UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

EDWIN B. EDWARDS, Petitioner,	:	
v.	:	
	:	CA 03-532ML
A. T. WALL, Respondent.	:	

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge

Before the court is the Petition Under 28 USC § 2254 for Writ of Habeas Corpus by a Person in State Custody (the "Petition") filed by Edwin B. Edwards ("Petitioner"). The State of Rhode Island (the "State") has moved to dismiss the Petition. This matter has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and D.R.I. Local R. 32(a). For the reasons stated herein, I recommend that the State's motion to dismiss be granted.

Facts and Travel

Petitioner was indicted on December 13, 1999, by the Providence County Grand Jury on one count of domestic murder of Jeanne Robinson in violation of R.I. Gen. Laws §§ 11-23-1, 12-29-2, and 12-29-5.[1] See Memorandum in Support of Petition under 28 U.S.C. Sec. 2254 for Writ of Habeas Corpus by Person in State Custody ("Pet. Mem.") at 1. On January 7, 2000, the Rhode Island Attorney General filed a notice pursuant to R.I. Gen. Laws § 12-19.2-1, of the state's intention to seek a sentence of life

[1] The first statute, R.I. Gen. Laws § 11-23-1, defines first and second degree murder. The other two statutes are part of Rhode Island's Domestic Violence Prevention Act, §§ 12-29-1 to 12-29-10. They require that a person convicted of a crime of domestic violence (which may include homicide, see §12-29-2) participate in a "batterer's intervention program," § 12-29-5, and to pay a twenty-five dollar assessment in addition to other court costs or assessments imposed, see id.

imprisonment without parole pursuant to § 11-23-2(4).[2] See Pet. Mem. at 1. The case was reached for trial on January 8, 2001, at which point Petitioner waived his right to trial by jury. See Pet. Mem. at 2. Following a bench trial which began on January 23, 2001, and concluded on January 23, 2001, Petitioner was found guilty of first degree murder on February 5, 2001, by Justice Savage. See id. Justice Savage also found that the state had proven, beyond a reasonable doubt, allegations required to subject Petitioner to a sentence of life without parole pursuant to § 11-23-2(4). See id.

On April 2, 2001, Petitioner filed a sentencing memorandum

---

[2]

> **11-23-2. Penalties for murder.** — Every person guilty of murder in the first degree shall be imprisoned for life. Every person guilty of murder in the first degree: (1) committed intentionally while engaged in the commission of another capital offense or other felony for which life imprisonment may be imposed; (2) committed in a manner creating a great risk of death to more than one person by means of a weapon or device or substance which would normally be hazardous to the life of more than one person; (3) committed at the direction of another person in return for money or any other thing of monetary value from that person; **(4) committed in a manner involving torture or an aggravated battery to the victim**; (5) committed against any member of the judiciary, law enforcement officer, corrections employee, assistant attorney general or special assistant attorney general, or firefighter arising from the lawful performance of his or her official duties; (6) committed by a person who at the time of the murder was committed to confinement in the adult correctional institutions or the state reformatory for women upon conviction of a felony; or (7) committed during the course of the perpetration or attempted perpetration of felony manufacture, sale, delivery or other distribution of a controlled substance otherwise prohibited by the provisions of chapter 28 of title 21; **shall be imprisoned for life and if ordered by the court pursuant to chapter 19.2 of title 12 that person shall not be eligible for parole from imprisonment**. Every person guilty of murder in the second degree shall be imprisoned for not less than ten (10) years and may be imprisoned for life.

R.I. Gen. Laws § 11-23-2 (second and third bold added).

which argued "that he had not been charged pursuant to s 11-23-2 and that imposing a sentence of life without parole pursuant to that statute would violate his rights as guaranteed by pursuant to the United States Constitution, Amend. 5, Amend. 6, and Amend." Id. Justice Savage rejected this argument and sentenced Petitioner to life imprisonment without the possibility of parole. See id.

Petitioner appealed his sentence to the Rhode Island Supreme Court, arguing, among other things, that "his sentence violated due process because he had not been properly charged with an offense that carried the penalty of life without the possibility of parole." Id. The Rhode Island Supreme Court rejected Petitioner's due process claim and denied his appeal on November 25, 2002. See State v. Edwards, 810 A.2d 226 (R.I. 2002). On December 12, 2002, that court denied Petitioner's petition for rehearing. See Pet. Mem. at 3.

