here (CB at 23-24). But the Commonwealth reads too much into the Burns *dicta*, where this Court stated that the one-year grace period following enactment of AEDPA would have terminated on April 23, 1997.

In some cases, the issue has arisen concerning whether the AEDPA grace period

[5]See Rogers v. United States, 180 F.3d 349, 355, n.13 (1st Cir.1999); Mickens v. United States, 148 F.3d 145, 148 (2nd Cir.1998); Hernandez v. Caldwell, 225 F.3d 435, 436 (4th Cir. 2000) ("Ultimately, **the issue before us is not a hard one**. The general rule for counting time in the federal courts is provided by Fed.R.Civ.P. 6(a) . . . We use Rule 6(a) in computing the limitations periods provided in statutes."); Flanagan v. Johnson, 154 F.3d 196, 200-02 (5th Cir. 1998) (Adhering to its "longstanding rule that Rule 6(a) applies when computing federal periods of limitations" and applying it to AEDPA); Bronaugh v. Ohio, 235 F.3d 280, 284-85 (6th Cir. 2000); Newell v. Hanks, 283 F.3d 827, 833 (7th Cir. 2002); Moore v. United States, 173 F.3d 1131, 1135 (8th Cir. 1999) ("Rule 6(a) provides a reasonable basis for determining the appropriate ending date of the grace period."; noting the wide acceptance of the 'modern doctrine' under which federal statutes of limitations are calculated pursuant to Rule 6(a)"); Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001); United States v. Hurst, 322 F.3d 1256 (10th Cir. 2003); Moore v. Campbell, 344 F.3d 1313 (11th Cir. 2003).

started to run on April 24, 1996 – the date the statute was enacted – or, applying Rule 6(a), on April 25, 1996.[6] Eight Courts of Appeal applied Rule 6(a) to the starting date of the grace period, finding that it began to run on April 25, 1996, and ended on April 24, 1997.[7]

In Burns, this Court did not discuss the application of Rule 6(a) to this question. That is not surprising, since the question of whether the grace period ended on the 23rd or 24th was not relevant to the outcome of the case. That is because the prisoner in Burns deposited his petition with prison officials on April 22 and, therefore, under the rule that a prisoner files a document when he presents it to a prison official for mailing, see Houston v. Lack, 487 U.S. 266 (1988), the petition was deemed filed as of April 22. See Burns, 134 F.3d at 112. Whether the grace period expired on April 23 or 24 was not at issue in Burns, and the Court's reference to April 23 was *dicta*.

Several Courts of Appeal have noted that Burns did not decide the application of Rule 6(a) to the AEDPA limitations period. See Moore, 344 F.3d at 1320 n.7 (citing

---

[6]E.g., Stokes v. District Attorney, 247 F.3d 539, 541 (3d Cir. 2001) ("Although the statute itself did not provide for one, most courts of appeals, including ours, implied a one year grace period for petitioners whose convictions became final before the effective date of AEDPA."); Crews v. Horn, 360 F.3d 146, 150 (3d Cir. 2004) (same).

[7]The eight Courts of Appeals that applied Rule 6(a) to the grace period were Rogers, Mickens, Hernandez, Flanagan, Newell, Moore v. United States, Patterson, and Moore v. Campbell.

Burns, the Court "observe[d] that the Third Circuit has stated that the grace period includes 23 April 1997; it however, has done so without purporting to make the choice about whether a petition filed on 24 April 1997 would be timely"); Patterson, 251 F.3d at 1246 n.4 ("The only Circuits espousing the April 23, 1997 deadline are those that have not specifically addressed the applicability of Fed. R. Civ. P. 6(a) to AEDPA's one-year grace period. . . . Further, the exact date of the expiration of the limitations period was not dispositive in those cases."); Newell, 283 F.3d at 832 (applying Rule 6(a) to AEDPA's limitations period, the Court distinguished Burns because in that case, the "date was not critical"); see also Hernandez, 225 F.3d at 438 (applying Rule 6(a) and holding that the grace period ended on April 24, 1997, despite its earlier *dicta* that the grace period ended on April 23).

The District Court followed the reasoning of the Courts of Appeal and rejected the Commonwealth's argument that Burns controlled the question of whether Rule 6(a) was applicable. Wilson-1 at 21-23. The District Court noted that none of the Circuits citing April 23 as the end of the grace period "have ever addressed the applicability of the rule [6(a)], and none have faced the situation in which the exact expiration date of the statute of limitations was dispositive," id., at 23, and that "Burns cannot be read to express any opinion on the question of Rule 6(a)'s applicability to the AEDPA statute of limitations," id. at 22.

2. Application of Rule 6(e).

Rule 6(e) affords litigants three days to perform any act when the time period in question was commenced through notice by mail.[8] The District Court found that the date of receipt of the April 3, 1997 Notification Letter to Mr. Nolas could not be determined. Wilson-1 at 25. The Commonwealth does not challenge this finding. Under such circumstances, precedent requires that Petitioner be afforded the three days allotted by Rule 6(e).

This and other Circuits apply Rule 6(e) in analogous settings involving Title VII litigation. Prior to filing a Title VII civil rights lawsuit, a prospective litigant is required to obtain a "right to sue letter" from the Equal Employment Opportunity Commission (EEOC). Once that letter is received, the prospective litigant has 90 days to file suit. Baldwin County Welcome Center v. Brown, 466 U.S. 147, 149 (1984). When, as in this litigation, the date that the notice was received is unknown, this and other Circuits apply the Rule 6(e) presumption that receipt of the notice was three days after mailing:

---

[8]Rule 6(e) states: "Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party . . . [by United States Mail], 3 days shall be added to the prescribed period." Rule 6(e) represent "a reasonable transmission time, and a fair compromise between the harshness of measuring time strictly from the date of mailing and the indefiniteness of attempting to measure from the date of receipt." Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: Civil 3d § 1171.

> When the actual date of receipt [of the right-to-sue letter] is known, that date controls. . . .However, in the absence of other evidence, courts will presume that a plaintiff received her right-to-sue letter three days after the EEOC mailed it.

Seitzinger v. Reading Hospital and Medical Center, 165 F.3d 236, 239 (3d Cir. 1999).[9]

These Title VII cases are persuasive authority here. The District Court found that the date on which the April 3, 1997 Notification Letter was received by Petitioner's counsel is unknown. Wilson-1 at 25. Just like a litigant in the Title VII setting, Petitioner is entitled to the Rule 6(e) presumption that the letter was received

---

[9]See also Mosel v. Hills Department Store, Inc., 789 F.2d 251, 253, n.2 (3d Cir. 1986) (Rule 6(e) applies when date of receipt is unknown or in dispute (citing Baldwin)); Smith-Haynie v. District of Columbia 155 F.3d 575, 578, n.3 (D.C. Cir. 1998); Lozano v. Ashcroft, 258 F.3d 1160, 1164 (10th Cir. 2001) ("When the receipt date for an EEOC right-to-sue letter is unknown or disputed, federal courts have presumed various receipt dates ranging from three to seven days after the letter was mailed . . .We therefore conclude that a presumption of receipt is appropriate whenever the actual receipt date is unknown or disputed."); Taylor v. Books a Million, Inc., 296 F.3d 376 (5th Cir. 2002); Adams v. Purfield, 1995 WL 610654, *2 (E.D. Pa. Oct. 18, 1995) (same); Arots v. Salesianum School, Inc., 2003 WL 21398017, *2 (D. Del. June 17, 2003); Stambaugh v. Kansas Department of Corrections, 844 F.Supp. 1431, 1433 (D. Kansas 1994) (Rule 6(e) "ensur[es] that the plaintiff has the benefit of the full ninety-day period when the date of the actual receipt [of the right to sue letter] is unknown or in dispute."); cf. Hatchell v. United States, 776 F.2d 244 (9th Cir. 1985) (Rule 6(e) inapplicable to tort actions against the United States because the statute of limitations is triggered by the date of mailing of a notice by the administrative agency denying his claim, and not the date of receipt); Hart v. United States, 817 F.2d 78, 80 n.2 (9th Cir. 1987) (discussing Hatchell: "Rule 6(e) provides for an extension of time for acts conditioned upon service of notice when service is made by mail.").

three days after mailing.

The Commonwealth argues that Rule 6(e) is only applicable to a "party" to an existing lawsuit, and therefore does not apply to a statute of limitations calculation because the act required to be performed – filing the lawsuit – is done before the litigant becomes a "party." CB at 25-26. This is not persuasive and conflicts with precedents from the United States Supreme Court and this Circuit.

