

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

CLAUDE A. JONES,                    )  
  )  
                                  Petitioner,    )  
  )  
v.                                        )     Civil Action No. 04-119-SLR  
  )  
THOMAS CARROLL,                    )  
Warden, and M. JANE                )  
BRADY, Attorney General            )  
of the State of                        )  
Delaware,                             )  
  )  
                                  Respondents.    )

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Claude A. Jones. Pro se petitioner.

Loren C. Meyers, Chief of Appeals Division, Delaware Department  
of Justice, Wilmington, Delaware. Counsel for respondents.

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**MEMORANDUM OPINION**

September 19, 2005  
Wilmington, Delaware

  
ROBINSON Chief Judge

**I. INTRODUCTION**

Presently before the court is petitioner Claude A. Jones' ("petitioner") application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (D.I. 2) Petitioner is a Delaware inmate in custody at the Delaware Correctional Institution in Smyrna, Delaware. For the reasons that follow, the court will dismiss his application.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

In October 1999, petitioner was in the cookie aisle of a supermarket, accompanied by a young girl who later proved to be his daughter. A store employee observed the girl removing items from the shelves and placing them in her backpack. The employee approached petitioner and asked that he return the items to the shelves. Petitioner cursed at the employee and, claiming to have a gun, made a movement with his hand. He and his daughter quickly left the store. Jones v. State, 803 A.2d 428 (Table), 2002 WL 1522941, at \*1 (Del. July 10, 2002).

Two other employees pursued petitioner into the parking lot and ordered him to stop. He cursed at them, threatened to shoot them, and partially withdrew an object from his pocket that one employee described as a "dark, bluish" revolver, and the other employee described as a "brown object." Both employees stopped pursuing petitioner, and petitioner and his daughter fled in a

car driven by a third individual. One of the employees wrote down the license plate number and turned it over to the police. Further investigation led to petitioner's arrest. Id.; (D.I. 11 at ¶2).

In November 1999, a grand jury indicted petitioner on three counts of first degree robbery (one count for each of the three store employees he had threatened) and one count of possession of a firearm during the commission of a felony. During his jury trial in the Delaware Superior Court, petitioner did not deny that he was in the store at the time of the incident, but he claimed that he never threatened anyone and he never displayed a weapon. At the end of the trial, the Superior Court judge granted petitioner's motion to dismiss the two robbery counts involving the two employees in the store parking lot because those counts alleged use of force to overcome "resistance to the taking of the property" rather than the use of force for "the retention thereof immediately after the taking." (D.I. 11) However, the Superior Court judge refused to dismiss the robbery count involving the store incident, because that count alleged that petitioner, "in the course of committing theft did thereafter use force upon [the store employee] and . . . in immediate flight therefrom, he displayed what appeared to be a gun, a deadly weapon." Jones, 2002 WL 1522941, at \*1. The judge also refused to deliver a lesser included offense instruction as

to the remaining robbery count.

The jury convicted petitioner of one count of first degree robbery and one count of possession of a firearm during the commission of a felony. In September 2000, the Superior Court sentenced him to 25 years imprisonment, suspended after 8 years for 17 years probation.

Petitioner's attorney did not file an appeal. Instead, in November 2000, his attorney filed a motion pursuant to Delaware Superior Court Criminal Rule 35(a) to correct sentence, which the Superior Court denied on November 8, 2001. Petitioner's attorney appealed, arguing that the evidence was insufficient to support the weapons and robbery convictions.

On April 5, 2002, while the Rule 35(a) appeal was pending, petitioner filed a pro se motion for post-conviction relief pursuant to Delaware Superior Court Criminal Rule 61. This motion alleged that petitioner's attorney had provided ineffective assistance by failing to file a direct appeal of his sentence, despite petitioner's request that he do so.