A petition for certiorari was filed in the United States Supreme Court on March 11, 2003, by Petitioner. See id. The Court denied the petition on April 21, 2003. See id.

Petitioner filed the instant Petition on November 24, 2003. The following day the court entered an order requiring the State to file a response to the Petition on or before December 19, 2004. See Order (Document #4) of 11/25/03. The State's Response to and Motion to Dismiss Petitioner's Petition for Writ of Habeas Corpus (Document #7) ("Motion to Dismiss") was filed on December 19, 2004. See Motion to Dismiss. The Motion to Dismiss was supported by a memorandum of law. See Memorandum of Law in Response to and Motion to Dismiss Petition for Writ of Habeas Corpus ("State's Mem.").

On January 13, 2004, an assented to motion was filed on January 13, 2004, enlarging the time for Petitioner to file his objection to the Motion to Dismiss up to and including that date. See Petitioner's Motion to Extend Time for Filing Objections to

Motion to Dismiss (Assented to) (Document #9). Petitioner's Objection to the Motion to Dismiss and Petitioner's Memorandum in Opposition to Respondent's Motion to Dismiss ("Pet. Mem. in Opp.") were filed the same day.

On February 6, 2004, Petitioner moved for leave to supplement his memorandum with a recently decided case, United States v. Edwards, 357 F.3d 745 (8th Cir. Feb. 2, 2004), Rehearing En Banc Granted, Judgment Vacated (8th Cir. May 11, 2004). See Petitioner's Motion for Leave to Supplement Memorandum with Recently Decided Case (Document #12) ("Motion for Leave"). In support of the Motion for Leave, Petitioner filed a supplemental memorandum. See Petitioner's Memorandum in Support of Motion for Leave to Supplement with Recently Decided Case (Pet. Mem. for Leave"). The Motion for Leave was granted by this Magistrate Judge on February 12, 2004. See Order (Document #13). The State filed a Reply to Petitioner's Supplemental Memorandum ("State's Reply") on February 13, 2004.

A hearing on the Motion to Dismiss was held on March 10, 2004. Thereafter, the court took the matter under advisement.

On October 6, 2004, Petitioner filed another motion for leave to file a supplemental memorandum of law. See Petitioner's Motion for Leave to File Supplemental Memorandum of Law (Document # 17). This second motion for leave was granted by District Judge Mary M. Lisi on October 7, 2004. See Document #18. On November 18, 2004, Petitioner moved for an extension of ten days within which to file his supplemental memorandum of law. See Petitioner's Motion for Ten Day Extension of Time to File Supplemental Memorandum of Law (Document #19). This motion was referred to me for determination, and I granted it on November 9, 2004. See Document #20. Petitioners' Supplemental Memorandum of Law (Document #21) ("Pet. Supp. Mem.") was filed November 17, 2004. The State responded with a Reply to Petitioner's Supplemental Memorandum of Law Dated November 16, 2004 (Document

#22) ("State's Second Reply") on November 29, 2004.

Law

"The Antiterrorism and Effective Death Penalty Act [AEDPA] of 1996 modified a federal habeas court's role in reviewing state prisoner applications 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, 122 S.Ct. 1843, 1849 1532 L.Ed.2d 914 (2002)(citing Williams v. Taylor, 529 U.S. 362, 403-404, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). As a result, a federal habeas court's power to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court has been constrained. See Williams v. Taylor, 529 U.S. at 412, 120 S.Ct. at 1523. Under 28 U.S.C. § 2254(d), the writ may not be granted unless 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.

Id. 28 U.S.C. § 2254(d)(bold added); see also Rashad v. Walsh, 300 F.3d 27, 30, 34 (1st Cir. 2002)(stating that a federal court may grant habeas relief for a state prisoner only the state court decision falls within either of the above two subsections).