Obviously, a prospective Title VII litigant in possession of a "right to sue letter" has not yet filed a federal lawsuit. See Baldwin, 466 U.S. at 149 (filing of "right to sue letter" with district court does not constitute commencement of a civil rights lawsuit, which is only accomplished by filing complaint); Anjelino v. The New York Times Co., 200 F.3d 73, 94 (3d Cir. 2000) (EEOC proceedings "informal [and] non-judicial"); Truitt v. County of Wayne, 148 F.3d 644, 647 (6th Cir. 1998) (While "Title VII requires that a party file a civil action within 90 days of receiving a right-to-sue letter. . . An individual commences a civil action by filing a complaint with the clerk of court"). Thus, prospective Title VII litigants are afforded the Rule 6(e) presumption when they have not commenced a lawsuit, and there is no principled reason that Rule 6(e) should not apply to a habeas litigant. Since there is nothing in AEDPA precluding application of Rule 6(e), and its use "provides certainty and uniformity," Frey, 748 F.2d at 174-75, Judge Padova correctly applied it.

The Commonwealth argues that mailing of a right-to-sue letter is "different" because a prospective Title VII litigant "could not otherwise learn that he has been authorized to commence legal action" (CB at 26). This argument misses the point that Rule 6(e) is only applied in this Circuit when the date of the actual receipt of the letter is unknown. See Seitzinger, 165 F.3d at 239 ("When the actual date of receipt [of the right-to-sue letter] is known, that date controls. . . .however, in the absence of other evidence, courts will presume that a plaintiff received her right-to-sue letter three days after the EEOC mailed it."). Thus, if a Title VII litigant had actual knowledge of the right-to-sue letter that predated the presumed date of receipt, then the Rule 6(e) presumption would not apply. [10] Similarly, if Mr. Wilson had known of the Tape earlier than the presumed date that Mr. Nolas received the letter, then he too would not have been entitled to the presumption. But, as Judge Padova found, he did not know, and the Commonwealth's distinction fails.

The Commonwealth also says that Title VII cases are different because prospective litigants have 90 days to commence suit, whereas habeas petitioners have

---

[10]But see Baldwin, 466 U.S. at 148 n.1 (referring to a presumed date of receipt even when there was no dispute about the actual date of receipt); Smith-Haynie, 155 F.3d at 578, n.3 ("Title VII plaintiffs need not include the date of receipt of a right-to-sue letter in their complaints. In the event that a date is not pleaded, the Supreme Court has applied the '3-day' rule of Fed. R. Civ. P. 6(e) to presume that the letter is received three days after it is mailed" (citing Baldwin)).

one year (CB at 27). This argument ignores that statutes of limitation are designed to let a litigant know how much time s/he has to commence an action. Such statutes are neither applied less stringently to those with shorter periods, nor more stringently to those with longer periods.

The Commonwealth then cites four cases for its argument that Rule 6(e) does not apply to Petitioner. Each case is either distinguishable or in conflict with this Circuit's application of Rule 6(e). First, the Commonwealth cites Rouse v. Lee, 339 F.3d 238 (4th Cir. 2003) (en banc), which declined to apply Rule 6(e) to an AEDPA time calculation (CB at 25). In Rouse, however, the petitioner argued that he was entitled to three days under Rule 6(e) because the court order which rendered his state court judgment final was mailed to him. The court rejected that argument because the AEDPA limitations period under § 2244(d)(1)(A) itself expressly states that the limitations period does not run from the date of service of a state court judgment, but instead from the date on which the state court judgment became final. Rouse, 399 F.3d at 245.

The AEDPA statutory language relevant to Petitioner, in contrast, is 2244(d)(1)(D) which does not run from the date that a judgment became final. Instead, it runs from when the factual predicate could have been discovered through due diligence. Therefore, Rouse does not help the Commonwealth: it stands for is the

proposition that Rule 6(e) does not apply to (d)(1)(A), but it says nothing about, and is irrelevant to, it's application to (d)(1)(D).

The Commonwealth further argues that this Court should adopt Rouse's view that Rule 6(e) only applies to parties to existing lawsuits (CB at 25). However, this suggestion obviously conflicts with the holdings of this Court we cited earlier, e.g., Seitzinger, 165 F.3d at 239, and those of the Supreme Court, Baldwin, 466 U.S. at 148, n. 1 ("the presumed date of receipt of the notice" is governed by Rule 6(e)), which apply Rule 6(e) to non-parties in the Title VII context.

The Commonwealth also cites Clay v. United States, 199 F.3d 876 (6th Cir. 1999) (CB at 25). Clay is also distinguishable, for several reasons.

First, the statute at issue in Clay was 26 U.S.C. § 7609, which gives the target of an Internal Revenue Service investigation twenty days to move to quash third party subpoenas. **This is a jurisdictional time limit**. Clay, 199 F.3d at 880. The AEDPA limitations period, however, is **not** jurisdictional. Miller v. New Jersey State Department of Corrections, 145 F.3d 616, 617-18 (3d Cir. 1998). This distinction is important because, as the Court in Clay pointed out, Fed.R.Civ.P. 82 specifically directs that the Federal Rules of Civil Procedure may never extend the jurisdiction of a federal court and, thus, Rule 6(e) cannot be applied when the time limit in question is jurisdictional:

> Fed.R.Civ.P. 82 tightly circumscribes application of the Federal Rules of Civil Procedure, mandating that they 'not be construed to extend or limit the jurisdiction of the United States district courts.' Because application of Rule 6(e) to section 7609(b)(2)(A) would extend the district court's jurisdiction, Fed.R.Civ.P. 82 forbids construction of Rule 6(e) to reach such a result.

Clay, 199 F.3d at 880.

Clay is distinguishable for another reason. Unlike the AEDPA period, the period in Clay contained its own time calculation rule. The Clay statute, 26 U.S.C. § 7609, states that the movant has twenty days to file "notwithstanding any other provision of law." Clay, 199 F.3d at 880 (emphasis original). Thus, the court held that application of Rule 6(e) would "contravene the express language of the statute." Id. When a statute has its own rules for calculating time, it is impermissible to use the time calculation methods of the Rules of Civil Procedure. Frey, 748 F.2d at 174-75. Accordingly, the statute involved in Clay is different in this critical respect from AEDPA, which includes neither such a prohibition regarding "any other provision of law" nor any other rule regarding time calculation.[11]

II. THE DISTRICT COURT PROPERLY HELD AN EVIDENTIARY HEARING.

Following the release of the Tape, Petitioner filed a PCRA petition. He requested, *inter alia*, a hearing on his jury discrimination claim. See SA- Counsel did

---

[11]The Commonwealth's reliance on Berman v. United States, 264 F.3d 16 (1st Cir. 2001) and Brohman v. Mason, 587 F.Supp. 62 (W.D. NY 1984) (CB at 25) is similarly misplaced because they too involved the time period in 26 U.S.C. § 7609.

not have a copy of the transcript of Petitioner's voir dire, and were unaware that the notes of testimony of the voir dire were lost. However, once that fact became known, counsel filed two requests for a hearing to, *inter alia*, reconstruct the record.[12]

Neither of Petitioner's requests were ruled on. The PCRA petition was dismissed without an evidentiary hearing.

On appeal in the Superior Court, Petitioner again requested an evidentiary hearing, both to reconstruct the voir dire record and on his substantive claim of discrimination in voir dire. See, e.g., *Initial Brief of Appellant*, A-62-104, at A-74 (requesting reconstruction hearing), at A-103 (requesting hearing on merits). Relief was denied. See Commonwealth v. Wilson, 764 A.2d 1131 (Pa.Super. 2000). Petitioner also sought a hearing in his allocatur petition, which was denied. Commonwealth v. Wilson, 775 A.2d 806 (Pa. 2001).

Despite the denial of Petitioner's repeated requests for an evidentiary hearing in the state courts, the Commonwealth appeals the District Court's grant of a hearing as violative of 28 U.S.C. § 2254(e)(2). The Commonwealth errs.

Section § 2254(e)(2) inhibits a federal hearing only if the petitioner "failed to

---

[12]On July 15, 1998 Petitioner filed a *Motion for a Reconstruction Hearing*. When no ruling on that *Motion* was forthcoming, on September 15, 1998 he filed a *Supplement to Petitioner's Motion for a Reconstruction Hearing and Motion for Discovery* (both included in Petitioner's Supplemental Appendix).

develop" the factual basis for the claim in state court. In Williams v. Taylor, 529 U.S. 420 (2000), the Supreme Court explained that (e)(2)'s "failed to develop" clause applies only when a habeas petitioner is at fault for not "tak[ing] the necessary steps to" develop the relevant facts in state court. Id. at 432. Thus, a petitioner fails to develop the factual basis for a claim when s/he displays a "lack of diligence, or some greater fault." Id. Where, as here, the prisoner "seek[s] an evidentiary hearing in state court," but is denied such a hearing, id. at 437, there is no lack of diligence and no "failure to develop" within the meaning of § 2254(e)(2).