On April 15, 2002 the Superior Court held an office conference with petitioner's attorney. As a result of the conference, the Superior Court vacated its November 8, 2001 order denying the Rule 35(a) motion and granted the Rule 35(a) motion. On April 16, 2002, the Superior Court vacated petitioner's September 29, 2000 sentence and reinstated the sentence in order

to give petitioner an opportunity to appeal. (D.I. 13, App. to Appellant's Op. Br. in No. 665,2002, Exh. A: Del. Super. Ct. Crim. Dkt. Nos. 26-28)

On April 25, 2002, petitioner's counsel filed an appellate brief. (D.I. 13, Appellant's Op. Br. in No. 622,2001) He argued that the Superior Court should have dismissed the remaining robbery count because it suffered from the same deficiency as the other two robbery counts that were dismissed, namely, it charged petitioner "with intent to prevent or overcome resistance to the taking of property" rather than "the retention thereof immediately after the taking." (D.I. 13, Appellant's Op. Br. in Jones v. State, No.622,2001, at 10)

On May 22, 2002, the Superior Court denied without prejudice petitioner's pro se Rule 61 motion, finding that it did not have jurisdiction to consider the motion because petitioner's case was on appeal in the Delaware Supreme Court. (D.I. 13, App. to Appellant's Op. Br. in No. 665,2002, at A-11)

On July 10, 2002, the Delaware Supreme Court affirmed petitioner's conviction and sentence. The state supreme court held that the testimony of the two store employees who pursued petitioner into the parking lot provided sufficient evidence in describing the gun to prove the weapon element of first degree robbery with respect to petitioner's actions in the store. Jones, 2002 WL 1522941, at \*1.

In September 2002, petitioner filed another pro se Rule 61 motion, this time alleging: (1) ineffective assistance of counsel during his trial and on direct appeal, as well as ineffective assistance for failing to file a timely notice of appeal in the first place; and (2) the Delaware Superior Court or the Delaware Supreme Court lacked jurisdiction to consider his direct appeal and issue the order dated July 10, 2002, thus, the whole appellate proceeding was not the result of a logical and orderly deductive process. (D.I. 13, Appellant's Op. Br. in Jones v. State, No. 665,2002) The Superior Court treated the second Rule 61 motion as if it was petitioner's first one, and denied it as meritless. (D.I. 13, Appellant's Op. Br. in No. 665,2002, Exh.: Letter Order, I.D. No. 9910022380 (Del. Super. Ct. Nov. 7, 2002)). Petitioner appealed, arguing that: (1) the Superior Court lacked jurisdiction to vacate and reinstate his sentence; (2) his counsel provided ineffective assistance by failing to file a timely direct appeal; and (3) there was insufficient evidence introduced at trial to support his convictions. Jones v. State, 825 A.2d 238 (Table), 2003 WL 21254621, at \*1 (Del. May 30, 2003). The Delaware Supreme Court rejected these arguments and affirmed the Superior Court's decision. Id.

Thereafter, petitioner filed the habeas application currently before the court. His application essentially asserts

three claims<sup>1</sup> for relief: (1) the Superior Court lacked jurisdiction to vacate and reinstate his September 2001 sentence, thereby violating his right to due process; (2) his counsel provided ineffective assistance by failing to file a timely direct appeal, and by continuing to represent petitioner during his appeal despite the fact that counsel's failure to file a timely appeal created a "conflict of interest"; and (3) there was insufficient evidence to sustain his first degree robbery conviction. (D.I. 2)

The State filed an answer, asking the court to dismiss the entire application, to which petitioner filed a response. (D.I. 11; D.I. 14)

Petitioner's habeas application is ready for review.

### **III. GOVERNING LEGAL PRINCIPLES**

#### **A. The Antiterrorism and Effective Death Penalty Act of 1996**

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "to reduce delays in the execution of state and federal criminal sentences . . . and to further the principles of comity, finality, and federalism." Woodford v. Garceau, 538 U.S. 202, 206 (2003) (internal citations and

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<sup>1</sup>Petitioner's application actually contains four separate claims, two of which allege ineffective assistance of counsel. For ease of analysis, the court has combined the two ineffective assistance issues into one claim, but will still address both issues.

quotation marks omitted). Pursuant to AEDPA, a federal court may consider a habeas petition filed by a state prisoner only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). AEDPA increases the deference federal courts must give to state court decisions, primarily by imposing procedural requirements and standards "in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." Bell v. Cone, 535 U.S. 685, 693 (2002); see Woodford, 538 U.S. at 206.

