IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ADRIN SMACK,	:	
	:	
Petitioner,	:	
	:	
v.	:	Civ. Act. No. 19-691-LPS
	:	
THERESA DELBALSO, Superintendent, SCI Mahoney, and, ATTORNEY GENERAL OF THE STATE OF DELAWARE,	:	
	:	
Respondents.	:	

ANSWER

Pursuant to Rule 5 of the Rules Governing Section 2254 Actions, 28 U.S.C. foll. § 2254, Respondents state the following in response to the petition for a writ of habeas corpus:

Factual Background[1]

On or around August 2014, an FBI Task Force began investigating a drug trafficking organization known as the Sparrow Run Crew. "Evidence obtained during the investigation indicate[d] that this organization [was] responsible for distributing heroin and cocaine base to a wide network of distributors and sub-distributors. The heroin [was] distributed by [Mr. Smack] in quantities ranging from multiple bundles to multiple logs per transaction." Law enforcement believed that Mr. Smack and his Co-Defendant, Miktrell Spriggs, were "co-leaders of the organization and that they pool[ed] money to buy heroin and cocaine from source(s) of supply." The FBI Task Force's investigation included the use of confidential sources to conduct controlled

[1] This recitation of facts is taken verbatim from Smack's Opening Brief on appeal to the Delaware Supreme Court in Case No. 201, 2016 (footnotes and citations to the record omitted). D.I. 30 at 104-05 of 153.

purchases, as well as to enable law enforcement to monitor phone calls between Mr. Smack and these confidential sources.

On April 10, 2015, Resident Judge Richard R. Cooch signed an order authorizing law enforcement to intercept the wireless communications to and from Mr. Smack's cell phone. On April 18, 2015, a phone call between Mr. Smack and his Co-Defendant, Al-Ghaniyy Price, was intercepted. During this call, Mr. Price informed Mr. Smack that he was hiding something behind a radiator in Mr. Price's residence. In response, Mr. Smack advised Mr. Price to make sure that no one saw him hide the object behind the radiator. Later on that day, law enforcement intercepted a text message from Mr. Price to Mr. Smack advising that "Yo bro it's there." A subsequent search of Mr. Price's residence revealed a military style tactical vest, $16,108, a loaded black Taurus .9-millimeter handgun, and 803 bundles of heroin.

Procedural History

On May 26, 2015, a New Castle County Grand Jury returned a 261-count indictment against multiple defendants, including the petitioner, Adrin Smack.[2] Smack was charged with seventy-one counts of Drug Dealing (16 *Del. C.* § 4752), one count of Giving a Firearm to a Person Prohibited (11 *Del. C.* § 1454), one count of Possession of Marijuana (16 *Del. C.* § 4674), two counts of Conspiracy Second Degree (11 *Del. C.* § 512), and five counts of Possession of a Firearm by a Person Prohibited ("PFBPP") under two different subsections (11 *Del. C.* § 1448 (a)(4) and (a)(9)). On March 31, 2016, Smack pleaded guilty to four counts of Drug Dealing, one count of PFBPP, and one count of Conspiracy Second Degree.[3] As part of the plea agreement, the State agreed to limit its sentencing recommendation to no more than fifteen years of unsuspended

[2] D.I. 29 at 19-105 of 151.

[3] *Smack v. State*, 2017 WL 4548146, at *1 (Del. Oct. 11, 2017).

incarceration, and Smack agreed that he would request no less than eight years of unsuspended incarceration.[4]

At Smack's June 22, 2016 sentencing hearing, the prosecutor recounted facts underlying the charges in Smack's indictment and noted that Smack asserts he is not a "kingpin" in a drug dealing enterprise.[5] Smack disagreed with the prosecutor's characterization of him as a "kingpin," argued that he was a "retail" level drug dealer and requested an evidentiary hearing to dispute the "kingpin" characterization.[6] The Superior Court continued Smack's sentencing to allow him to develop his claim that he was entitled to an evidentiary hearing.[7] After considering the submitted briefing and oral argument, the Superior Court, on November 17, 2016, denied Smack's request for an evidentiary hearing, finding that Delaware Superior Court Criminal Rule 32(a) did not mandate an evidentiary hearing.[8] The court determined "all 'that [was] required [was] that the court afford the defendant some opportunity to rebut the Government's allegations,'"[9] and the prosecution was "not required to call witnesses to support its contention that the Defendant was heavily involved in drug trade."[10]

On November 23, 2017, the Superior Court sentenced Smack to an aggregate of fourteen years of incarceration, followed by decreasing levels of supervision.[11] Smack appealed, and the

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[4] D.I. 29 at 109 of 157.