Given that § 2254(e)(2) only inhibits a federal hearing if the petitioner is at fault for not having requested one in state court, the Commonwealth's claim that Judge Padova erred in holding a hearing is curious. The Commonwealth charges that Petitioner was at "fault" for not developing the facts underlying his claim in state court because he "waived" his entire discrimination claim by not raising it at trial, on direct appeal, or in his first state post-conviction litigation (CB at 29-34) – when the Commonwealth concedes that he had no knowledge of the Tape containing McMahon's admission that he always discriminates because the Commonwealth had not disclosed it.

Crucially, the Commonwealth has not appealed Judge Padova's ruling that the "waiver" assertion made by the state courts is an "inadequate" state procedural ruling.

See Wilson-1 at 26-31. Thus, although not appealing Judge Padova's holding that the state court "waiver" ruling was based upon an "inadequate" ground, the Commonwealth tries to do an end run around that holding – the Commonwealth incorrectly suggests that this Court "need not reach" the adequacy question because the federal habeas statute prohibits federal hearings whether or not the state courti "waiver"ruling, which deprived Petitioner of a hearing, was inadequate or invalid (CB at 35). This argument is unsupported by the law or logic. In short, as Judge Padova found, because there is no "adequate" procedural bar to federal review, Petitioner's claim is before the federal court on its merits. On the merits, a hearing was appropriate for resolution of issues of fact, and there is nothing unusual about a district court resolution of factual issues after a hearing.

The law is just the opposite of what the Commonwealth proposes. Since the state court "waiver" ruling was not based on an "adequate" state law ground, and because Petitioner repeatedly requested and was denied a hearing by the state courts, § 2254(e)(2) does not preclude a federal evidentiary hearing.

In order to put the Commonwealth's muddled argument in proper context, Petitioner first reviews the law of procedural default and adequate state law grounds. Then, he reviews the law setting forth his entitlement to a federal hearing. Petitioner then discusses his right to a hearing under established law. Finally, Petitioner

demonstrates that the state court "waiver" ruling was not "adequate" to prohibit either review of his claims or a federal evidentiary hearing.

A. The Law of Procedural Default and "Adequacy."

Habeas corpus "plays a vital role in protecting constitutional rights," Slack v. McDaniel, 529 U.S. 473, 483 (2000), and is the "highest safeguard of liberty," Smith v. Bennett, 365 U.S. 708, 712-13 (1961). While some restrictions on habeas are imposed by comity, comity-based doctrines are "not . . . a capitulation of federal power to state interests." Carter v. Estelle, 677 F.2d 427, 442-43 (5th Cir.1982). Instead, they "reflect[] a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a swift and imperative remedy." Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 490 (1973).

"Procedural default" is a doctrine of comity which sometimes inhibits a federal habeas court from ruling on the merits of a claim when a state court, because of a state procedural rule, has rejected the claim. Not all state procedural rules, however, inhibit merits review by the federal habeas courts. In order for a state rule to inhibit federal review, it must be "adequate." See Harris v. Reed, 489 U.S. 255, 260-62 (1989); Szuchon v. Lehman, 273 F.3d 299, 325 (3d Cir. 2001); Liebman & Hertz, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, ch. 26 (1998).

A state rule is "adequate" and may bar federal merits review "only if it is **firmly**

established, **readily ascertainable**, and **regularly followed** " Szuchon, 273 F.3d at 325 (citing, inter alia, Ford v. Georgia, 498 U.S. 411, 423-24 (1991); James v. Kentucky, 466 U.S. 341, 346-48 (1984); Doctor v. Walters, 96 F.3d 675, 683-84 (3d Cir. 1996)). The "waiver" ruling in this case is not based on such an "adequate" rule.

B. Federal Hearing.

Federal district courts have "broad power" to conduct evidentiary hearings in habeas cases. Cristin v. Brennan, 281 F.3d 404, 413 (3d Cir. 2002). However, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992), held that a habeas petitioner could be denied a federal hearing if s/he "failed to develop" relevant facts in state court. See Cristin, 281 F.3d at 415 ("Keeney never applied, however, to all requests for evidentiary hearings in habeas actions. The Court described its holding as relevant only when the petitioner 'fail[ed] to develop' the facts of his habeas claim in state court.") AEDPA's § 2254(e)(2) codifies Keeney's "failed to develop" doctrine. Cristin, 281 F.3d at 415, (citing Williams, 529 U.S. at 434).

Accordingly, § 2254(e)(2) only prevents a federal court hearing in the limited circumstance where the petitioner "failed to develop the factual basis of a claim in State court proceedings." In Williams, at 432, the Court held that a petitioner "failed to develop" the factual basis for a claim under (e)(2) only when s/he "did not take the necessary steps to" develop it or otherwise displayed a "lack of diligence, or some

greater fault." Petitioner did not so fail.

C. The Relationship Between Procedural Default and the Right to an Evidentiary Hearing.

The "adequacy" doctrine exists to ensure that a habeas petitioner is not deprived of federal review by a state court's arbitrary rejection of a federal claim. See, e.g., NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58 (1958) (novel application of state rules cannot thwart federal review); Hathorn v. Lovorn, 457 U.S. 255, 263 (1982) ("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims."); Brown v. Lee, 319 F.3d 162, 170 (4th Cir. 2003) ("adequacy requirement was designed to prevent . . . state courts [from] . . . engag[ing] in an arbitrary application of state procedural rules to thwart federal habeas review of constitutional issues").

Since § 2254(e)(2) focuses on whether a habeas petitioner is at fault or did not seek to develop the facts in state court, it would make no sense to punish Petitioner by denying him a federal hearing when, in state court, he requested a hearing and proffered relevant facts (i.e., the Tape, once it was disclosed) but his request was denied by the state court's application of an inadequate state waiver rule. Recognizing the absurdity of such a scenario, federal courts have held that when a petitioner was denied a hearing in state court by the application of an **inadequate** state law ground, § 2254(e)(2) cannot

be used to deny a federal hearing.[13]

The Commonwealth's argument that this Court need not consider "adequacy," is utterly incorrect.

D. There Was No Adequate State Court Bar Ruling.

As the District Court found:

[The Tape] provides evidence of Jack McMahon's discriminatory intent in the

---

[13]Pursell v. Horn, 187 F.Supp.2d 260, 382 (W.D. Pa. 2002) ("Pursell has shown sufficient diligence to overcome § 2254(e)(2)'s hurdle. He specifically requested an evidentiary hearing on his claim in state court, and that alone is enough. Williams, 529 U.S. at 437. That the Pennsylvania Supreme Court deemed his request procedurally barred does not alter my decision. . . [T]he Pennsylvania Supreme Court's decision ... did not rest on an adequate bar for purposes of federal review. Accordingly, that decision does not foreclose Pursell's request for an evidentiary hearing." (some citations omitted)); Morris v. Woodford, 229 F.3d 775, 780-82 (9th Cir. 2000) (where state court denied post-conviction petition as time-barred, but time-bar was not an adequate state ground, habeas petitioner has not failed to develop the facts in state court, and is entitled to federal hearing); McDonald v. Johnson, 139 F.3d 1056, 1058-59 (5th Cir. 1998) (when petitioner presented claim to state courts, but "they found [his] claim procedurally barred and thus did not hold an evidentiary hearing," he has not "failed to develop" a factual basis for his claim); United States ex rel. Gosier v. Welborn, No. 96-C-2176, 1997 WL 452406, *6-*8, *12-*13 (N.D. Ill.) (where state court found claim procedurally barred, and did not hold hearing on that claim, but where state procedural bar rule was not adequate and independent, petitioner had not "failed to procedurally barred and did not hold a hearing, but state procedural bar rule was not adequate, petitioner had not "failed to develop" a factual basis for his claim); see also Cochran v. Herring, 43 F.3d 1404, 1407-10 (11th Cir. 1995) (district court properly held hearing on claims denied in state court on basis of state court procedural bar rule that was not adequate and independent); Warner v. United States, 975 F.2d 1207, 1210, 1213-14 (6th Cir. 1995) (same); Jackson v. Calderon, 211 F.3d 1148, 1154, 1161-64 (9th Cir. 2000) (same).

> form of his own admission that he **always** engages in such [discriminatory] practices, [and] therefore represents a separate factual predicate on which discriminatory intent under Batson, may be established.

