

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

MUMIA ABU-JAMAL  
Petitioner  
V.

CIVIL ACTION

MARTIN HORN, et. al.

NO. 99-5089

**RESPONSE TO PETITIONER'S SUPPLEMENTAL BRIEF**

Petitioner was allowed to file a supplemental brief to discuss the impact of recent United States Supreme Court precedent on the AEDPA standard of review (Order of May 11, 2000). He now argues that he should prevail due to a purportedly missing word in the state supreme court opinion, and that the standard of review for legal issues under § 2544 (d)(1) somehow permits a federal court to contradict state findings of fact.

Petitioner therefore permeates his supplemental brief with credibility arguments, and insists that this Court, under the guise of legal analysis, is free to ignore findings of fact made by the state court. This is entirely incorrect. The recent Supreme Court decisions confirm that, under AEDPA, state findings of fact are binding on a federal court.

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## 1. Review of legal issues under Terry Williams

Where the facts were adequately developed in state court, AEDPA mandates that habeas relief “shall not be granted” for claims adjudicated on the merits, excepting two categories of legal error. 28 U.S.C. § 2254(d)(1). The preclusion applies unless the state court decision was “contrary to” clearly established federal constitutional law as determined by the Supreme Court, or the state decision “involved an unreasonable application” of that same law. The two categories -- “contrary to” and “unreasonable application” -- have independent meaning, as explained in Justice O’Connor’s majority opinion in Terry Williams v. Tavlор, 120 S. Ct. 1495, 1519 (2000), on which petitioner solely relies.’

“**Contrary to**” means “diametrically different,” or “mutually opposed.” A state court’s

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<sup>1</sup> Petitioner does not invoke the companion case of Michael Williams v. Taylor, 120 S. Ct. 1479 (2000). There, a unanimous Court held that § 2254(e)(2) bars a federal hearing where the petitioner failed to develop the facts in state court through “a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner’s counsel.” 120 S. Ct. at 1488. In short, one who neglects to present evidence in state court may not present it in federal court

Petitioner’s neglect bars a further federal hearing. Indeed, he seeks a hearing to introduce evidence which he only speculates exists (petitioner’s motion for hearing, I, X); or which was inadmissible, or which he otherwise refused to fairly offer (Id., II through IX). He withheld some evidence because he did not deem it “ripe” (Id., p.9). His vague allegation that other evidence “came into [his] possession during the pendency of” his appeal (Id., p.7) fails to explain his non-use of available state procedures for offering allegedly after-discovered evidence. Compare 120 S. Ct. at 1494 (“the Commonwealth has not argued that petitioner could have sought relief in state court once he discovered the factual bases of these claims”). See Commonwealth’s response to motion for hearing, 18-1 9 (facts previously unknown that could not have been ascertained by the exercise of due diligence may be offered via second PCRA petition); 42 Pa.C.S. § 9545(b)(1).

Michael Williams also clarifies that a hearing is unavailable for defaulted claims absent cause and prejudice. 120 S. Ct. at 1494. Many of petitioner’s claims are wholly or partially defaulted (habeas claims 2, 3, 4, 5, 6, 9, 10, 13, 16, 20, 24, 27, and 28). Thus, a hearing should be denied.

decision is "contrary to" that of the United States Supreme Court if it "arrives at a conclusion opposite to that reached by" the Supreme Court on a question of federal constitutional law, or if it "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to" that of the Supreme Court. Id., 1519-1520. Alternately, a state court decision is an "unreasonable application" of Supreme Court precedent where it "identifies the correct governing legal rule . . . but unreasonably applies it to the facts," or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply[,] or unreasonably refuses to extend that principle to a new context where it should apply." Id., 1520. A federal court may not overturn a state decision merely because it considers it erroneous or incorrect. The writ may issue only where the application of clearly established federal constitutional law was unreasonable. 120 S. Ct. at 1522.

In his prior memorandum of law, petitioner explained that the "unreasonable application" standard "has no place in this litigation" (petitioner's memorandum of law, 5). He relies solely on the "contrary to" clause as to all of his claims.

In Williams, the Virginia post-conviction court, as finder of fact, determined that mitigating evidence omitted by Williams' ineffective counsel would likely have changed the outcome at sentencing. However, the Virginia Supreme Court erroneously concluded that Lockhart v. Fretwel, 506 U.S. 364 (1993), had supplanted the Strickland standard, such that more than "mere outcome determination" was required to establish ineffective assistance. The Virginia Supreme Court ruled that Williams had to additionally show that the result of the criminal proceeding was "fundamentally unfair or unreliable." 120 S. Ct. at 1501, 1524. Williams concluded that the Virginia Supreme Court had thus applied a standard "contrary to" settled United States Supreme

Court precedent. The United States Supreme Court overturned that decision, noting that the facts -- as found by the Virginia Circuit Court, the state finder of fact -- satisfied the controlling Strickland prejudice standard. Id. at 1524-1525.