#### **B. Exhaustion and Procedural Default**

Before seeking habeas relief from a federal court, a petitioner in custody pursuant to a state court judgment must exhaust all remedies available in the state courts. As stated in AEDPA:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that -

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). The exhaustion requirement is grounded on principles of comity in order to ensure that state courts have the initial opportunity to review federal constitutional



challenges to state convictions. Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000).

A state prisoner exhausts state remedies by giving the "state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 844-45 (1999). To satisfy this requirement, a petitioner must demonstrate that the claim was fairly presented to the state's highest court, either on direct appeal or in a post-conviction proceeding. See Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997) (citations omitted); Coverdale v. Snyder, 2000 WL 1897290, at \*2 (D. Del. Dec. 22, 2000). Fair presentation also requires the petitioner to raise the claim in a procedural context in which the state courts can consider it on the merits. Castille v. Peoples, 489 U.S. 346, 351 (1989).

If a petitioner presents unexhausted habeas claims to a federal court, but further state court review is procedurally barred, the federal court will excuse the failure to exhaust and treat the claims as exhausted. Lines v. Larkins, 208 F.3d 153, 160 (3d Cir. 2000); Wenger v. Frank, 266 F.3d 218, 223 (3d Cir. 2001); see Teague v. Lane, 489 U.S. 288, 297-98 (1989). Although deemed exhausted, such claims are considered procedurally defaulted. Coleman v. Thompson, 501 U.S. 722, 749 (1991); Lines, 208 F.3d at 160.

A federal habeas court cannot review the merits of procedurally defaulted claims unless the petitioner demonstrates either cause for the procedural default and actual prejudice resulting therefrom, or that a fundamental miscarriage of justice will result if the court does not review the claims. McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999); Coleman, 501 U.S. at 750-51.; Caswell v. Ryan, 953 F.2d 853, 861-62 (3d Cir. 1992). To demonstrate cause for a procedural default, the petitioner must show that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). To demonstrate actual prejudice, the petitioner must show "not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Id. at 494.

Alternatively, a federal court may excuse a procedural default if the petitioner demonstrates that failure to review the claim will result in a fundamental miscarriage of justice. Edwards v. Carpenter, 529 U.S. 446, 451 (2000); Wenger v. Frank, 266 F.3d 218, 224 (3d Cir. 2001). The miscarriage of justice exception applies only in extraordinary cases where a "constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 496.

Actual innocence means factual innocence, not legal insufficiency, Bousley v. United States, 523 U.S. 614, 623 (1998), and is established if no reasonable juror would have voted to find the petitioner guilty beyond a reasonable doubt. Sweger v. Chesney, 294 F.3d 506, 522-24 (3d Cir. 2002).

**C. Standard of Review Under AEDPA**

Once a federal court determines that a claim is exhausted, it must next determine the appropriate standard for reviewing the habeas claim. If the highest state court adjudicated the federal habeas claim on the merits, then the federal habeas court can only grant habeas relief when the state court's adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1), (2); Williams v. Taylor, 529 U.S. 362, 412 (2000); Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001). A state court has adjudicated a claim on the merits for the purposes of 28 U.S.C. § 2254(d)(1) if the state court "decision finally resolv[es] the parties' claims, with res judicata effect, [and] is based on the substance of the claim advanced, rather than on a procedural, or other ground." Rompilla v. Horn, 355 F.3d 233, 247 (3d Cir. 2004) (internal citations omitted), rev'd

on other grounds by Rompilla v. Beard, - U.S. -, 125 S. Ct. 2456 (2005).

AEDPA also requires a federal court to presume that a state court's determinations of factual issues are correct. 28 U.S.C. § 2254(e)(1). A petitioner can only rebut this presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); Miller-El v. Cockrell, 537 U.S. 322, 341 (2003) (stating that the clear and convincing standard in § 2254(e)(1) applies to factual issues, whereas the unreasonable application standard of § 2254(d)(2) applies to factual decisions). This presumption of correctness applies to both explicit and implicit findings of fact. Campbell v. Vaughn, 209 F.3d 280, 286 (3d Cir. 2000).