Wilson-1 at 9. The Tape constitutes **an admission** of discriminatory practices on the part of the prosecutor who tried Petitioner's case. In Commonwealth v. Basemore, 744 A.2d 717 (Pa. 2000), a post-conviction case, the Pennsylvania Supreme Court held that claims founded upon the previously undisclosed Tape – i.e., claims such as Petitioner's – should be heard:

> There can be no question that the practices described in the transcript support an inference of invidious discrimination on the part of any proponent. Basemore argues, persuasively, that our requirements concerning the establishment of a *prima facie* case by circumstantial evidence of the prosecutor's motivation (i.e., the races of all potential jurors, stricken venirepersons and jurors ultimately seated) should not, as a matter of law, foreclose consideration of a claim where the petitioner is able to show by direct evidence (the prosecutor's own words) that the prosecutor engaged in a pattern or practice of discrimination. . . .

Id. at 732.

The Tape is an admission by Petitioner's prosecutor that he systemically engaged in racial discrimination in jury selection. It provided Petitioner with a claim that was not previously available to him.

The Superior Court's ruling that he "waived" his claim by not raising it in earlier proceedings – before the Commonwealth disclosed the Tape – was an inadequate state bar ruling because it was inconsistent with other post-conviction cases in Pennsylvania

addressing Batson issues in light of the Tape. In those cases, the Pennsylvania courts did not make a "waiver" ruling such as the one that the Superior Court made here. In those cases, the Pennsylvania courts did not hold the claim arising from the Tape should have been raised at trial, on appeal or in any proceeding before the Tape was disclosed to the petitioner. The Wilson Superior Court decision is a paradigmatic example of the application of a procedural rule that is unique, novel, not regularly followed and not firmly established.[14]

---

[14]On the state post-conviction remand proceedings in Basemore, the Court of Common Pleas applied no procedural bar and granted a new trial after finding that McMahon engaged in discriminatory jury selection. Commonwealth v. Basemore, slip op. at 3 (December 19, 2001) ("From the evidence before it, this Court is convinced that the trial prosecutor in this case engaged in a pattern of discrimination during voir dire. The record indicates a conscious strategy to exclude African-American jurors.") (A copy of Judge Savitt's opinion is included in Petitioner's Supplemental Appendix). The Commonwealth did not appeal.

In Commonwealth v. Spence, the post-conviction court applied no procedural bar and granted a new trial on the merits, again finding that McMahon discriminated in voir dire. The Commonwealth did not appeal. (A copy of the transcript of Judge Berry's decision from the bench is included in Petitioner's Supplemental Appendix).

Another Philadelphia Common Pleas Court also found that McMahon discriminated in jury selection, applied no procedural bar and granted relief on the merits, in the post-conviction proceedings in Commonwealth v. Harold Wilson. Judge Temin found: "[T]he Court finds that there was definitely an attempt on [the] part of the Commonwealth to preempt jurors because of their African-American race, that the neutral reasons given were not satisfactory. . . I find that the reasons given were pretextural . . ." (A copy of the Wilson transcript is included in Petitioner's Supplemental Appendix).

After all, in Basemore itself the Pennsylvania Supreme Court considered the Tape to be "newly discovered evidence" which overcomes the very "waiver" ruling the Superior Court made against Petitioner. Like Mr. Wilson, Mr. Basmore was prosecuted by McMahon and asserted a claim of racial discrimination in jury selection based upon the Tape. Also like Mr. Wilson, the Commonwealth, also represented by the Philadelphia District Attorney, opposed his claim with a "waiver" argument.[15]

---

[15]Specifically, in its Basemore Pennsylvania Supreme Court brief, the Commonwealth asserted:

> Prior to the PCRA hearings below, defendant was represented by three separate lawyers at trial, on direct appeal, and on his amended PCRA petition in 1995. None of these lawyers, who were obviously familiar with the trial record, ever suggested that the prosecutor violated Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). Nor did this claim occur to defendant himself when he initiated the PCRA proceedings via a lengthy, pro se petition. In fact, the CLEADA lawyers who entered this case sometime before January, 1996, also never thought to raise a claim based on Batson – until May, 1997, after the Philadelphia District Attorney's Office released a videoTape made by former prosecutor Jack McMahon.
>
> If a Batson claim existed in this case, it would have existed since jury selection occurred in 1988. It did not suddenly arise upon release of the McMahon videoTape. The current claim, which was not presented until the PCRA proceedings (which spanned over three years), ended, is triply waived.

Brief for Appellee, Commonwealth v. Basemore, (Supreme Court of Pennsylvania) (footnotes omitted). The relevant portion of the Commonwealth's Basemore brief was provided to the District Court as an attachment to Petitioner's November 19, 2002

The Pennsylvania Supreme Court addressed and rejected the Commonwealth's waiver argument:

> It remains to address the Commonwealth's contention that remand for a hearing is unnecessary, because Basemore's Swain/Batson claim is waived. ... The essential allegation underlying a newly discovered evidence claim is that the central proof of a Swain/Batson violation, the videoTape, was not made available until approximately one and one half months prior to the filing of the supplemental petition. . . . Moreover, the averments are of concealment on the part of the government, both in terms of the previous nondisclosure of the videoTape at the time of trial and thereafter, and in the inherently covert nature of conduct constituting the underlying violation. . . . [I]t is at least arguable that Basemore's claim of recent discovery of concealed government activity implicating the fundamental fairness of his trial would state a claim for relief under Section 9543(a)(2)(i), although the issue has not previously been raised.

Basemore, 744 A.2d at 732-33. The Pennsylvania Supreme Court remanded for the same type of hearing the Court of Common Pleas and Superior Court denied to Mr. Wilson.

As Judge Padova explained, despite the obvious relevance of Basemore, the Superior Court decision "does not even address the effect of Basemore on the issue of waiver in Petitioner's case." Wilson-1 at 29.

The Superior Court relied on Commonwealth v. Lark, 746 A.2d 585 (Pa. 2000), where the defendant raised a Batson claim in a second state post-conviction petition

---

Objections to the Magistrate-Judge's Report and Recommendation (District Court Docket, document # 26).

subsequent. Like the petitioners here and in Basemore, Lark relied on the Tape and asserted that the Commonwealth used peremptory strikes in a discriminatory manner. Lark, 746 A.2d at 588.

The Pennsylvania Supreme Court held the portion of Lark's claim that relied upon the Tape **was based on newly discovered evidence and was therefore timely and not waived**. However, it ruled that this did not entitle Lark to relief because Lark was **not prosecuted by McMahon** and the Tape therefore was not relevant in his case. Lark, 746 A.2d at 588, 589. Because McMahon was not the prosecutor, the rest of Lark's claim of racial bias in jury selection was held procedurally barred. Lark, 746 A.2d at 589.

Had the Pennsylvania Superior Court applied Lark to Petitioner's case in a manner consistent with Pennsylvania law, it would have found that Petitioner's claim is not waived. This point was not lost on Judge Padova: "Lark cannot control in a case such as this where the defendant was actually prosecuted by Jack McMahon." Wilson-1 at 30.

In light of the Pennsylvania Supreme Court's holdings in Basemore and Lark – that a claim of racial bias in jury selection based upon the Tape in a case prosecuted by McMahon is not waived – Petitioner complied with all state court rules in litigating the second post-conviction petition. Under these circumstances, the Superior Court's

"waiver" ruling is not an adequate state ground.

While contending that this Court need not "reach" the adequacy question, the Commonwealth nonetheless takes issue with Judge Padova's decision finding the "waiver" ruling inadequate. The Commonwealth claims that Judge Padova improperly "substituted" his "own opinion" for that of the Superior Court, because the "only difference [between Lark and Petitioner's case] is that McMahon was the prosecutor here, and in Lark he was not" (CB at 34-5). The Commonwealth is correct – that is the **"only"** difference, but it is quite a **material difference**. It is the difference that the Pennsylvania Supreme Court held controlls the "waiver" issue.

The Commonwealth also argues that since Petitioner has "conceded that he believes that Mr. McMahon's use of strikes during voir dire and his lifetime strike rate were each individually enough to establish 'at least' an inference of discrimination," (CB at 29-30) Petitioner has waived his claim by not raising it at trial, direct appeal or in his first state post-conviction litigation. This argument ignores that the petitioner in Basemore (and in other Pennsylvania cases involving post-conviction rulings on the Tape, see n.14, supra) also relied on the trial record in addition to the Tape, and that nonetheless the Tape-based claim was not deemed waived. As the Pennsylvania Supreme Court explained:

Basemore's appellate brief further asserts, inter alia, that: the pertinent

> **training videoTape** was made sometime in 1987 (within the year preceding Basemore's trial) and was released by the Office of the District Attorney to the public for the first time in April, 1997 (the month preceding Basemore's filing of his supplemental post-conviction petition); the **trial record** reveals practices employed by Attorney McMahon at trial which reflect the techniques for discrimination described on the videoTape, including the utilization of nineteen peremptory challenges to strike African American venirepersons; and **records from other capital trials** in which Attorney McMahon was the prosecutor also reflect his employment of discriminatory practices in jury selection.