Williams has no real bearing on any of petitioner's claims, most of which turn on issues of fact, not law. His habeas petition and prior memoranda fail to explain how any of his claims was decided under a standard "contrary to" that clearly defined by the United States Supreme Court.

## **2. Petitioner's new Strickland claim**

Thus, petitioner raises an entirely new issue. He now argues, for the first time, that the Pennsylvania Supreme Court applied a wrong legal standard to his ineffectiveness claims. He notes that the state supreme court described the prejudice test as requiring that "the outcome of the proceedings would have been different" -- rather than, for example, "would 'likely' have been different" or that "'there was a reasonable probability that' the outcome would have been different" (petitioner's supplemental brief, 3; citing 720 **A.2d** at 88). Because the state supreme court supposedly did not include the all the proper words in its description of the prejudice standard, petitioner argues, it applied a standard "contrary to" Strickland.

The basis for' this new argument is Justice O'Connor's hypothetical to the effect that requiring a defendant to prove that the result "would [really] have been different" would be "contrary to" Strickland, which requires only a "reasonable probability" of a different result. 120 S. Ct. at 15 19. But this dicta does not connote, as petitioner would have it, a federal mandate to defer to state court judgments, and yet to grant the writ for putative omissions in nomenclature. The alleged error must "undermine confidence in the fundamental fairness of the state adjudication." 120 S. Ct. at 1503 (citations omitted). It is not enough for a state court to make some statement

that, when taken out of context, can be characterized as being contrary to clearly established United States Supreme Court precedent; to obviate the bar of § 2254(d)(1), it is the state court “decision” that must be contrary to that precedent,

In Williams the Virginia Supreme Court did not merely fail to recite a particular word or phrase, but expressly declined to apply the Strickland standard, opining that “mere” outcome determination would not suffice because Strickland had supposedly been supplanted by a new “fundamentally unfair or unreliable” prejudice standard. 120 S. Ct. at 1501, 1524. Petitioner’s new claim, in contrast to that in Williams, is purely one of semantics.

First, in this case the Pennsylvania Supreme Court did not even reach the question of prejudice. It rejected petitioner’s ineffectiveness claims due to their lack of merit. E.g., 720 A.2d at 108 (no ineffectiveness because there is “no merit to any of [the] underlying claims”). Specifically addressing the claim of ineffectiveness for failure to call cumulative character witnesses which petitioner now highlights in his supplemental brief, the state supreme court explained:

Appellant presented several witnesses at the PCRA hearing who, in essence testified to Appellant’s -talents as a journalist, his dedication to community services and his devotion to his family and humanity generally.. Jackson testified that he, and not Appellant, dictated the penalty hearing strategy. However, the PCRA court made a credibility determination that Jackson was not credible when he testified to such. The court found as a fact, that Appellant chose to exercise personal control over the trial strategy, including, specifically, the selection of character witnesses during the guilt phase. [T]he court found that Appellant’s steadfast refusal to cooperate with his counsel continued in the penalty phase. Our review of the record leads us to no different conclusion. Accordingly, *since the record supports the PCRA court’s conclusion that the failure to present mitigation witnesses was as a result of Appellant’s own choosing. this court is bound thereby and Appellant’s claim, thus, warrants no relief:*

720 A.2d at 116, emphasis added.

Second, the prejudice standard referenced by the Pennsylvania Supreme Court clearly is the Strickland standard. The opinion of the state supreme court cites its seminal decision in Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987). 720 **A.2d** at 88 (citing Pierce). Pierce expressly adopted the Strickland definition of prejudice. 527 A.2d at 974, 976-77 (requiring “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” and holding Pennsylvania’s and Strickland’s tests for prejudice are “identical”). That standard continues to be followed to the present day. E.g., Commonwealth v. Fletcher, 750 A.2d 261, 274 (Pa. 2000) (ineffectiveness requires “a reasonable probability that the act or omission prejudiced appellant in such a way that the outcome of the proceeding would have been different”); Commonwealth v. Mason, 741 A.2d 708, 715 (Pa. 1999) (prejudice defined as “a reasonable probability that the outcome of the trial would have been different”); Commonwealth v. Howard, 719 A.2d 233, 241 n.7 (Pa. 1998) (“Actual prejudice is defined as a reasonable probability that, but for the act or omission in question, the result of the proceeding would have been different”).<sup>2</sup>