[5] D.I. 29 at 116-17 of 151.

[6] D.I. 29 at 120-21 of 151.

[7] D.I. 29 at 115-23 of 151.

[8] *State v. Smack*, Del. Super., I.D. No. 1505015401, Parkins, J. (Nov. 17, 2016), Ltr. Ord. at 1-3. (D.I. 30 at 69-71 of 153).

[9] *Id*. at 2. (quoting *United States v. Sabhnani*, 599 F.3d 215, 258 (2d Cir. 2010) (internal quotations omitted). (D.I. 30 at 70 of 153).

[10] *Id.* at 2. (D.I. 30 at 70 of 153).

[11] *Smack*, 2017 WL 4548146, at *1; Sent. Ord. (D.I. 30 at 85-92 of 153).

Delaware Supreme Court affirmed the judgment of the Superior Court on October 11, 2017.[12] The United States Supreme Court denied Smack's petition for writ of certiorari on April 16, 2018.[13]

On April 16, 2019, Smack filed the instant petition for federal habeas relief[14] and, on February 3, 2020, he filed his opening brief.[15] On February 28, 2020, the American Civil Liberties Union (ACLU) and the Office of Defense Services (ODS) filed Amicus Briefs in support of Smack's petition.[16] This is the Respondent's answer.

Timeliness

Smack's petition is timely under 28 U.S.C. § 2244(d). Because Smack's petition was filed on January 15, 2018, it is subject to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which became effective on April 24, 1996.[17] By the terms of section 2244(d)(1), a federal habeas petitioner must file the petition within one year from the latest of: (A) the date the state court judgment became final upon the conclusion of direct review; (B) the date the government no longer interfered with the filing of an action; (C) the date on which the Supreme Court recognized a newly applicable constitutional right made retroactive to cases on collateral review; or (D) "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."[18] Smack does not assert, nor can the

[12] *Smack*, 2017 WL 4548146, at *3.

[13] *Smack v. Delaware*, 138 S. Ct. 1548 (Apr. 16, 2018).

[14] D.I. 1.

[15] D.I. 33.

[16] D.I. 35, 36.

[17] *See generally Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (holding the AEDPA applies to "such cases as were filed after the statute's enactment."); *Lawrie v. Snyder*, 9 F. Supp. 2d 428, 433 n.1 (D. Del. 1998); *Dawson v. Snyder*, 988 F. Supp. 783, 802-03 (D. Del. 1997).

[18] *See Pace v. DiGuglielmo*, 544 U.S. 408, 416 n.6 (2005) (noting the Supreme Court has summarized the four possible starting points for the statutory year under 2244(d)(1) as: (A) "date

Respondents discern, any basis to apply section 2244(d)(1)(B), (C), or (D). Accordingly, the one-year period of limitations began to run when Smack's conviction became final under section 2244(d)(1)(A).[19]

Smack pleaded guilty in March 2016 and was sentenced on November 23, 2016.[20] On October 11, 2017, the Delaware Supreme Court affirmed Smack's conviction and sentence.[21] The United States Supreme Court denied Smack's petition for certiorari review on April 16, 2019.[22] Thus, Smack's conviction became final on April 16, 2018, and the limitations period began running the following day. Smack had until April 16, 2019,[23] to file his federal habeas petition without running afoul of section 2244(d). Smack's petition, dated April 16, 2019, is thus timely filed.

Legal Principles Governing Petition

A state petitioner seeking habeas relief must exhaust all remedies available in the state courts.[24] The purpose of the exhaustion doctrine is "to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts."[25] A claim is exhausted if it has been fairly presented to the state's highest court.[26]

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of final judgment;" (B) "governmental interference;" (C) "new right made retroactive;" and (D) "new factual predicate").

[19] *See, e.g., Gibbs v. Carroll*, 2004 WL 1376588, at *2 (D. Del. June 17, 2004).

[20] *See* D.I. 29 at 13 (Crim D.I. 35) of 151; D.I. 29 at 16 of 151.

[21] *See* D.I. 29 at 18 of 151.

[22] *Smack v. Delaware*, 138 S. Ct. 1548 (Apr. 16, 2018).

[23] *See* Fed. R. Civ. P. 6.

[24] 28 U.S.C. § 2254(b); *Rose v. Lundy*, 455 U.S. 509, 510 (1982).

[25] *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

[26] *Castille v. Peoples*, 489 U.S. 346, 351 (1989).