Basemore, 744 A.2d at 727. This is exactly like Petitioner's case. There is no adequate state procedural bar to federal review.

III. THE DISTRICT COURT PROPERLY GRANTED HABEAS RELIEF.

The judge who tried the Batson issue was Judge Padova. He found that McMahon in fact had the intent to and did discriminate in Petitioner's jury selection. He found Petitioner successfully established intentional discrimination by the prosecutor in selecting a jury in this case. Wilson-2 at 449. He found this after holding a hearing, considering all the evidence and addressing all the Commonwealth's arguments. The record supports Judge Padova's findings. He was not clearly erroneous.

A. Judge Padova Was Correct – Not Clearly Erroneous.

The Commonwealth does not even try to discuss the clearly erroneous standard

of appellate review.[16] Judge Padova's "decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal" and will not be overturned unless clearly erroneous. Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) (quoting Hernandez v. New York, 500 U.S. 352, 364 (1991)); see also Purkett v. Elem, 514 U.S. 765, 769 (1995 (per curiam) (discriminatory intent is question of fact). This Circuit also has explained that the finding "as to intentional discrimination or lack thereof is a finding of fact . . . Such invidious intent does not rear its ugly head for everyone to see; instead it hides behind the cloak of pretext. Consequently, the trial judge's finding of discrimination largely turns on evaluation of the credibility and demeanor of the attorney who exercises the challenge." United States v. Casper, 956 F.2d 416, 419 (3d Cir. 1992) (citing Hernandez).

Here, Judge Padova observed McMahon's demeanor, considered all the

---

[16]"Where a district court holds an evidentiary hearing in a habeas proceeding, [the circuit court] reviews the district court's findings of fact for clear error." Love v. Morton, 112 F.3d 121, 133 (3d Cir. 1997) (citing Lesko v. Owens, 881 F.2d 44, 50-51 (3d Cir.1989); Yohn v. Love, 76 F.3d 508 (3d Cir.1996)). The District Court's findings of fact must be affirmed unless that they are "(1) completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bear[] no rational relationship to the supportive evidentiary data." Haines v. Liggett Group, Inc., 975 F.2d 81, 92 (3d Cir.1992) (quoting Krasnov v. Dinan, 465 F.2d 1298, 1302 (3d Cir.1972)).

evidence and made credibility findings. His "evaluation of the prosecutor's state of mind based on demeanor and credibility" requires deference. Hernandez, 501 U.S. at 365.

B. Judge Padova's Findings.

Judge Padova's findings have ample record support. After all, McMahon admitted that the Tape reflected his views as a prosecutor on jury selection and Judge Padova so found. Wilson-2 at 447. Judge Padova also found the practices described "in the Tape are the jury selection practices that Mr. McMahon engaged in during [Mr. Wilson's] trial." Wilson-2 at 447. Those views were:

> [L]et's face it, again, there's the blacks from the low-income areas that are less likely to convict ... There's a resentment for law enforcement, there's a resentment for authority, and, as a result you don't want those people on your jury.

Tape at , SA-

> [I]n selecting blacks, you don't want the real educated ones . . .

Tape at , SA-

> [B]lack women, young black women, are very bad. There's an antagonism. I guess maybe because they're downtrodden on two respects, they got two minorities, they're women and they're blacks, ... black women are people who inherently may be against the government or against police or against the Commonwealth.

Tape at , SA-

> Teachers you don't like. [But] I've had good luck with teachers that teach in the public school system . . . [T]hey may be so fed up with the garbage that they've had in their schools. If you get like a white teacher teaching in a black school that's sick of these guys maybe, that may be one that you accept.

Tape at 63, SA-

> [P]eople from Mayfair are good and people from 33rd and Diamond stink. . . . [Y]ou don't want any jurors from 33rd and Diamond.[17]

Tape at 21, SA-

> [W]hen they call the names out, okay, Juror No. 1, No. 20, Reynard Boykin. I know I'm not taking Reynard; I can tell you that already.

Tape at 25, SA-

> You're not going to have some brain surgeon from Chestnut Hill with some nitwit from 33rd and Diamond.[18]

Tape at 58, SA-.

> Another thing to do, little tips, too, when a jury comes in the room, the 40 people come in the room, count them. Count the blacks and whites. You want to know at every point in that case where you are. In other words, the 40 come in -- you'll never get it just right. You don't want to look there or go, "Is there a black back there? Wait a minute. Are you a black guy?

Tape at 66-67, SA .

---

[17]"33rd and Diamond" is in the predominantly African-American Strawberry Mansion neighborhood, while Mayfair is predominantly white.

[18]Chestnut Hill is well known as a predominantly white area of Philadelphia.

And if you lose track or you're not sure of what's going on or you want to -- you can always take a recess.

Because a lot of times what they do is they'll like have the next group -- the court officers want to set them up. Like remember in that method I told you earlier where they have -- now we've picked five, so they're going to bring seven more in. Usually they'll have the next seven sitting right out there in order. So you can see -- you can say, "Judge, I have to go to the bathroom." You can go out and see what's left and check out what's left, see what's you know -- because you know you got two strikes left. You want to know, look, you know, if the first two are going to be bad, I'm going to have to use strikes and the next ones will be good. But if they're two, you know, good ones coming up, then you know you're not going to strike them. And it changes your philosophy and your ability to make a decision knowing what's coming up.

Tape at 67, SA-.

The case law says that the object of getting a jury is to get -- I wrote it down. I looked in the cases. I had to look this up because I didn't know this was the purpose of a jury. "Voir dire is to get a competent, fair, and impartial jury." Well that's ridiculous. You're not trying to get that.

Tape at 45, SA-.

And if you go in there and any one of you think you're going to be some noble civil libertarian and try to get jurors, "Well, he says he can be fair; I'll go with him," that's ridiculous. You'll lose and you'll be out of the office; you'll be doing corporate law. Because that's what will happen. You're there to win . . . .

And the only way you're going to do your best is to get jurors that are as unfair and more likely to convict than anybody else in that room.

Tape at 45-46, SA

In short:

> [T]he purpose of voir dire, namely, to select a fair and impartial jury, is denigrated as "ridiculous," in favor of the selection of jurors who will be biased in favor of conviction; various racial and gender stereotypes are described and offered as reasons to discriminate in the selection of jurors; techniques for accomplishing such discrimination are described in detail, including the maintenance of a running tally of the race of the venire panel and the invention of pretextual reasons for exercising peremptory challenges; and a willingness to deceive trial courts to manipulate jury panels to these ends is also expressed.

Basemore, 744 A.2d at 729. Judge Padova made a similar finding:

> Mr. McMahon describes in great detail his strategy of systematically excluding certain types of black jurors in cases that he tried. Specifically, Mr. McMahon describes in the Tape his practice of striking all African-American potential jurors from low income neighborhoods, striking young African-American women, and striking older African-American women in cases involving young black male defendants. Mr. McMahon, realizing that his practices were in direct contravention of Batson, also described techniques which could be utilized to avoid detection, such as questioning black jurors more carefully in order to ensure that one had a non-discriminatory reason for striking the juror if an objection were made.

Wilson-2 at 441.

For McMahon a "great" jury consists of "eight whites and four blacks, or nine and three," which, in his twisted logic would prevent "reverse racism" that is, the all white jury concluding "Aw, who gives a shit . . . them people live like this." Tape at 59. Petitioner's jury matched McMahon's notions of "greatness," consisting of nine white jurors, two African-Americans and one whose race could not be determined.

The Commonwealth is piqued at Judge Padova's findings, but it presents nothing

showing they are clearly erroneous. The Commonwealth's argument on appeal, summarized in its own words, is:

> The District Court erred in concluding that the prosecutor violated Batson because it cannot identify a single juror that was struck on account of his or her race. Rather, the Court simply assumed that a violation took place based upon general statements that the prosecutor made during a lecture on jury selection techniques at least two years after Mr. Wilsons' trial.
>
> Finally, the District Court erred in concluding that the Commonwealth failed to establish that the prosecutor would have exercised his peremptory challenges against African-Americans in the absence of an improper motive. The lack of a record in this case, which prevents the Commonwealth from making such a showing is attributable to Mr. Wilson's inexplicable 13-year delay in bringing his Batson claim. Thus, it is unfair to require the Commonwealth to establish specific reasons for each of its strikes – especially where the Court cannot identify a single juror that was struck because of his or her race.

CB at 11.