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<sup>2</sup> In Commonwealth v. Kimball, 724 A.2d 326, 332 (Pa. 1999), the Pennsylvania Supreme Court rejected an argument that the state Post Conviction Relief Act created a burden to prove prejudice different from that of Pierce and Strickland:

Both the PCRA language and Pierce reflect two aspects of the same standard: Strickland’s test for determining when counsel’s ineffectiveness prejudiced the defendant. Pierce and its progeny adopted the “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different” definition of prejudice the PCRA standard is equivalent to the standard for direct appeal claims of ineffective assistance of counsel to hold otherwise would require us to recognize that the ineffective assistance of counsel test adopted in Pierce is actually less stringent than the Strickland standard. This we refuse to do, and should not do, given Pierce’s express recognition that our standard for

Finally, petitioner does not explain (and has never explained) how he supposedly established Strickland prejudice in light of the character witnesses he actually presented. Although he refuses to acknowledge it, the six character witnesses he produced in 1995 were cumulative to the fifteen he produced in 1982. The jury was told, fifteen times, that the murder was “not in keeping with his character” (petitioner’s supplemental brief, 8). To prove prejudice, petitioner had to prove that his jury’s hearing the same thing six additional times would have been likely to have changed the result. The state PCRA court decided, as a matter of fact, that this was not so.

Since the Pennsylvania Supreme Court did not reach the prejudice question, and in any event followed Strickland -- a standard petitioner *factually* failed to surmount with his cumulative character witnesses -- Williams is inapposite. The state court decision is not “contrary to” United States Supreme Court precedent.’

( . c o n t i n u e d )

ineffective assistance of counsel claims on direct appeal is “identical” to Strickland's.

<sup>3</sup> Petitioner’s effort to imply that other aspects of this case are “contrary to” United States Supreme Court precedent fails outright. He argues, for example, that the state court could not properly hold that a Batson claim fails where it is based solely on (here incomplete) “raw numbers” (petitioner’s supplemental brief, 4 n.3) That, however, is an entirely correct application of Batson; indeed, it is accepted law. Batson v. Kentucky, 476 U.S. 79, 96 (1986); Walker v. Vaughn, 53 F.3d 609, 612-613 (3rd Cir. 1995) (Batson claim failed where record did not show how many blacks were in venire, how many were struck by prosecution and defense, and how many blacks served on jury); Deputy v. Tavior, 19 F.3d 1485 (3rd Cir.) (rejecting Batson claim where record failed to show how many minority members were in the venire), cert. denied, 512 U.S. 1230 (1994); United \_\_\_\_\_ Ferguson, 23 F.3d 135, 141 (6th Cir.) (absent detailed information such as composition of pool, final panel, and order of strikes, even use of all peremptory challenges to exclude blacks did not raise inference of intentional discrimination necessary to prima facie case), cert. denied, 513 U.S. 900 (1994); United States v. Willie, 941 F.2d 1384, 1399 (10th Cir. 1991) (prima facie analysis requires defendant to “point to more than the bare fact of the removal of certain venirepersons and the absence of an obvious valid reason for the removal”; he must “identify facts and circumstances that support [an] inference of intentional discrimination”), cert. denied, 502 U.S. 1106 (1992). As another example, petitioner frivolously continues to cite Hopt v. Utah, 110 U.S.

### 3. Petitioner's credibility arguments

In attempting to reargue numerous existing claims in his supplemental brief by analogy to Williams, petitioner systematically relies on issues of fact and credibility, not issues of law. For example, he complains in a footnote about the state court's finding that there was no Brady violation regarding a supposed "deal" between Robert Chobert and the prosecutor, in that no "deal" existed to be disclosed. Petitioner deems this merely "the witness's characterization" and concludes that, because the state court did not disbelieve the witness, it must have applied "incorrect legal standards" (petitioner's supplemental brief, 3 n.3). This, however, is nonsense. Mr. Chobert testified in 1995 as petitioner's own witness. He testified that there was no "deal." This was the sole evidence offered on the issue. He was found credible by the state **court (Finding of Fact 278)**. That the finder of fact credited the only evidence on point is unremarkable, and has nothing to do with "incorrect legal standards." Petitioner simply disagrees with the court's credibility findings, as he has done all along. The Williams- decision, which concerns § 2254 (d)(1), not (e)(1) ("a determination of a factual issue made by a State court shall be presumed to be correct"), is irrelevant to petitioner's credibility claims.