Once a state's highest court adjudicates a federal claim on the merits, the federal habeas court must review the claim under the deferential standard contained in 28 U.S.C. § 2254(d). Pursuant to 28 U.S.C. § 2254(d), federal habeas relief may only be granted if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," or the state court's decision was an unreasonable determination of the facts based on the evidence adduced in the trial.[27] A claim has been "adjudicated on the merits" for the purposes of section 2254(d) if the state court decision finally resolves the claim on the basis of its substance, rather than on a procedural or some other ground.[28] The deferential standard of section 2254(d) applies even "when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied" because "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."[29]

In determining whether the state court reasonably applied clearly established federal law, this Court does not look at the decision of the state courts to see whether it would have reached the same result in the first instance. Instead, this Court must determine what argument supported, or could have supported, the state court's decision and then determine whether it is possible that fair-minded jurists could disagree that those arguments are inconsistent with a prior decision of the United States Supreme Court.[30] This standard is difficult for a petitioner to meet, and it was

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[27] 28 U.S.C. § 2254(d)(1) & (2); *see also Williams v. Lanzo*, 529 U.S. 362, 412 (2000); *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001).

[28] *Thomas v. Horn*, 570 F.3d 105, 115 (3d Cir. 2009).

[29] *Harrington v. Richter*, 562 U.S. 86, 98-99 (2011); *see also Johnson v. Williams*, 568 U.S. 289, 293 (2013) (holding that when a state court rules against a defendant and issues an opinion that addresses some issues but does not expressly address defendant's federal claim, a federal habeas court must presume, subject to rebuttal, that the claim was adjudicated on the merits).

[30] *Richter*, 562 U.S. at 101-02.

meant to be.[31] "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations."[32]

In addition, a federal court must presume that the state court's determinations of factual issues are correct.[33] This presumption of correctness applies to both explicit and implicit findings of fact, and a petitioner must present clear and convincing evidence to the contrary to rebut the presumption.[34]

Discussion

In his petition for federal habeas relief, Smack raises two claims: 1) the Superior Court violated Smack's due process rights during his sentencing hearing by considering unproven aggravated sentencing facts under an erroneous minimal indicia of reliability evidentiary standard; and 2) the Superior Court erred in concluding that Smack was not entitled to an evidentiary hearing to challenge the State's presentation of contested aggravating factors during Smack's sentencing hearing. (D.I. 34 at 2 of 47). Smack presented each of these claims to the Delaware Supreme Court on direct appeal of the sentencing. (D.I. 30 at 102-03 of 153). The Delaware Supreme Court rejected the claims on their merits.[35] Therefore, Smack has exhausted his claims,[36] but, for the reasons set forth below, he is not entitled to relief.

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[31] *Id*. at 102.

[32] *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

[33] 28 U.S.C. § 2254(e)(1).

[34] 28 U.S.C. § 2254(e)(1); *Campbell v. Vaughn*, 209 F.3d 280, 286 (3d Cir. 2000).

[35] *See Smack v. State*, 2017 WL 4548146, at *1-2 (Del. Oct. 11, 2017).

[36] *See Bodnari v. Phelps*, 2009 WL 1916920, at *2 (D. Del. July 6, 2009) ("A petitioner satisfies the exhaustion requirement by demonstrating that the habeas claims were 'fairly presented' to the state's highest court, either on direct appeal or in a post-conviction proceeding.").

Claim 1 – Evidentiary standard at sentencing

Clearly established federal law

Smack claims that the state court deprived him of a constitutionally fair sentencing by failing to require the State to prove disputed facts by a preponderance of the evidence.[37] Smack asserts that the clearly established United States Supreme Court precedent controlling this claim is *McMillan v. Pennsylvania*,[38] and its progeny, including *Nichols v. United States*,[39] and *United States v. Watts*.[40] But, Smack's reliance on these cases in seeking habeas relief is misplaced. These cases stand for the broad proposition that the Government need not establish disputed sentencing facts used to enhance a sentencing range by more than a preponderance of the evidence to satisfy due process. None of the cases discuss the admissibility of evidence standard where the facts are not disputed, nor what standard of proof is required regarding disputed facts within the sentencing range.

In *McMillan*, the Supreme Court held that a Pennsylvania statute allowing for a five-year minimum statutory sentencing enhancement if the government proved by a preponderance of the evidence that defendant visibly possessed a firearm during the commission of a felony satisfied due process.[41] In *Nichols*, the Supreme Court held that a federal sentencing court could consider a defendant's previous uncounseled misdemeanor conviction when applying a sentencing enhancement under the United States Sentencing Guidelines ("USSG.").[42] In *Watts*, the Supreme

[37] D.I. 34 at 20 of 47.