Even a cursory review of Judge Padova's findings shows that the Commonwealth's argument is frivolous:

> [T]he Court has considered the possibility that Mr. McMahon's strikes of individual African-American jurors in this case were based solely upon race neutral reasons, and not based upon the fact that the jurors were African-American.
>
> However, notwithstanding such possibility, the Court finds as fact that at least one of the peremptory strikes exercised against African-American jurors by Mr. McMahon at Petitioner's trial was motivated at least in part by that juror's race. The categories of African-American jurors whom Mr. McMahon advocates striking are so broad that it is impossible for the Court to believe that none of the nine African-American jurors whom Mr.

> McMahon struck at Petitioner's trial were stricken at least in part because of their race. For example, based upon his statements in the Tape, Mr. McMahon would have endeavored at Petitioner's trial to exercise peremptory strikes against both "young" and "older" black women. (McMahon Tape at 56-57.) Furthermore, in the Tape Mr. McMahon never specifically defined the terms "young" and "older." Moreover, the parties have stipulated that Mr. McMahon actually exercised peremptory strikes against at least six black women at Petitioner's trial. (Hearing Stip. Ex. 4.) There is nothing in the record to indicate that these six jurors were stricken solely because they fit into one of Mr. McMahon's race neutral disfavored categories, and, given Mr. McMahon's statements in the Tape concerning black female jurors, it would not be reasonable for the Court to assume that this was the case.
>
> Accordingly, the Court finds that Petitioner has established, by a preponderance of the evidence, that Mr. McMahon's decision to exercise a peremptory strike against one or more African-American members of the jury venire at Petitioner's trial was motivated by racial discrimination.

Wilson-2 at 449-50.

Judge Padova was correct and certainly not clearly erroneous in finding that Petitioner "successfully established intentional discrimination by the prosecutor in selecting a jury in [his] case." Wilson-2 at 449. With the Tape admitted in evidence, and following an evidentiary hearing at which McMahon testified and acknowledged that the Tape accurately reflected his prosecutorial views on the role of race in jury selection, see Wilson-2 at 447, the District Court found "as a fact that at least one of the peremptory strikes exercised against African-American jurors by Mr. McMahon at Petitioner's trial was motivated at least in part by that juror's race." Wilson-2 at 448.

The District Court found "that it is impossible [] to believe that none of the nine African-American jurors whom Mr. McMahon struck at Petitioner's trial were stricken at least in part because of their race." Id. at 449. The District Court found: "There is nothing in the record to indicate that these six [African-American women] jurors were stricken solely because they fit into one of Mr. McMahon's race neutral disfavored categories, and, given, Mr. McMahon's statements in the Tape concerning black female jurors, it would not be reasonable for the Court to assume that this was the case." Id. at 450. And the District Court found "that Petitioner has established, by a preponderance of the evidence, that Mr. McMahon's decision to exercise a peremptory strike against one or more African-American members of the jury venire at Petitioner's trial was motivated by racial discrimination." Id. at 450.

Like Judge Padova, other judges addressing post-conviction Batson claims after release of the Tape in cases prosecuted by McMahon found discrimination in the jury selection and granted relief under Batson, see n. 14 and accompanying text, supra (discussing cases).

Judge Padova's careful, detailed findings are against every one of the arguments the Commonwealth makes on appeal. He specifically addressed and expressly found against each of them. The Commonwealth does not even acknowledge that Judge Padova made findings of fact, submitting instead a brief which speculates on what may

or might have been possible alternative views of McMahon's mind-set during the jury selection in this case, and/or on the Tape. This is far from enough to overcome the findings Judge Padova made after the hearing, which are supported by the record evidence and are utterly contrary to the Commonwealth's arguments.

C. Judge Padova's Application of the Law.

Judge Padova also applied the appropriate law:

> In Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court recognized that the practice of exercising peremptory challenges provides an opportunity for prosecutors so inclined to engage in discrimination. Accordingly, the Court in Batson established a three part burden shifting procedure to be used in determining whether a prosecutor had engaged in racially discriminatory jury selection. Under Batson, 'Once the defendant makes a prima facie showing of racial discrimination (step one), the prosecution must articulate a race-neutral explanation for its use of peremptory challenges (step two). If it does so, the trial court must determine whether the defendant has established purposeful discrimination (step three).

Wilson-2 at 440 (quoting Riley v. Taylor, 277 F.3d 261, 275 (3d Cir. 2001)).

On step-one, the Pennsylvania Supreme Court itself has held the Tape constitutes a *prima facie* case. Basemore, 744 A.2d at 732. See also Johnson v. Love, 40 F.3d 658, 665 (3d Cir. 1994) (*prima facie* case when there is "some reason to believe that discrimination might be at work"). Based upon the Tape and hearing record, which included McMahon's testimony and a reconstructed record as to much of the jury, Judge Padova found "more than sufficient" evidence for Petitioner to meet the step-one

burden. Wilson-2 at 441. See also n.14 and accompanying text, supra (discussing similar decisions from other courts on the basis of the Tape). On appeal, the Commonwealth does not challenge to Judge Padova's *prima facie* case findings.

At step-two, "the burden shifts to the state to come forward with a neutral explanation for challenging black jurors." Batson, 476 U.S. at 97. McMahon could provide no racially neutral explanation for striking 8 African-American jurors here. Judge Padova could have stopped right there and granted relief under the applicable law. However, he gave the Commonwealth the benefit of the doubt, taking the view that he would consider any "reason" McMahon gave on the Tape for striking any juror, even though McMahon could not provide a race-neutral reason at the hearing. Judge Padova therefore took a position accruing to the Commonwealth's benefit and proceeded to step-three. The Commonwealth's attempt to blame Petitioner for a "delay" in bringing this claim, is thus irrelevant on step-two. Further, any "delay" in bringing this claim is attributable to the Commonwealth itself, which withheld the Tape and the discrimination it establishes from Petitioner for over a decade.

And at step-three, Judge Padova explained that the party challenging the strike "must establish, by a preponderance of the evidence, that [the prosecutor's] decision to strike at least one juror ... was motivated at least in part by race." Wilson-2 at 446 (citations omitted). Judge Padova also noted: "[I]t is clear that a court may examine

all relevant circumstances in determining whether petitioner has met his ultimate burden of persuasion." Wilson-2 at 447. After hearing McMahon's testimony, assessing his credibility and considering all the evidence, Judge Padova expressly found race discrimination in McMahon's strikes against African-American jurors in this case. Judge Padova found as a fact that nothing McMahon said on the Tape, or at the hearing, can be accepted as sufficiently race-neutral to show a lack of discrimination.

As noted, the Commonwealth's brief does not even acknowledge these factual findings or the clearly erroneous standard of review. Rather, the Commonwealth asserts that Judge Padova made no finding of discrimination as to a specific juror, even though he found that discriminatory intent was the reason McMahon struck at least one, if not all, the African-American jurors. Judge Padova found that any other suggestion would be pretext.

Judge Padova also found as a fact against the Commonwealth's belated "dual motive" suggestions:

> In cases where a Petitioner has established that race played a role in a prosecutor's decision to strike a potential juror, courts have allowed the prosecution to raise a mixed motive defense. Respondents have forcefully argued that a mixed motive analysis should be applied to this case, because the Tape and Mr. McMahon's hearing testimony establish that Mr. McMahon never struck a juror solely because of that juror's race. However, a mixed motive analysis is not helpful to Respondents. In a

> mixed motive analysis, it is the *respondent's* burden to establish that the prosecutor would have stricken the potential juror even if the juror were of a different race. *See Gattis v. Snyder,* 278 F.3d 222, 235 (3d Cir.2002). In order to meet this burden in this case Respondents would have to establish, at a minimum, that every one of the black jurors stricken by Mr. McMahon at Petitioner's trial because of their race fit into one of Mr. McMahon's race neutral disfavored categories, and therefore would have been stricken regardless of their race. Respondents have not come close to meeting this burden. Accordingly, Respondents' mixed motive argument fails.

Wilson-2 at 450. The record and relevant law are all in accord with Judge Padova and against the Commonwealth.

D. The Evidence.

The evidence supports Judge Padova's findings. They are not clearly erroneous.

Step-One: Prima Facie Case. The District Court found that Petitioner had presented "more than sufficient" evidence to meet his step-one burden. Wilson-2 at 441.

The McMahon Tape. In or around 1986, McMahon led a training on jury selection for assistant district attorneys in Philadelphia. Tr. at 37-38. In the Tape:

> Mr. McMahon describes in great detail his strategy of systematically excluding certain types of black jurors in cases that he tried. Specifically, Mr. McMahon describes in the Tape his practice of striking all African-American potential jurors from low income neighborhoods, striking young African-American women, and striking older African-American women in cases involving young black male defendants. Mr. McMahon, realizing that his practices were in direct contravention of Batson, also described techniques which could be utilized to avoid detection, such as questioning

> black jurors more carefully in order to ensure that one had a non-discriminatory reason for striking the juror if an objection were made.