#### **IV. DISCUSSION**

##### **A. Jurisdiction claim**

Petitioner's first claim contends that the Superior Court did not have jurisdiction to issue its April 2002 order vacating and reinstating his September 2000 sentence. Petitioner exhausted state remedies for this claim by presenting it to the Delaware Supreme Court in his post-conviction appeal. See Jones, 2003 WL 21254621, at \*1 (Del. May 30, 2003).

It is well-settled that claims asserting a violation of a state law, or challenging a state court's interpretation of state law, are not cognizable on federal habeas review. Estelle v.

McGuire, 502 U.S. 62, 67-8 (1991); Smith v. Phillips, 455 U.S. 209, 211 (1982); Mullaney v. Wilbur, 421 U.S. 684, 691 (1975); Johnson v. Rosemeyer, 117 F.3d 104, 109 (3d Cir. 1997) ("it is well established that a state court's misapplication of its own law does not generally raise a constitutional claim"). Here, whether the Delaware Superior Court had jurisdiction to vacate its prior order denying petitioner's Rule 35(a) motion, and thereafter vacate his sentence and reinstate it to permit the timely filing of a direct appeal, is a matter of Delaware state law.<sup>2</sup> See Lambert v. Blackwell, 2003 WL 1718511, at 20 n.21 (E.D. Pa. Apr. 1, 2003), aff'd, 387 F.3d 210 (3d Cir. 2004), petition for cert. filed, No. 04-8536 (Feb. 3, 2005); U.S. ex rel. Roche v. Scully, 739 F.2d 739, 741 (2d Cir. 1984) (stating that "no federal court to our knowledge has ever granted a writ where a state court's asserted lack of jurisdiction resulted solely from the provisions of state law."); Wills v. Egeler, 532

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<sup>2</sup>For example, in Webb v. State, the Delaware Supreme Court held that, a defendant who files a post-conviction motion during the pendency of his appeal cannot complain if the Superior Court acts on that motion. Webb v. State, 794 A.2d 601 (Table), 2002 WL 480939 (Del. Mar. 22, 2002). In petitioner's post-conviction appeal, the Delaware Supreme Court cited Webb when it rejected his jurisdictional claim, holding that:

Jones himself filed the motion for postconviction relief that resulted in the Superior Court's vacation and reinstatement of his sentence, which permitted the timely filing of a direct appeal. He may not now complain that it was improper for the Superior Court to act on his motion. Jones, 2003 WL 21254621, at \*1.

F.2d 1058, 1059 (6<sup>th</sup> Cir. 1976) (holding that a “[d]etermination of whether a state court is vested with jurisdiction under state law is a function of the state courts, not the federal judiciary.”); Poe v. Caspari, 39 F.3d 204, 207 (8<sup>th</sup> Cir. 1994); Wright v. Angelone, 151 F.3d 151, 158 (4<sup>th</sup> Cir. 1998). Thus, the court will dismiss this claim because it is not cognizable on federal habeas review.<sup>3</sup>

#### **B. Ineffective assistance of counsel**

Petitioner next contends that his counsel provided ineffective assistance by failing to file a timely direct appeal. Petitioner presented this claim to the Delaware Supreme Court in his post-conviction appeal. The Delaware Supreme Court analyzed the claim under Strickland v. Washington, 466 U.S. 668 (1984), and affirmed the Superior Court’s decision that petitioner was not prejudiced by counsel’s failure because the Superior Court had reinstated his right to appeal. Jones, 2003 WL 21254621, at\*1. Thus, the court must apply the deferential standard of review provided by § 2254(d)(1) to determine if this claim entitles petitioner to federal habeas relief.