[38] 477 U.S. 79 (1986).

[39] 511 U.S. 738 (1994).

[40] 519 U.S. 148 (1997).

[41] 477 U.S. at 91.

[42] 511 U.S. at 746-47.

Court held that a federal sentencing court could consider conduct for which a defendant was acquitted to enhance their sentence under the USSG, "so long as that conduct has been proved by a preponderance of the evidence."[43] Smack acknowledges that the Supreme Court did not hold, in any of these cases, that a state sentencing hearing requires the state court to use a preponderance of the evidence standard in considering disputed facts that would not alter the sentencing range available to the court.

AEDPA "requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established by United States Supreme Court precedent at the time the state court conviction became final."[44] The Supreme Court has consistently held that "it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [it]."[45] Thus, Smack's reliance on Supreme Court cases that do not provide holdings requiring the desired rule of law is unavailing. This Court's review is limited to the application of clearly established rules of law found in Supreme Court precedent available to the states at the time of decision.

Rather than the cases cited by Smack, the relevant clearly established Supreme Court precedent can be found in *United States v. Tucker*[46] and *Townsend v. Burke*.[47] In *Tucker*, the Supreme Court overturned a sentence where the sentencing court had considered two prior

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[43] 519 U.S. at 158.

[44] *Williams v. Taylor*, 529 U.S. 362, 380 (2000).

[45] *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) (internal quotations omitted). *See Wright v. Van Patten*, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented, . . . it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law." (internal quotations omitted)).

[46] 404 U.S. 443 (1972).

[47] 334 U.S. 736 (1948).

convictions that were later invalidated. In *Townsend*, the Supreme Court found a due process violation where the sentencing court relied on materially false information about a defendant's criminal history in making its sentencing decision. *Tucker* and *Townsend* stand for the general proposition that a criminal defendant has a due process right to be sentenced on the basis of accurate information.[48]

In addition, the Supreme Court, in *Williams v. New York*,[49] held that a defendant who did not challenge the accuracy of the presentence report was not entitled under due process clause to an opportunity to confront and cross-examine sources of information used in that report. In a subsequent plurality opinion, the Supreme Court qualified *Williams* in the specific context of capital cases, holding that the defendant had a due process right not to receive the death penalty on the basis of information that he had no opportunity to deny or explain.[50]

The Delaware Supreme Court's decision was not contrary to, nor an unreasonable application of, *Tucker* and *Townsend*. Smack failed to point to materially false information relied upon by the sentencing court. Further, Smack did not allege that anything in the presentence report was, in fact, inaccurate. Smack had the opportunity – and took that opportunity - to argue that he was not a drug kingpin, but rather a retail drug entrepreneur. Smack admitted to the drug dealing alleged in the indictment. The only specific factual challenge was to Smack's relationship to Price and the contraband seized from Price's residence. The prosecutor asked the sentencing judge not

[48] *See United States v. Baylin*, 696 F.2d 1030, 1040 (3d Cir. 1982) ("as a matter of due process, factual matters may be considered as a basis for a sentence only if they have some minimal indicium of reliability").

[49] 337 U.S. 241 (1949). *See also Specht v. Patterson*, 386 U.S. 605, 608 (1967) (adhering to *Williams v. New York*; but declining to extend it to commitment proceedings).

[50] *Gardner v. Florida*, 430 U.S. 349, 362 (1977).

to consider those charges in the indictment,[51] and there is no indication that the judge considered those counts at the subsequent sentencing hearing. Smack was not sentenced on the basis of inaccurate information that Smack did not have an opportunity to explain or deny. Thus the Delaware Supreme Court's decision was a reasonable application of the relevant federal precedent.

Moreover, even under the cases upon which Smack relies, his claim fails. The common thread in each of the cases upon which Smack relies is the presence of a state statutory or federal sentencing guideline enhancement. Smack's case, however, did not involve a statutory sentencing enhancement provision.[52] The prosecutor in Smack's case was arguing in support of a sentence that was *within* statutory sentencing range, not an increase of the sentencing range.[53] As the Delaware Supreme Court found:

> Under the federal sentencing guidelines, the judge must find facts at sentencing using evidentiary burdens because those factual determinations can cause an increase in the sentencing ranges under the guidelines. Here, Smack's guilty plea resulted in a sentencing range of two to seventy-six years. To fix the sentence *within* that statutory range, the judge was entitled to consider all facts that had a minimal indicia of reliability—including the intercepted text messages and phone conversations that led to the seventy-seven charges of drug dealing brought against Smack.[54]

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[51] *See* D.I. 30 at 68 of 153.