Wilson-2 at 441. See also Basemore, 744 A.2d at 729, 732 (describing Tape); Clemons, 843 F.2d at 745 (statements and/or admissions of prosecutor significant to Batson analysis); Holloway, 335 F.3d at 728-29 (same); Johnson, 40 F.3d at 663, 665 (same). Judge Padova found that McMahon followed the approach he described in the Tape during the selection of Petitioner's jury. Wilson-2 at 447-48.

McMahon's Peremptory Challenges. In this case, "at least nine of the sixteen jurors against whom McMahon exercised peremptory strikes at Petitioner's trial were African-American." Wilson-2 at 442.[19] Judge Padova specifically found that McMahon's pattern of excluding African-American potential jurors, "provid[es] additional circumstantial evidence that the strikes were racially motivated." Wilson-2 at 442 (citations omitted).

---

[19]The parties stipulated in the District Court, that the voir dire transcript was lost through no fault of Petitioner. Wilson-2 at 439. Petitioner, relying on voter registration data and affidavits, was able to establish the race of several stricken jurors. Because McMahon's handwritten notes contained the race and gender of 11 of the 12 seated jurors, the parties were also able to agree on the racial composition of the seated jury. See Hearing Stipulation P-2 at Tab 3, 4. Petitioner submitted that 12 of the jurors stricken by McMahon were African-American. The Commonwealth stipulated that eight of the stricken jurors and two of the seated jurors were African-American. Id. The Court accepted the stipulation. It also found one additional juror (Mr. McNeil) – for a total of nine struck jurors – were African-American. There was no definitive proof, one way or the other, as to the race of the remaining jurors McMahon struck.

The Commonwealth argues that the District Court's reliance on the fact that McMahon used at least nine of his sixteen peremptory strikes against African-American is flawed because this evidence does not show a pattern of discriminatory conduct but, instead, shows that "Mr. McMahon apparently used his challenges in an evenhanded manner." CB at 45.

This argument is unsound. The record does not represent "evenhanded[ness]": the District Court found 9 African-Americans were stricken; the races of the remaining 7 stricken jurors were not established. The Commonwealth's current attempt to change 7-unknowns into 7-whites and thus recast the numbers as "evenhanded" fails in light of the District Court's findings. In any event, even had McMahon stricken blacks and whites equally, Batson is against the Commonwealth: "[s]triking a single black juror could constitute a prima facie case even when blacks ultimately sit on the panel and even when valid reasons exist for striking other blacks." Clemons, 843 U.S. at 747; Holloway, 355 F.3d at 728-29 (same).

The Racial Make-up of the Jury. The "jury panel at Petitioner's trial consisted of nine whites and only two African-Americans, with the race of one juror unknown." Wilson-2 at 442. This shows the seated jury matched McMahon's notion – as expressed on the Tape – of the racial composition of a "great jury" (i.e. eight-whites-and-four-blacks or nine-and-three) See Tape at 59, SA at ___.

McMahon's Notes. "Mr. McMahon noted the race, as well as the gender, of 11 of the 12 jurors empaneled at Petitioner's trial." Wilson-2 at 448. Judge Padova expressly found that "Mr. McMahon noted the race of these jurors because race played a role in his decision-making process during voir dire at Petitioner's trial." Wilson-2 at 448. Cf. Miller-El, 537 U.S. at 347 ("[t]he supposition that race was a factor could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards"). Thus, this fact further supports the District Court's finding.

McMahon's Admissions. At the hearing, McMahon admitted that the Tape reflected his views as a prosecutor on jury selection and acknowledged that he could not discount that race played a role in his strikes. Wilson-2 at 447-48. As Judge Padova noted, McMahon tried to be "equivocal," but ultimately was unable to dispute that race "was relevant in his decision making." Wilson-2 at 442.

Step-Two: McMahon Presented No Race Neutral Reasons for His Strikes. As Petitioner set forth a *prima facie* case of discrimination, "the burden shift[ed] to the State to come forward with a neutral explanation for challenging black jurors." Batson, 476 U.S. at 97. McMahon testified that, even with his handwritten notes he had no recollection of reasons for all but one of his peremptory strikes. Tr. 9/29/03 at 39, 45-

48.[20] Thus, "Mr. McMahon failed to articulate a non-discriminatory reason for all but one of the peremptory strikes that he exercised against African-Americans." Wilson -2 at 443.

The District Court could have stopped there and granted relief.[21] However, it still gave the Commonwealth a chance to prevail, ruling that "under the facts of this case" McMahon's inability to articulate reasons for his challenges would be deemed "not fatal to [the Commonwealth's] ability to satisfy Step Two of Batson." Wilson-2 at 445. "Accordingly, in the interest of fairness, the Court will allow [the Commonwealth] to rely upon the many race neutral reasons for striking individual jurors listed in the Tape when attempting to meet their burden under Step Two of Batson." Wilson-2 at 445-446.

Step-Three: Judge Padova's Findings that McMahon Discriminated. "If [the State's] burden [under step two] is met, the court then addresses and evaluates all evidence introduced by each side (including all evidence introduced in the first and

---

[20]McMahon testified that he used a peremptory strike against Darryl Lampkin because his brother had been convicted of a crime and was in jail. Tr. 9/29/03 at 47.

[21]Under Batson, once a prima facie case has been presented, a new trial is required if the prosecution does not affirmatively produce "a 'clear and reasonably specific' explanation of its 'legitimate reasons' for exercising the challenges." Batson, 476 U.S. at 98 n.20; Harrison v. Ryan, 909 F.2d 84, 88 (3d Cir. 1990); cf. Riley v. Taylor, 277 F.3d 261(3d Cir. 2001) (*en banc*).

second steps) that tends to show that race was or was not the real reason and determines whether the defendant has met his burden of persuasion." Riley, 277 F.3d at 286.

At step-three, the issue is whether the court "finds the prosecutor's race-neutral explanations to be credible." Miller-El, 537 U.S. at 324. As noted, however, Judge Padova afforded the Commonwealth the benefit of the doubt in not requiring McMahon to produce actual reasons for each of his strikes at step-two. Therefore, Judge Padova noted "[t]he traditional method by which a defendant successfully meets his burden is by attacking the validity of the race neutral reasons provided by the prosecutor." Wilson-2 at 446(citation omitted), was not applicable. Instead of examining the non-existent reasons, Judge Padova correctly noted "a court may examine all relevant circumstances in determining whether petitioner has met his ultimate burden of persuasion." Wilson-2 at 447 (citing Miller-El, 537 U.S. at 347). Judge Padova ultimately concluded that Petitioner "established, by a preponderance of the evidence, that Mr. McMahon's decision to exercise a peremptory strike against one or more African-American members of the jury venire at [Mr. Wilson's] trial was motivated by racial discrimination." Wilson-2 at 450.

In reaching this conclusion, Judge Padova first found that "the jury selection practices that Mr. McMahon describes in the Tape are the jury selection practices that

Mr. McMahon engaged in during [Mr. Wilson's] trial." Wilson-2 at 447:

> [T]he strongest evidence in support of [Mr. Wilson's] assertion that Mr. McMahon engaged in discriminatory jury selection practices at his trial is, of course, the McMahon Tape itself. Mr. McMahon admitted during his testimony at the hearing that, 'by and large,' the presentation that he gave in the McMahon Tape was an accurate summary of the manner in which he conducted jury selection. ... Moreover, ... Mr. McMahon was quite clear in the Tape that he always followed the same practice in selecting juries, regardless of the circumstances of the case.

Wilson-2 at 447-448; see also id. at 447 n.12 (citing McMahon Tape at 3 wherein "Mr. McMahon compared the jury selection process to a game of blackjack, and insisted that one should always adhere to the same rules when picking a jury, regardless of the situation."). Furthermore, Judge Padova found:

> [t]he assertion that Mr. McMahon engaged in the race-based jury selection practices described in the Tape at [Mr. Wilson's] trial is bolstered by evidence of the pattern of strikes Mr. McMahon made. The parties do not dispute that Mr. McMahon exercised at least eight of his sixteen peremptory strikes against African-American jurors, and further that the jury panel in [Mr. Wilson's] case consisted of nine white jurors and two black jurors. The racial composition of the jury panel in [Mr. Wilson's] case matches the racial composition that Mr. McMahon stated he strove for in the McMahon Tape.

Id. at 448. And Judge Padova found:

> Mr. McMahon noted the race, as well as the gender, of the 12 jurors empaneled at [Mr. Wilson's] trial. [Mr. Wilson's] trial occurred two years before the Batson decision was handed down, and Respondents have offered no other legitimate rationale for Mr. McMahon's decision to make such notations. Accordingly, the Court draws the reasonable inference that Mr. McMahon noted the race of these jurors because race played a

> role in his decision-making process during voir dire at [Mr. Wilson's] trial.