Federal habeas relief is only warranted under § 2254(d)(1) if the state court’s adjudication of the claim is either contrary

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<sup>3</sup>Alternatively, the claim is dismissed because it simply attacks the state post-conviction procedure, which also does not state a claim cognizable on federal habeas review. See Gattis v. Snyder, 46 F.Supp. 2d 344, 384 (D. Del. 1999); Dawson v. Snyder, 988 F.Supp. 783, 825 (D. Del. 1997).

to, or an unreasonable application of, clearly established Federal law as determined by the United States Supreme Court. 28 U.S.C. § 2254(d)(1). In the instant situation, the governing Supreme Court precedent is provided by Strickland v. Washington, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, the petitioner must demonstrate both that: 1) counsel's performance fell below an objective standard of reasonableness; and 2) counsel's deficient performance actually prejudiced the petitioner's case; in other words, there is a reasonable probability that, but for counsel's faulty performance, the outcome of the proceedings would have been different. Strickland, 466 U.S. at 687-88, 692-94; Marshall v. Hendricks, 307 F.3d 36, 85 (3d Cir. 2002).

The Delaware Supreme Court correctly identified Strickland as the proper standard, and analyzed petitioner's claim within its framework. Thus, the state court's decision is not contrary to clearly established Federal law. See Williams, 529 U.S. at 406

The Delaware Supreme Court also did not unreasonably apply Strickland in finding that petitioner did not demonstrate the requisite prejudice. When an attorney fails to file a direct appeal, the appropriate relief is for the trial court to reinstate the defendant's sentence so that he can perfect an appeal. Rodriguez v. U.S., 395 U.S. 327 (1969); see, e.g.,

Lewis v. Johnson, 359 F.3d 646, 662 (3d Cir. 2004) (after finding that petitioner's counsel had been ineffective for failing to file a direct appeal, the Third Circuit remanded the matter to the district court "with instructions that it issue a writ of habeas corpus conditioned upon the Commonwealth's reinstatement of Lewis' right of first appeal"). In the instant situation, the Superior Court reinstated petitioner's sentence to give petitioner an opportunity to appeal. Petitioner appealed, and the Delaware Supreme Court reviewed his claims. Thus, petitioner was not prejudiced as a result of counsel's failure, and the instant claim does not warrant relief under § 2254(d)(1).<sup>4</sup>

Petitioner also contends that his trial counsel "labored under" a conflict of interest during the appeal due to his attorney's failure to file a timely appeal, and therefore, he failed to represent petitioner effectively. (D.I. 14, at 5) Although petitioner raised this claim in his Rule 61 motion to the Superior Court, he did not present it to the Delaware Supreme Court in his post-conviction appeal. Consequently, he has not exhausted state remedies.

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<sup>4</sup>Additionally, because petitioner's appeal rights were reinstated, there is no further habeas relief that could be awarded. See, e.g., Braxton v. Redman, Civ. Act. No. 84-412-MMS (D. Del. Mar 7, 1985) (denying relief for petitioner's ineffective assistance of counsel claim because the Delaware Supreme Court had reinstated petitioner's right to timely appeal, thus, he had already "received the only remedy appropriate in light of the violation alleged").



However, the court will excuse petitioner's failure to exhaust state remedies and treat the claim as exhausted because state procedural rules would prevent him from pursuing further state court relief.<sup>5</sup> Although deemed exhausted, this claim is still procedurally defaulted, and the court cannot review the claim absent a showing of cause and prejudice, or a miscarriage of justice.

Here, petitioner states that "the state court clearly and expressly relied on untimeliness in rejecting his claim in state court, and therefore denies that the alleged procedural default is independent." (D.I. 14, at 6.) To the extent this statement is petitioner's attempt to demonstrate cause, it fails, because it does not show that an external impediment prevented him from presenting this claim in his post-conviction appeal.<sup>6</sup> See Murray v. Carrier, 477 U.S. 478, 492 (1986). His failure to demonstrate

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<sup>5</sup>First, petitioner cannot now return to the Delaware Supreme Court and raise this issue on appeal because it would be dismissed as untimely. See, e.g., Webb v. Carroll, 2003 WL 22299036, at \*7 (D. Del. Oct. 6, 2003); Kendall v. Attorney General of Delaware, 2002 WL 531221, at \*3-4 (D. Del. Mar. 26, 2002). Second, he cannot present this issue again to the Superior Court in order to appeal from the ensuing decision because state law would preclude reconsideration of the claim as formerly adjudicated under Rule 61(i)(4). See Wonnum v. Kearney, 2001 WL 173799, at \*2 (D. Del. Feb. 15, 2001).