#### A. Credibility of cumulative mitigation witnesses

Much of petitioner's supplemental brief is devoted to re-arguing his claim that his trial counsel was ineffective in the penalty phase for not calling six character witnesses in addition to the

(. . . continued)

574 (1884), which does not even construe the United States Constitution, but rather applies the law of the Utah Territory.

Space does not permit a response to all of the arguments crammed into footnote 3 of petitioner's supplemental brief. To the extent they have been properly raised, they have been addressed in the Commonwealth's other filings.

fifteen who testified in the guilt phase (see Commonwealth's memorandum of law at 138-142). But the state court found, as a matter of fact, that it was petitioner who decided that additional character witnesses would not be called in **the** penalty phase (**Finding of Fact 89**). The new character witnesses petitioner proffered in 1995, to substantiate his claim that trial counsel should have called them **in** 1982, were found as a matter of fact to be unpersuasive (**Finding of Fact 90**). They were therefore found, as a matter of fact, to be cumulative to the fifteen character witnesses at trial (**Finding of Fact 91**). The state PCRA court concluded that trial counsel was not ineffective in the penalty phase, because it was petitioner's decision not to call additional character witnesses, and because the existing character testimony was available as mitigation (**Conclusions of Law 197 through 203**).

Under these facts, there was no unprofessional error by trial counsel in the penalty phase; and the omitted evidence would not likely have led to a different result.

Petitioner argues (ignoring the other findings of fact) that **Finding of Fact 90** (finding the 1995 witnesses unpersuasive) is "perplexing" in light of the Commonwealth's supposed "concession" that his 1995 evidence "established" that his murder of Officer Faulkner was "not in keeping with his character" (petitioner's supplemental brief, 8).

It is petitioner's concept of "concession," however, that is perplexing. At the 1995 PCRA hearing, the prosecutor indeed **acknowledged** the testimony of petitioner's new character witnesses, that his act of murdering Officer Faulkner was out of character (N.T. 7/26/95, 190-191). But this conceded nothing -- at trial, **all** fifteen of petitioner's 1982 character witnesses had testified to exactly the same thing. It was not enough for petitioner to prove, in 1995, merely that there were six more witnesses who would also testify that the murder was "not in keeping with his character."

To establish prejudice, he had to prove that evidence *reasonably likely to produce a different result* was omitted. The prosecutor's supposed "concession" indicated only that petitioner's 1995 character evidence was equivalent to his 1982 character evidence, such that petitioner *failed* to prove prejudice. It is entirely consistent with the state **court's Finding of Fact 90**, that the new character witnesses were **unpersuasive**.<sup>4</sup>

Although petitioner tries to liken his claim to that in Williams (petitioner's supplemental brief, 8), there is no comparison. In Williams, the state finder of fact -- "the Virginia trial judge" -- found that counsel's conduct in the sentencing phase "fell short of professional standards -- a judgment barely disputed by the State[.]" 120 S. Ct. at 1514. But here, the Pennsylvania trial judge -- the **finder** of fact on collateral review -- found as a fact that petitioner frustrated the assistance of his counsel by refusing to cooperate, and by refusing to allow family members or additional character witnesses to testify in the penalty phase. The findings of fact further show that the character witnesses proffered in 1995 were not likely to produce a different result in light of the fifteen who actually testified in 1982, whose evidence was fully available in the penalty phase as mitigation. These facts are different from those in Williams.

Petitioner refers to the Williams Court's supposed "independent examination of the record,"

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<sup>4</sup> Petitioner also argues that, because the PCRA court found his 1995 character witnesses unpersuasive, it must have ruled that mitigation evidence is irrelevant unless it "blunt[s] the abhorrence of the crime" (petitioner's supplemental brief, 9-10). This is quite false. The PCRA court found the new character evidence "unpersuasive," not "irrelevant." Petitioner's sister, for example, did not know at what age he had dropped out of high school; she attended the trial, yet claimed to be unaware of his demand to be represented by John Africa (Findings of Fact 110-1 15). The court's credibility findings as to this and the other character witnesses went directly to the issue of whether the new character evidence would likely have produced a different result. For petitioner to prevail, his new character evidence had to be superior to that actually heard in 1981, such that a different result would have been likely. He failed to surmount this burden.

and urges this Court to follow suit by ignoring the state findings of fact and credibility determinations. According to him, Williams demonstrates that a federal habeas court can “independently” “marshall” evidence from the “record as a whole,” with greater “quality” than the state court, in order to reach factual conclusions contrary to those of the state finder of fact -- “even if” the state findings are presumed correct (petitioner’s supplemental brief, 5, 6, 7, 8, 13, 15).