[52] Generally, when making factual findings for sentencing purposes, a federal circuit court has held that a district court "may consider any information which bears sufficient indicia of reliability to support its probable accuracy." *United States v. Zuniga*, 720 F.3d 587, 590 (5th Cir. 2013) (citing *United States. v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012)). The USSG permit the sentencing court to consider certain evidence "so long as such evidence has sufficient or minimally adequate indicia of reliability and the defendant has an opportunity to rebut such evidence that he perceives is erroneous." *United States v. Christman*, 509 F.3d 299, 305 (6th Cir. 2007) (citing *United States v. Moncivais*, 492 F.3d 652, 658 (6th Cir. 2007)).

[53] *See Smack*, 2017 WL 4548146, at *2.

[54] *Id.* (internal citations omitted) (emphasis in original).

The Delaware Supreme Court properly found that the federal cases cited by Smack were inapposite. Here, the Superior Court did not use statutory or guideline-based enhancements when it sentenced Smack to fourteen years of incarceration, well within the sentencing range of two to seventy-six years.

While Smack complains that the sentencing judge failed to require the State to prove disputed sentencing facts by a preponderance of evidence in violation of due process, Smack failed to provide the state courts with any concrete objections at sentencing, beyond objecting to the prosecutor's characterization of Smack as a drug kingpin. Subsequently, Smack claimed that all facts beyond the facts Smack admitted at the plea colloquy had to be established by the State by a preponderance of evidence, regardless of whether those underlying facts were in dispute or whether there was a good faith basis upon which to challenge them. There is no established Supreme Court precedent to support that claim and the cases Smack relies upon simply do not support Smack's position. Smack's claim is thus unavailing.

Factual dispute

At Smack's originally scheduled sentencing hearing, the prosecutor described, "by way of background,"[55] the contents of an intercepted phone call between Smack and his co-defendant, Price. The prosecutor then described the contraband, including large sums of cash, a loaded handgun, and more than 150 grams of heroin packaged for sale, police discovered at Price's residence when they executed a search warrant.[56] Then, the prosecutor argued: "Mr. Smack now tells this Court that he's not a drug king pin, that the police have the wrong guy."[57] The prosecutor

[55] 6/22/2016 Sent. Hrg. at 2 (D.I. 29 at 116 of 151).

[56] 6/22/2016 Sent. Hrg. at 4-5 (D.I. 29 at 116 of 151).

[57] 6/22/2016 Sent. Hrg. at 6 (D.I. 29 at 117 of 151).

went on to discuss Smack's activities discovered by the FBI Task Force during their investigation and listed the names of fifteen people who had purchased drugs from Smack and who were now in Drug Diversion programs.[58] Finally, the prosecutor recommended, consistent with the plea agreement, that the court sentence Smack to fifteen years of incarceration followed by reduced levels of supervision.[59] Smack's counsel did not object during this recitation.

Smack, through counsel, then argued that beyond the phone call in which Smack directed Price to hide something, there was nothing to link Smack to the contents of Price's residence.[60] Although Smack pleaded guilty to possession of a firearm, the specific count of the indictment to which he pled did not list the weapon found at that house.[61] Smack's counsel further argued that Smack was not a kingpin, but rather "a small-time retail Heroin salesman."[62] In response to a question from the court, counsel stated that the court could not consider the items found at Price's residence because the State had failed to establish by a preponderance of the evidence that Smack was responsible for any of the items found there.[63] Smack's counsel claimed that he had been sandbagged and that the State's presentation had gone beyond the indictment.[64] The court then provided Smack 45 days to present all written arguments regarding the State's burden at sentencing.[65]

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[58] 6/22/2016 Sent. Hrg. at 6-10 (D.I. 29 117-18 of 151).

[59] 6/22/2016 Sent. Hrg. at 10-13 (D.I. 29 at 118 of 151).

[60] 6/22/2016 Sent. Hrg. at 18 (D.I. 29 at 120 of 151).

[61] 6/22/2016 Sent. Hrg. at 18 (D.I. 29 at 120 of 151).

[62] 6/22/2016 Sent. Hrg. at 19 (D.I. 29 at 120 of 151).

[63] 6/22/2016 Sent. Hrg at 21 (D.I. 29 at 120 of 151).

[64] 6/22/2016 Sent. Hrg at 21 (D.I. 29 at 120 of 151).

[65] 6/22/2016 Sent. Hrg. at 26-30 (D.I. 29 at 122-23 of 151).