<sup>6</sup>The court notes that the Superior Court did not deny petitioner's Rule 61 motion as being time-barred. Thus, it is unclear whether this statement actually refers to the instant procedural default.

cause obviates the court's need to address the issue of prejudice. See Smith v. Murray, 477 U.S. 527, 533 (1986). Further, because petitioner has not alleged that he is actually innocent, or presented any colorable evidence of his actual innocence, he has not demonstrated that a fundamental miscarriage of justice will result from failure to review this claim. Murray, 477 U.S. at 496 (to establish a miscarriage of justice, a petitioner must show that a "constitutional violation has probably resulted in the conviction of one who is actually innocent"); Sweger v. Chesney, 294 F.3d 506, 522-24 (3d Cir. 2002) (a petitioner establishes actual innocence by proving that no reasonable juror would have voted to find him guilty beyond a reasonable doubt); Bousley v. United States, 523 U.S. 614, 623 (1998) (actual innocence means factual innocence, not legal insufficiency).

Accordingly, federal habeas review of petitioner's "conflict of interest"/ineffective assistance of counsel claim is unavailable.

### **C. Insufficient evidence**

Petitioner's final claim alleges that the evidence introduced at trial was insufficient to convict him of first degree robbery and possession of a firearm during the commission of a felony. Petitioner exhausted state remedies for this claim by presenting it to the Delaware Supreme Court in his direct

appeal and in his post-conviction appeal. On direct appeal, the Delaware Supreme Court rejected the claim as meritless.<sup>7</sup> Thus, the court must apply the deferential standard of review provided by § 2254(d)(1) to determine if this claim entitles petitioner to federal habeas relief.

In the instant situation, the governing Supreme Court precedent is provided by Jackson v. Virginia, 443 U.S. 307 (1979). Pursuant to Jackson, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319 (citations omitted). The jury's role is to weigh the evidence, and the court must defer to the jury's resolution of conflicts in evidence. See id. at 326 (holding any argument relating to the credibility of the government's witnesses is irrelevant to a determination of the sufficiency of the evidence). When a court applies this standard, it must be "with explicit reference to the substantive elements of the criminal offense as defined by state law." Jackson, 443 U.S. at 324 n.16; Jordan v. Snyder, Civ. Act. No. 97-385-SLR, Mem. Op. at 10 (D. Del. Jan. 5, 2000). Further, "a federal habeas court faced with a record of historical facts that supports conflicting inferences

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<sup>7</sup>In his post-conviction appeal, the Delaware Supreme Court denied the claim as formerly adjudicated under Rule 61(i)(4). Jones, 2003 WL 21254621, at \*1.

must presume - even if it does not affirmatively appear in the record - that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Jackson, 443 U.S. at 326.

Here, petitioner does not contend that the Delaware Supreme Court applied an incorrect standard in reviewing his insufficient evidence claim, only that the state court unreasonably applied the Jackson standard. (D.I. 14, at ¶ 2) Therefore, the court will limit its § 2254(d)(1) inquiry accordingly.

1. First degree robbery conviction

During petitioner's trial, the in-store employee testified she was walking down the cookie aisle and saw a man and a little girl, and the girl was putting items into a backpack. The employee told the man to remove the items from the backpack, and the trial transcript contains the following testimony regarding the ensuing events:

A: [H]e got very hostile to me. He kept saying, fuck you, get of my way, fuck you. And then he said that he had a gun, and that is when I backed away . . .

Q: And do you recall specifically what the perpetrator of this act, what he told you as far as specifically shooting you or having a gun, if you can recall?

A: He just told me to - he said, you bitch, fuck off. He kept saying - he was very hostile . . . And when he said gun, he like sort of put his hand, and then I backed away and just started moving.

Q: What did you think when he said that?

A: Well, I thought that he had a gun.

. . . .  
Q: Did you ever see a gun?

A: No, I didn't.

Q: Did he ever display to you anything that looked like a gun?

A: No. He just started putting his hand in his pocket, and that's when I backed away.