But in reality, the examination of the record in Williams was not “independent” at all, as petitioner uses the term. Rather, the Williams Court was concerned with the Virginia Supreme Court’s failure to consider facts found by the state trial judge, about which there was “really . . .n[o] dispute[.]” “We do not agree with the Virginia Supreme Court that Judge Ingram’s [the state finder of fact’s] conclusion should be discounted” where his judgment “rested on his assessment of the totality of the omitted evidence[.]” 120 S. Ct. at 1515. **All** of the Justices agreed that “federal habeas courts must make as the starting point of their analysis the state courts’ determinations of fact[.]” 120 S. Ct. at 1509 (opinion of the court by Stevens, J.). The United States Supreme Court stressed that it was relying on factual conclusions reached on state collateral review by “the very judge who presided at Williams’ trial” -- fact findings that the Virginia Supreme Court had not altered or overturned, but rather had overlooked as a consequence of its wrong legal standard. 120 S. Ct. at 15 15. Far from being “independent,” the Williams analysis **deferred, in every** way, to the facts found by the Virginia courts.

Williams, therefore, does not provide a “tutorial” on how a federal court can “assess the reasonableness of” state fact finding (petitioner’s supplemental brief, 6-7). On the contrary, it confirms that a federal court must accept state court fact finding as true.

Petitioner’s idiosyncratic misreading of Williams finds no support in the text of the opinion.

Yet he proceeds to argue from this misreading that a subsection of AEDPA -- one that was not even considered in Williams -- does not mean what it plainly says.

Williams considered the meaning of a “decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” under § 2254 (d)(1) (emphasis added). But petitioner’s arguments go to issues of fact, and so are controlled by subsection (e)(1): **“a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.”** Berryman v. Morton, 100 F.3d 1089, 1102-03 (3rd Cir. 1996) (same); Cantach v. Larkins, 1999 WL 529036, No. 98-85 (E.D. Pa., July 23, 1999), \*4 (same).

Petitioner nevertheless argues that Williams suggests a federal habeas court “has an independent obligation to determine whether the state court’s marshaling of the record evidence was thorough and fair” (petitioner’s supplemental brief, 5). If by this petitioner meant that a federal court must review how the findings of fact apply to the law, there would be no dispute; but that is not what he means. For him, “marshaling” the evidence is a euphemism for “making credibility determinations about” the evidence. He could hardly be more wrong. Under AEDPA, a federal court’s obligation is to accept state findings of fact unless they are rebutted by clear and convincing evidence, a task petitioner declines to attempt. Absent such rebuttal, a federal court has no authority to “marshall” testimony passed upon by the state court as finder of fact, by pretending that the facts were other than what the state court found. See Marshall v. Lonberger, 459 U.S. 422, 435 (1983) (pre-AEDPA; federal habeas court has “no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court”); Burden v. Zant, 498 U.S. 433, 437

(1991) (per curiam) (pre-AEDPA; habeas court “may not disregard” the presumption of correctness unless an enumerated exception applies) [under AEDPA, there are no more exceptions]. Williams says nothing contrary to the plain language of (e)(1), which remains binding on this Court.

## B. Credibility of Gary Wakshul

At the 1995 PCRA hearing petitioner's own witness, Gary Wakshul, testified that he heard petitioner's bragging confession outside the hospital emergency room in 1981. Petitioner called Wakshul knowing he would so testify, since Wakshul had disclosed this in a written report he made before trial.<sup>5</sup> Like Officer Bell -- who testified at trial -- Wakshul had earlier reported that petitioner made no statements; he explained that this error resulted from his emotional devastation over the murder of his friend, Danny Faulkner. The sole witness for petitioner's 1995 theory that his confession was “manufactured” was Wakshul, who testified that the confession was real. The PCRA court, as finder of fact, saw Wakshul's demeanor and credited his unrebutted testimony, just as the jury had credited Bell's. As already noted elsewhere, Wakshul's (and Bell's) account is fully corroborated by the trial testimony of hospital security guard Priscilla Durham.