In his written pleading, Smack asserted that the State had the burden of proving all factual assertions by a preponderance of the evidence before the court could consider any proffered facts. Further, Smack argued that he should be able to "cross examine any witness who purports a disputed fact."[66] Smack then argued that if the State intended to assert that the court should consider any criminal acts beyond those offenses to which Smack had pleaded guilty, then the State should be required to present witness testimony to establish the facts, subject to cross examination.[67]

In its answer, the State noted that the indictment against Smack and his numerous co-defendants came as the result of an FBI Task Force investigation with Smack as the target. The charges were based almost exclusively on Smack's intercepted communications from a wiretap authorized by the court. The presentence report also noted that multiple raids resulted in three firearms, over $16,000 in cash, and various quantities of heroin, crack cocaine and marijuana that were located and seized from the co-defendant's residence. Price pleaded guilty to maintaining a drug property for Smack. The State did not argue that Smack could not challenge any of the factual allegations as being inaccurate or that Smack could not present information to counter the State's claims or any inaccuracies in the presentence report.[68]

Finally, Smack responded that he was entitled to present live witnesses to rebut the State's evidence and to support his argument that the State had failed to prove the disputed facts by a preponderance of the evidence.[69]

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[66] D.I. 29 at 128 of 151.

[67] D.I. 29 at 128 of 151.

[68] D.I. 29 at 130-36 of 151.

[69] D.I. 30 at 39-41 of 153.

The sentencing court allowed oral argument at Smack's request. At argument, the State asserted that it intended to rely on all counts of drug dealing in the indictment for which Smack was named as the defendant.[70] Smack's counsel then conceded that "[m]y expectation is the – the vast majority of any of the drug deals, which are small drug deals that are outlined within the indictment, is something that Mr. Smack would take responsibility for."[71] Smack's counsel then stated that "[w]e're disputing the conduct beyond conviction."[72]

After the argument, the State, based on Price's statements at his own sentencing that he intended to sell the drugs found in his home, informed the court that, at Smack's sentencing, the State would not ask the court to consider the drugs or other contraband found at Price's residence.[73]

At Smack's November 23, 2016 sentencing hearing, the prosecutor began with the following remarks:

> Your Honor, the State did make a presentation on the sentencing I think back in June, and at that time asked Your Honor to impose a 15 year sentence. That comes from the plea agreement.
>
> The plea agreement indicates that Mr. Smack has pled guilty to two offenses, each of which require a two-year minimum mandatory sentence.
>
> Pursuant to the plea agreement, Mr. Smack has agreed to request no less than eight years here today, and the State has agreed that it will ask for no more than 15, which the State has done previously, and continues to do today.
>
> That number is within the guidelines.
>
> On each of the Tier IV drug dealing charges, it is within the guidelines for those offenses.
>
> On the first, the SENTAC Guidelines are two to ten, and on the second they are two to five.
>
> Additionally, the remaining Drug Dealing counts, which are no tier weight, are guidelines up to two years;
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> The Firearm charge is up to one year;
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> The Conspiracy charge is up to one year, all at Level V.

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[70] 11/9/2016 Oral Arg. at 23 (D.I. 30 at 64 of 153).

[71] 11/9/2016 Oral Arg. at 24 (D.I. 30 at 65 of 153).

[72] 11/9/2016 Oral Arg. at 24 (D.I. 30 at 65 of 153).

[73] 11/11/2016 Ltr. (D.I. 30 at 68 of 153).

> And, so, the State's recommendation is within the guidelines on the Tier IV charges alone; the higher end, but within the guidelines.
>
> As far as the SENTAC aggravating factors are concerned, Mr. Smack has one prior violent offense that was listed in the presentence report. It is a juvenile conviction; however, because he was 17 at the time SENTAC does allow this Court to consider it.
>
> That offense was for robbery and for a handgun charge. And, according to SENTAC, specifically Page 133, that is why his initial drug dealing charge, the presumptive is a two to ten.[74]

At the Court's request, the prosecutor then informed the court about the sentences three other somewhat comparable co-defendants received for their offenses in the indictment. Thereafter Smack's counsel argued that Smack "was no kingpin. He was a retail drug dealer.... He wasn't a supplier of other individuals."[75] Counsel discussed Smack's difficult upbringing and difficulties finding and keeping employment to support his family. Counsel argued, consistent with the plea agreement, for an 8-year prison sentence.