(D.I. 13, App. to Appellant's Op. Br. in Jones v. State, No. 622,2001, at A16-17, 18, 52).

The jury convicted petitioner of first degree robbery as defined in 11 Del. C. Ann. § 832 (1999), which provides, in relevant part:<sup>8</sup>

A person is guilty of robbery in the first degree when the person commits the crime of robbery in the second degree<sup>9</sup> and when, in the course of the commission of the

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<sup>8</sup>The current version of 11 Del. C. Ann. § 832(a)(2)(2003) includes the following additional language: "or represents by word or conduct that the person is in possession or control of a deadly weapon." The new language was added to provide statutory clarification of well-settled judicial precedent that the "displays" requirement is satisfied upon a showing that the victim had a subjective belief that the defendant had a weapon, and this belief was based on some objective manifestation of a weapon. See State v. Smith, 2004 WL 1551513, at \*\*4-6 (Del. Super. Ct. June 28, 2004); see also Walton v. State, 821 A.2d 871, 874 (Del. 2003). The statutory change has no effect the court's analysis of petitioner's claim.

<sup>9</sup>Second degree robbery is defined in 11 Del. C. Ann. § 831 (1999) as follows:

(a) A person is guilty of robbery in the second degree when, in the course of committing theft, the person uses or threatens the immediate use of force upon another person with intent to:

(1) Prevent or overcome resistance to the taking of the property or to the retention thereof immediately after

crime or of immediate flight therefrom, the person or another participant in the crime:

(2) Displays what appears to be a deadly weapon; or

(3) Is armed with and uses or threatens the use of a dangerous instrument.

In short, pursuant to Delaware law, the jury could only have found petitioner guilty of first degree robbery with respect to his actions in the store if the prosecution established beyond a reasonable doubt that petitioner: (1) committed theft; (2) threatened the immediate use of force upon the in-store employee; (3) intended to prevent or overcome the employee's resistance to the taking of property; and (4) in the course of the commission of the crime or immediate flight therefrom, petitioner displayed what appeared to be a deadly weapon.

Reviewing the in-store employee's testimony with respect to the aforementioned elements, the court concludes that the Delaware Supreme Court did not unreasonably apply Jackson in affirming petitioner's conviction for first degree robbery. First, the employee witnessed the taking of property (cookies or crackers) and the placement of such property in a backpack. It

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the taking; or

(2) Compel the owner of the property or another person to deliver up the property or to engage in other conduct which aids in the commission of the theft.

(b) In addition to its ordinary meaning, the phrase "in the course of committing theft" includes any act which occurs in an attempt to commit theft or in immediate flight after the attempt or commission of the theft.

was reasonable for the jury to infer that by removing these items from the store shelves and placing them in a personal backpack, petitioner intended to permanently deprive the store of the items, which satisfies the "commission of theft" requirement. See 11 Del. C. Ann. § 841(a).

Second, the jury could infer from the testimony that petitioner's reference to a gun was intended to threaten his use of force upon the employee and that he made this statement in an effort to overcome her resistance to the taking of the cookies or crackers. Although petitioner testified that he did not have a gun, the jury's verdict indicates that it resolved this "possession" dispute in the prosecution's favor. Under Jackson, the court must defer to that resolution.

Finally, despite petitioner's argument to the contrary, the employee's testimony established the "displays a deadly weapon" element of first degree burglary. "In construing Section 832, the [Delaware Supreme] Court has held that 'display' includes not only the notion of spreading before view or exhibiting to the sight, but also that which is manifested by any of the victim's senses." DeShields v. State, 544 A.2d 265 (Table), 1988 WL 71442, at \*1 (Del. June 28, 1988). In other words, the "display" requirement is satisfied if the victim subjectively believed that the defendant possessed a deadly weapon, and this subjective belief was based on "some objective manifestation of a weapon,

even if the weapon was unseen.” State v. Smith, 2004 WL 1551513, at \*4 (Del. Super. Ct. June 28, 2004). The “objective manifestation” requirement can be satisfied where the defendant alleges “to have a weapon while concealing his or her hand under a piece of clothing,” Id., or where the defendant threatens to “blow [the victims’] heads off and reache[s] into his coat pocket as if he were reaching for a gun.” DeShields, 1988 WL 71442, at \*1.