Id. Therefore, he found "**Mr. McMahon practiced what he preached in the McMahon Tape at [Mr. Wilson's] trial**." Wilson-2 at 448.

Judge Padova also "considered the possibility that Mr. McMahon's strikes of individual African-American jurors in this case were based solely upon race neutral reasons, and not based upon the fact that the jurors were African-American." id. at 449. He found:

> [A]t least one of the peremptory strikes exercised against African-American jurors by Mr. McMahon at [Mr. Wilson's] trial was motivated at least in part by that juror's race. The categories of African-American jurors whom Mr. McMahon advocated striking are so broad that is impossible for the Court to believe that none of the nine African-American jurors whom Mr. McMahon struck at [Mr. Wilson's] trial were stricken at least in part because of their race. For example, based upon his statements in the Tape, Mr. McMahon would have endeavored at [Mr. Wilson's] trial to exercise peremptory strikes against both 'young' and 'older' black women. Furthermore, in the Tape, Mr. McMahon never specifically defined the terms 'young' and 'older.' Moreover, the parties have stipulated that Mr. McMahon actually exercised peremptory strikes against at least six black women at [Mr. Wilson's] trial. There is nothing in the record to indicate that these six jurors were stricken solely because they fit into one of Mr. McMahon's disfavored categories, and, given Mr. McMahon's statements in the Tape concerning black female jurors, it would not be reasonable for the Court to assume that this was the case.

Wilson-2 at 449-450.

E. The Commonwealth's Arguments.

The Commonwealth's arguments are wrong and inconsistent with Judge Padova's findings, which are supported by the record are not clearly erroneous.

The Commonwealth says the District Court should not have relied on the fact that the racial composition of Petitioner's jury matched the ideal jury proposed by McMahon on the Tape because "[b]y this faulty logic, if Mr. McMahon had struck every single African-American in the venire, this would be evidence that he was not practicing the discriminatory techniques he refers to in the Tape." CB at 45. While cute, this misinterprets McMahon's self-imposed racial quota system. In keeping with his view of how the races interact in integrated versus segregated settings, McMahon's mind-set was to avoid an all-white jury because of his fear that such a jury would not care enough about black-on-black crime to listen to the evidence because of an attitude of, "Aw, who gives a shit . . . them people live like this," Tape at 59. McMahon's mental state was to achieve a racial quota system with a majority of white jurors, but with a tiny minority of African-American jurors. Such a quota offends the Constitution.

The Commonwealth also disagrees with the District Court's reliance on McMahon's tracking of the race and gender of each of the seated jurors because McMahon, according to the Commonwealth, "may have wanted to protect himself against claims of discrimination." CB at 46. However, Judge Padova has found against the Commonwealth's speculation. Consistent with the Supreme Court's holding in

Miller-El, 537 U.S. at 347, Judge Padova found the fact that a prosecutor notes the race of jurors is, evidence of discrimination.

Moreover, Batson had not yet been decided at the time of Petitioner's trial and Pennsylvania law at that time actually permitted discrimination:

> [I]t is not constitutional error for a prosecutor to challenge a black juror for the reason that the prosecutor believes -- validly or invalidly – that a black venireman because of the facts of the case, is less likely to be impartial than a white venireman . . . the race, creed, national origin, sex or other similar characteristics of a venireman may be proper considerations in exercising peremptory challenges when issues relevant to these qualities are present in the case.

Commonwealth v. Henderson, 497 Pa. 23, 30 (Pa. 1981). In a setting where state law allowed discrimination, McMahon had no reason to "protect himself against claims of discrimination." CB at 46. Judge Padova was correct in finding – and was certainly not clearly erroneous – that McMahon's notations of race and gender were an effort to get a jury matching the quota espoused on the Tape.

In another example of flimsy speculation, the Commonwealth argues that the District Court's finding that McMahon applied the practices he described in the Tape during Petitioner's trial is flawed because it is possible that "some, or all of [Mr. McMahon's techniques] were not in place at the time of Mr. Wilson's trial." CB at 44. The Commonwealth made the same argument to the District Court which found that it "lacks credulity," Wilson-2 at 447-448, and that:

> [n]owhere in the Tape does Mr. McMahon indicate that he had developed this policy, or any of the other policies described in the Tape, only recently. Moreover, Mr. McMahon began his career with the district attorney's office in 1978, six years before [Mr. Wilson's] trial. Thus, it is hard to believe that Mr. McMahon had not developed his jury selection practices by the time of [Mr. Wilson's] trial.

Id. Indeed, McMahon testified that before Mr. Wilson's trial he tried "many, many juries." Tr. 9/29/03 at 50.

Ultimately, Judge Padova found the Commonwealth's assertion that McMahon did not rely on race in exercising peremptory challenges during the selection of Mr. Wilson's jury to be incredible:

> Respondents argue that Mr. McMahon's testimony at the evidentiary hearing establishes that race was never the motivating factor in Mr. McMahon's decision to strike potential jurors. The Court rejects Respondents' reading of Mr. McMahon's testimony as inconsistent with Mr. McMahon's statements in the McMahon Tape. Indeed, Mr. McMahon made clear in the Tape that his decision to strike jurors was motivated in part by race. ... Accordingly, if Mr. McMahon's testimony was intended to suggest that Mr. McMahon was solely motivated by factors other than race with respect to all of his peremptory challenges in this case, **the Court finds such testimony not to be credible**.

Wilson-2 at 443 n.4. Judge Padova found that, consistent with McMahon's statements on the Tape, McMahon struck at least six African-American women from the jury because of their race. Wilson-2 at 449-50. As there is evidence supporting the District Court's findings that McMahon's peremptory strikes were motivated by race, the District Court was justified in concluding that Petitioner established intentional

discrimination.

F. Mixed-Motives.

The Commonwealth argued to Judge Padova, and now argues again, CB at 72-75, that a "mixed-motive" analysis should apply because the Tape and McMahon's hearing testimony show that McMahon never struck a juror solely because of that juror's race. The District Court rejected this argument, Wilson-2 at 450, as should this Court.

Under the law of "mixed-motive," if the prosecutor exercised the peremptory challenge for two reasons – one race neutral and one race based – and it is proven that the prosecutor would have stricken the juror at issue irrespective of the juror's race, relief can be denied.[22] The District Court noted that in order to prove mixed-motive, "it is [the Commonwealth's] burden to establish that the prosecutor would have stricken the potential juror even if the juror were of a different race." Wilson-2 at 450. Therefore, "[i]n order to meet this burden ... [the Commonwealth] would have to establish, at a minimum, that every one of the black jurors stricken by Mr. McMahon at [Petitioner's] trial because of their race fit into one of Mr. McMahon's race neutral

---

[22]The "party accused of discrimination bears the burden of showing by a preponderance of the evidence that the strike would have been exercised in the absence of any discriminatory motivation." Wallace v. Morrison, 87 F.3d 1271, 1274-75 (11th Cir. 1996).

disfavored categories, and therefore would have been stricken regardless of their race. [The Commonwealth has] not come close to meeting this burden." Id.

Judge Padova's finding that the Commonwealth failed to establish a a "mixed motive" defense is entirely appropriate and supported by the law and the record. Judge Padova found the Commonwealth "did not come close" to presenting enough evidence to prove that Mr. McMahon would have stricken the jurors irrespective of race. Wilson-2 at 450. Even now, the Commonwealth points to **no evidence** establishing that McMahon would have relied upon race-neutral reasons to strike any of the six African-American female jurors discussed in detail by the District Court.

The Commonwealth contends that it is somehow unfair for the District Court to require it to present evidence demonstrating that McMahon was motivated by neutral reasons. Again, it complains that Petitioner should have raised this Batson claim earlier – before the release of the Tape – and therefore says the District Court should not have held the Commonwealth to its burden of proving mixed motive by a preponderance of the evidence CB at 50.

But any "delay" in bringing his claim was caused by the Commonwealth's own failure to divulge the Tape for more than a decade. The Pennsylvania Supreme Court itself has so held. See Basemore, 744 A.2d at 733 (noting the "concealment on the part of the government, both in terms of the previous nondisclosure of the Tape at the time

of trial and thereafter, and in the inherently covert nature of conduct constituting the underlying violation"). The Commonwealth should not be permitted to use its own misconduct to attack Judge Padova's thoughtful findings and analysis.

CONCLUSION

Judge Padova's findings were not clearly erroneous. He applied the appropriate law to the facts he found. He did not err on procedure, fact or law.

His findings are due deference; his rulings are not overcome by the Commonwealth's brief; and his decision should be affirmed.