Before hearing from Smack, the court asked the prosecutor if she wished to comment on counsel's observation that the defendant was not a kingpin.[76] The prosecutor responded:

> Your Honor, I think if you can gather sufficient evidence to charge 77 counts of drug dealing in two months of intercepted phone calls, that would suggest that that is certainly a full-time job. And that suggestion is backed up by all of the cases that Your Honor has sentenced. Your Honor has sentenced numerous people, not only for purchasing drugs in this case, but in wrapping up all of their other cases.
>
> Your Honor actually is in such a unique position to have seen individuals who were committing other crimes in order to feed their drug habit, and has such a unique picture on the, sort of, global problem that this was creating.
>
> And the General Assembly has seen that to charge, to enable the court to give higher minimum mandatories, or enable the prosecutors to ask for higher minimum mandatories when there is a greater quantity of drugs. But, having seen those faces, Your Honor knows, and the State knows, and certainly Mr. Smack ought to know, that when you are directly supplying an addict, this is someone who becomes known to you. And, so, many of the problems that Your Honor heard

[74] 11/23/2016 Sent. Trans. at 4-6 (D.I. 30 at 74-75 of 153).

[75] 11/23/2016 Sent. Trans. at 10 (D.I. 30 at 76 of 153).

[76] 11/23/2016 Sent. Trans. at 20 (D.I. 30 at 78 of 153).

> about, many of the mothers who came in with their children at sentencing many of the loved ones speaking of children who are affected by their loved one's heroin abuse are, certainly, people who maybe weren't known to Mr. Smack, but he knew them as people.
>
> And, so, is there a statutory difference in the way that we treat people who supply large quantities of heroin and profit the most? Yes. But, there is something different about the act of supplying daily heroin to a person with a family that is counting on them, as opposed to showing up at a parking lot with a trunk full of heroin and dropping it off as a distributor.
>
> Yes, they are punished differently; absolutely. Moving lots of weight and profiting in great amounts is certainly something that the State sees as a significant problem. But we can't minimize seeing the same people again and again.
>
> And, again, they are on the indictment, people who bought on a regular basis from Mr. Smack. And, so, the State's position is as it always has been. He is a significant drug dealer.[77]

When asked to summarize the aggravating circumstances the State was relying upon, the prosecutor noted, under the SENTAC guidelines, Smack's prior violent criminal conduct – the violent offense of robbery and the handgun - which were committed 8 years earlier when Smack was 17 years old.[78] The prosecutor also reminded the court that it was not bound by the guidelines as long as the court set forth with particularity the reasons for the deviation.[79]

After his counsel responded again with the idea that Smack was not a kingpin, Smack spoke directly to the court. Smack explained:

> [T]he prosecutor is making me sound like a person that really I'm not.
>
> And, um. I was really out there. I was selling drugs. I was selling drugs to drug dealers. But she was saying that I was doing a large amount of – some large amount drugs here and there. I wasn't, you see what I'm saying.
>
> I was trying to – I was really trying to make it happen because I've never had nothing.
>
> ***

[77] 11/23/2016 Sent. Trans. at 20-23 (D.I. 30 at 78-79 of 153).

[78] 11/23/2016 Sent. Trans. at 23 (D.I. 30 at 79 of 151).

[79] 11/23/2016 Sent. Trans. at 24 (D.I. 30 at 79 of 153).

> And, like you said, I knew what I was doing. I was sacrificing myself. But, at the same time, like, my kids – like, we just had to live.[80]

Ultimately, the Superior Court, having taken into account Smack's difficult life situation not of his own making, was concerned about the victims who were addicted to drugs and being preyed upon.[81] The court imposed a sentence of 14 years in prison followed by probation.

At no time did Smack point to any errors in the presentence report or the prosecutor's remarks. Smack asserted that the court could not consider any indicted charges to which Smack did not plead guilty, unless proven by a preponderance of the evidence at a hearing. When asked which charges Smack specifically disputed, the only charges at issue appeared to be those related to the contraband at Price's residence. Because the prosecutor asked the court not to consider those specific charges at sentencing, and the court did not refer to them at sentencing, there were no disputed facts other than the title of kingpin. That reference came from the presentence report and Smack did not object to the presentence report or ask that the reference be removed from the report. Thus, even if the United States Supreme Court cases could be read to require a preponderance of the evidence standard for the admission at a sentencing hearing of disputed facts, Smack failed to present the Delaware courts with any dispute regrading facts used at the sentencing. To the extent Smack objected to the prosecutor's presentation at the first sentencing hearing, the objected to statements were not included in the second sentencing hearing at which the prosecutor made no reference to Price or his charges and did not refer to Smack as a kingpin. The Delaware Supreme Court correctly determined that the sentencing court did not violate Smack's due process rights by considering comments made by a prosecutor at sentencing, when those comments were not based on disputed facts.

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[80] 11/23/2016 Sent. Trans. at 30-32 (D.I. 30 at 81 of 153).