The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) have independent meaning. See Williams v. Taylor, 529 U.S. at 404-05, 120 S.Ct. at 1495; Bell v. Cone, 535 U.S. at 694, 122 S.Ct. at 1850. "[A] state court decision is considered contrary to Supreme Court precedent only if it either applies a test that is inconsistent with one announced by the Court or reaches the opposite conclusion on materially indistinguishable

facts." Rashad v. Walsh, 300 F.3d at 34-35 (citing Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). The "unreasonable application" clause affords relief to a state prisoner "if the state court applies the correct legal standard in an objectively unreasonable manner, unreasonably extends a Supreme Court precedent to an inappropriate context, or fails to extend such a precedent to an appropriate context." Rashad v. Walsh, 300 F.3d at 35 (citing Williams v. Taylor at 407-08). In deciding whether a state court decision fits within the scope of this second clause, a federal court evaluates "the strength of the state court's ultimate conclusion, rather than its announced rationale ...." Id. (citing Ouber v. Guarino, 293 F.3d 19, 34 (1st Cir. 2002). "Importantly, the test does not demand infallibility: a state court's decision may be objectively reasonable even if the federal habeas court, exercising its independent judgment, would have reached a different conclusion." Id. (citing Williams v. Taylor, 529 U.S. at 411; Williams v. Matesanz, 230 F.3d 421, 425 (1st Cir. 2000). It is not enough that the federal habeas court "concludes in its independent judgment that the relevant state court applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Williams v. Taylor, 529 U.S. at 411, 120 S.Ct. at 411; accord McCambridge v. Hall, 303 F.3d 24, 36 (1st Cir. 2002)(citing Williams).

The determination of whether the relevant particular state court decision passes this test "must be decided primarily on the basis of Supreme Court holdings that were clearly established at the time of the state court proceedings." Rashad v. Walsh, 300 F.3d at 35 (citing Williams v. Taylor, 529 U.S. at 412). Nevertheless, cases from lower federal which are factually similar "may inform such a determination, providing a valuable reference point when the relevant Supreme Court rule is broad and applies to a kaleidoscopic array of fact patterns." Id. (citing

Ouber v. Guarino, 293 F.3d at 26; O'Brien v. Dubois, 145 F.3d 16, 25 (1st Cir.1998).

The AEDPA also permits relief from a state court judgment if that judgment is based on an unreasonable determination of the facts. See id. (citing 28 U.S.C. S 2254(d)(2). However, "the state court's factual findings are entitled to a presumption of correctness that can be rebutted only by clear and convincing evidence to the contrary." Id. (quoting Ouber v. Guarino, 293 F.3d at 27;) see also Sanna v. Dipaolo, 265 F.3d 1, 7 (1st Cir. 2001)(stating that the standard applies only to the determination of "basic, primary, or historical facts"). Thus, the petitioner's burden in this regard is "heavy," Rashad v. Walsh, 300 F.3d at 35, and if he fails to carry it "a federal habeas court must credit the state court's findings of fact--and that remains true when those findings are made by a state appellate court as well as when they are made by a state trial court," id., (citing King v. Bowersox, 291 F.3d 539, 540 (8th Cir. 2002); Everett v. Beard, 290 F.3d 500, 507 (3d Cir. 2002)).

Discussion

Petitioner bases his application for habeas relief on three grounds which the court discusses seriatim.

I. The Indictment

A. Basis for Claim

Petitioner argues that his due process rights have been violated by the imposition of a sentence for an offense which was not set forth in the indictment against him. See Pet. Mem. at 7. He acknowledges that he was indicted for first degree murder, see R.I. Gen. Laws § 11-23-1, an offense that carries the mandatory penalty of life imprisonment under Rhode Island law, see Pet. Mem. at 7, but with "the possibility of parole," Petitioner's Memorandum in Opposition to Respondent's Motion to Dismiss ("Pet. Mem. in Opp.") at 1. Petitioner asserts that "the State sought to enhance that penalty by seeking to prove that [he] committed

'life without parole/murder' in violation of R.I. Gen. L[aws] § 11-23-2(4) in that the homicide was committed in a manner involving torture or an aggravated battery to the victim ...." Pet. Mem. at 7. Petitioner objected to the enhanced penalty on the ground "that he had not been indicted for that offense and that he could not, therefore, be sentenced pursuant to § 11-23-2." Both the trial court and the Rhode Island Supreme Court rejected Petitioner's argument on this issue. See Pet. Mem. at 7.