Here, the in-store employee’s testimony was sufficient to establish her subjective belief that petitioner had a deadly weapon, and, considering petitioner’s reference to a gun, the movement of his hand into his pocket provided an objective manifestation of a weapon. Thus, viewing the evidence in the light most favorable to the prosecution, the court concludes that jury could have found the essential elements of first degree robbery beyond a reasonable doubt.

Accordingly, because the Delaware Supreme Court did not unreasonably apply Jackson in finding sufficient evidence to support petitioner’s first degree robbery conviction, this claim does not warrant relief under § 2254(d)(1).

## 2. Weapons conviction

The jury convicted petitioner of possession of a firearm during the commission of a felony under 11 Del. C. Ann. § 1447A. In order “to secure a conviction pursuant to Section 1447, the



State is required to establish that at the time [the defendant] was engaged in the designated predicate felony [he] had a deadly weapon physically available or accessible to him." Barnett v. State, 691 A.2d 614, 617 (Del. 1997). A person can be found guilty of a weapons offense under § 1447A even if the weapon is not used during the commission of the felony. Poli v. State, 418 A.2d 985, 987 (Del. 1980).

Here, during petitioner's trial, one of the employees who pursued petitioner out into the parking lot testified that petitioner said he had a gun, threatened to shoot the employee, and then reached into his pocket and produced what the employee believed to be a revolver. (D.I. 13, App. to Appellant's Op. Br. in Jones v. State, No. 622,2001, at A-27) This testimony provided sufficient evidence that petitioner possessed a gun while he was in the parking lot. Considering that petitioner had been pursued directly from the store into the parking lot, the jury could reasonably infer that petitioner had possessed the revolver when he confronted the employee in the store. Further, given the fact that petitioner pulled the gun from his pocket, and that he had motioned to his pocket when he was in the store, the jury could also reasonably infer that the gun was physically available and accessible to him during the in-store robbery.

In short, viewing all the testimony in the light most favorable to the prosecution, the court concludes that the

Delaware Supreme Court did not unreasonably apply Jackson in finding sufficient evidence to sustain petitioner's weapons conviction. Thus, this claim does not warrant habeas relief under § 2254(d)(1).

#### **V. CERTIFICATE OF APPEALABILITY**

Finally, the court must decide whether to issue a certificate of appealability. See Third Circuit Local Appellate Rule 22.2. The court may issue a certificate of appealability only when a petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This showing is satisfied when the petitioner demonstrates "that reasonable jurists would find the district court's assessment of the denial of a constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Further, when a federal court denies a habeas petition on procedural grounds without reaching the underlying constitutional claim, the prisoner must demonstrate that jurists of reason would find it debatable: (1) whether the petition states a valid claim of the denial of a constitutional right; and (2) whether the court was correct in its procedural ruling. Slack, 529 U.S. at 484.

For the reasons stated above, the court concludes that petitioner is not entitled to federal habeas relief for any of his claims. Reasonable jurists would not find these conclusions

unreasonable. Consequently, petitioner has failed to make a substantial showing of the denial of a constitutional right, and a certificate of appealability will not be issued.

**VI. CONCLUSION**

For the foregoing reasons, petitioner's application for habeas relief filed pursuant to 28 U.S.C. § 2254 will be denied.

An appropriate order will be entered.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

CLAUDE A. JONES, )  
 )  
 Petitioner, )  
 )  
 v. ) Civil Action No. 04-119-SLR  
 )  
 THOMAS CARROLL, )  
 Warden, and M. JANE )  
 BRADY, Attorney General )  
 of the State of )  
 Delaware, )  
 )  
 Respondents. )

**ORDER**

For the reasons set forth in the memorandum opinion issued this date, IT IS HEREBY ORDERED that:

1. Petitioner Claude A. Jones' application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (D.I. 2) is DENIED.
2. The court declines to issue a certificate of appealability.

Dated: September 19, 2005

  
UNITED STATES DISTRICT JUDGE