[81] *See* 11/23/2016 Sent. Trans. at 36-37 (D.I. 30 at 82-83 of 153).

The prosecutor's characterization of Smack's role as a "kingpin" in a drug dealing enterprise did not introduce a disputed fact for the sentencing court's consideration, the prosecutor did not refer to Smack as a "kingpin" at his final sentencing hearing, and Smack had the opportunity to rebut the prosecutor's characterization.

Smack's claim is unavailing, and this Court should deny relief.

Claim 2 – Petitioner was not entitled to an evidentiary hearing

In Claim Two, Smack asserts that the Delaware Superior Court is required to hold an evidentiary hearing regarding disputed facts to be used at a sentencing hearing. (D.I. 33 at 10 of 47). Because the Delaware Supreme court denied the claim on the merits, this Court must review the claim under the deferential standard contained in 28 U.S.C. § 2254(d). Pursuant to 28 U.S.C. § 2254(d), federal habeas relief may only be granted if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," or the state court's decision was an unreasonable determination of the facts based on the evidence adduced in the trial.[82] Smack has failed to offer any United States Supreme Court decision in support of this claim, much less a clearly established rule of law. This Court should dismiss the claim on that basis.

The claim also simply lacks merit. On appeal to the Delaware Supreme Court, Smack argued that the Superior Court's denial of his request for an evidentiary hearing violated his due process rights. The Delaware Supreme Court rejected Smack's due process argument, finding that the Superior Court "did not abuse its discretion in denying an evidentiary hearing because Smack had, and took, the opportunity to argue he was a middleman in the conspiracy and not the

[82] 28 U.S.C. § 2254(d)(1) & (2); *see also Williams v. Lanzo*, 529 U.S. 362, 412 (2000); *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001).

kingpin."[83] The Delaware Supreme Court, in denying Smack's claim, cited to its prior decisions which, in turn, cited to federal cases for the proposition that due process did not require a full evidentiary hearing to determine the reliability of the information in a presentence report.[84]

Smack never contested that he was a drug dealer. When he pleaded guilty to four counts of Drug Dealing, Smack acknowledged that he either possessed, with the intent to deliver, or delivered, various quantities of heroin on separate occasions.[85] At his original aborted sentencing hearing, the State informed the court that Smack was someone who had been "known to the police for a long time," that many people had purchased drugs from Smack, that Smack could be heard on the phone telling people to be mindful of police and undercover cars, that with Smack's history and the quantity of money and drugs in his possession Smack deserved fifteen years of incarceration.[86] Smack described his drug dealing activity as that of a "small-time retail [h]eroin salesman."[87] Smack again acknowledged that he was a "retail drug dealer" at his second sentencing hearing.[88] The prosecutor and Smack both described his criminal activity as the sale of heroin to individual addicts. Smack simply takes umbrage at the prosecutor's use of the term "kingpin" at the initial sentencing hearing, preferring the term "retail drug dealer."[89] Smack's disagreement with the prosecutor's characterization of his conduct does not amount to a "disputed

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[83] *Smack*, 2017 WL 4548146 at *2.

[84] *See, e.g., id.* at *2 n.3 (citing to *Lake v. State*, 1984 WL 997111, at *1 (Del. Oct. 29, 1984) (citing *United States v. Baylin*, 696 F.2d 1030, 1040 (3d Cir. 1982) and *United States v. Papajohn*, 701 F.2d 760, 763 (8th Cir. 1983))).

[85] D.I. 29 at 111-13 of 151.

[86] D.I. 29 at 117-18 of 151.

[87] D.I. 29 at 120 of 151.

[88] D.I. 30 at 226 of 153.

[89] D.I. 30 at 226 of 153.

fact" or a materially inaccurate fact upon which the Superior Court relied to apply a statutory or guideline-based sentencing enhancement. Because there is no actual dispute of fact, and because nothing here enhanced the sentencing range available to the court based on Smack's plea, there is no basis for this Court to grant habeas relief.

Records

Smack's plea, sentencing, and other relevant hearing transcripts are included in the State Court Records provided to the Court. Should the Court direct the production of any transcript not provided, Respondents cannot state with specificity when such transcript would be available. However, Respondents reasonably anticipate that such production would take 90 days from the issuance of any such order by the Court.

Conclusion

For the foregoing reasons, the petition for a writ of habeas corpus should be denied without further proceedings.

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Dated: July 6, 2020

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2020, I electronically filed the attached document with the Clerk of Court using CM/ECF which will send notification of such filing to the following registered participant:

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/s/Elizabeth R. McFarlan
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