Petitioner condemns the state credibility finding as “judicial blindness” and “shoddy treatment” of his theories (petitioner's supplemental brief, 12). But biased rhetoric cannot be confused with clear and convincing rebuttal evidence; nor is it at all surprising that the judge credited corroborated, uncontradicted testimony of a witness called by petitioner. There is no legal

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<sup>5</sup> Wakshul's emotional state was manifest even in that written report. Wakshul had been carrying petitioner and had just put him down when he bragged about murdering Officer Faulkner. Wakshul was “disgusted” and “decided I wasn't going to touch [petitioner] again, I didn't want to be near him.” Although he was on duty, he fled to an alcove, and then “walked out of the hospital” (N.T. 7/28/95, 89-90, quoting Wakshul's third report).

basis for petitioner's insistence that this Court can deem the facts to be the opposite of what the state court found (Id., 13).

Petitioner nevertheless launches into yet another credibility argument regarding Wakshul (Id., 14-15). Although this Court may not reevaluate state credibility findings, the argument is meritless in any event. Indeed, it never cites the record, and relies on a variety of inaccurate or exaggerated assertions.

Wakshul never claimed that he was "too overwrought to be interviewed," or that he was unable to remember any details. The PCRA judge did not "airbrush[]" out of the record" Wakshul's second report, but simply did not give it the weight petitioner would like, because that report concerned only petitioner's clothing and Officer Faulkner's missing camera. 720 **A.2d at 92 n.16**. Wakshul stated at one point that he "didn't realize [the] importance" of the confession. Contrary to petitioner's hypertechnical analysis, this was not inconsistent with his testimony that he was emotionally overcome; the former was obviously the result of the latter.

Petitioner says Wakshul's report of the confession was "suspiciously" made at the same time Ms. Durham "first reported [the confession] to law enforcement." But he then announces that Ms. Durham "failed to mention the confession to law enforcement" (petitioner's supplemental brief, 14-15). Which is it?

The reality, obviously, is that Ms. Durham did "mention the confession to law enforcement"; otherwise the state would not have known to call her as a witness. More importantly, Ms. Durham promptly reported the confession to her superiors at the hospital, thus negating petitioner's theory that his confession was fabricated by the police. Petitioner's notion that this "was never substantiated" demonstrates only that it is he, not the state court, who turns a blind

eye to the record. At trial Ms. Durham unequivocally adopted and authenticated a copy of her next-day report of petitioner's confession (N.T. 6/24/82, 97, 99-100).<sup>6</sup> Her trial testimony, which

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<sup>6</sup>Mr. Jackson did everything in his power to suggest otherwise on cross-examination, to no avail:

BY MR. JACKSON: Q. Show it to the witness, please. Read it, Miss Durham You've had an opportunity to review D-14; is that correct?

A. Yes.

Q. Earlier when I questioned you with regard to the statement that you perhaps gave to your supervisor at Jefferson Hospital you indicated that you dictated a statement orally; is that correct?

A. Yes

Q. Is that the statement?

A. Yes.

N.T. 6124182, 97.

Ms. Durham said that the report was originally taken down in handwriting, but rejected Jackson's suggestion that the typed copy presented in court was inaccurate, saying "I'd know if I said it." Jackson nevertheless continued:

Q. So any statement that would be presented to you that purports to be your statement would be a guess on your part. Is that right?

A. No.

Q. It wouldn't be a guess?

A. I'd know if I said it or not.

Q. You would know word for word what you said?

A. No.

Q. So how would you know if it was your statement, ma'am?

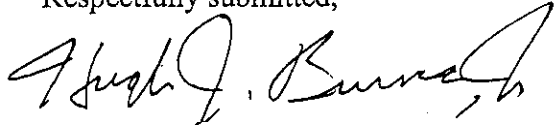
corroborates Wakshul, has never been refuted.

## CONCLUSION

Petitioner asks this Court to ignore the state court's findings of fact and instead rely on so-called "un-marshalled evidence" (petitioner's supplemental brief, 15, emphasis omitted), by which he means, "evidence the state court found to be incredible." But since petitioner has announced that he does not recognize, and will not try to meet, his burden to rebut the presumption of correctness, the state findings of fact are binding.

No relief is due.

Respectfully submitted,



HUGH J. BURNS, JR.  
Acting Chief, Appeals

(..continued)

A. Because I know what I said

Id., 99-100

The prosecutor on redirect took Ms. Durham through her report line by line, including the following:

Q. Now, would you read the next statement, the next line,

A. "Miss Durham stated that Jamal shouted, "Yeah, I shot the mother fucker and I hope he dies."

Q. You said that on December 10, 1982?

A. Yes, I did.

Id., 113.