Petitioner contends that the state supreme court's decision "is contrary to, or an unreasonable application of, a line of United States Supreme Court cases, 28 U.S.C. § 2254(d)(1), and he is therefore entitled to the writ of habeas corpus." Pet. Mem. at 8. The line of cases which Petitioner cites is Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), Castillo v. United States, 530 U.S. 120, 120 S.Ct. 2090, 147 L.Ed.2d 94 (2000), Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), see Pet. Mem. at 8-15, and Blakely v. Washington, U.S. , 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), see Pet. Supp. Mem. at 1-4. In Petitioner's view, "the Apprendi-Blakely line of cases requires that all elements of the offense charged be encompassed within the indictment or charging instrument." Id. at 4. Thus, according to Petitioner, the circumstances set forth in R.I. Gen. Laws § 11-23-2(4) which authorize the imposition of a life sentence without possibility of parole for first degree "committed in a manner involving torture or an aggravated battery to the victim," id., are elements of the offense for which he has been sentenced. Because those elements were not included in the indictment, he claims that he has been denied due process of law.

1. Jones v. United States

In Jones v. United States the petitioner was indicted for

violating the federal carjacking statute, 18 U.S.C. § 2119. See 526 U.S. at 230, 119 S.Ct. at 1218. The statute contained three numbered subsections which set forth three maximum periods of imprisonment: fifteen years, twenty-five years, and life. See id. The applicable maximum depended upon whether or not there was serious bodily injury or death resulting from the taking of the motor vehicle. See id. The indictment made no reference to the subsections and charged none of the facts mentioned in the latter two (which dealt with carjackings which resulted in serious bodily injury or death). See id. At Jones' arraignment, the Magistrate Judge told him that he faced a maximum sentence of fifteen years on the carjacking charge. See id. at 230-31, 119 S.Ct. at 1218. However, after being found guilty, he was sentenced for the carjacking offense to twenty-five years because the trial judge found by preponderance of the evidence that one of the victims had suffered serious bodily injury. See id. at 231, 119 S.Ct. at 1218.

Jones appealed to the United States Court of Appeals, claiming that the serious bodily injury was an element of the offense which had neither been pleaded in the indictment nor proven before the jury. See United States v. Oliver, 60 F.3d 547, 551-52 (9th Cir. 1995). The Ninth Circuit, rejected this argument, agreeing with the district court that serious bodily injury was a sentencing factor, not an element of the offense. See id.

The Supreme Court reversed. See United States v. Jones, 526 U.S. at 252, 119 S.Ct. at 1228. The Court held that the statute established "three separate offenses by the specification of distinct elements, each of which must be charged by indictment, proved beyond a reasonable doubt, and submitted to a jury for its verdict." Id. In explaining the rationale for this decision, the Court stated: "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth

Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Id. at 243 n.6, 119 S.Ct. at 1224.

2. Castillo v. United States

In Castillo v. United States, the Supreme Court again confronted the question of "whether words in a federal criminal statute created offense elements (determined by a jury) or sentencing factors[3] (determined by a judge)." 530 U.S. at 121, 120 S.Ct. 2091. The statute at issue, 18 U.S.C. S 924(c) (1988 ed., Supp. V), prohibited the use or carrying of a "firearm" in relation to a crime of violence, and dramatically increased the penalty when the weapon used or carried was a "machinegun" or similar weapon. See id. The Court "conclude[d] that the statute used the word 'machinegun' (and similar words) to state an element of the offense." Id. Consequently, the Court wrote, "the indictment must identify the firearm type and a jury must find that element beyond a reasonable doubt." Id., 530 U.S. at 123, 120 S.Ct. at 2092. Among the factors which the Court identified as weighing in favor of treating the type of firearm as an element of the offense was "the length and severity of an added mandatory sentence that turns on the presence or absence of

---

[3] "[T]he term "sentencing factor" ... refer[s] to a fact that was not found by a jury but that could affect the sentence imposed by the judge." Apprendi v. New Jersey, 530 U.S. 466, 485, 120 S.Ct. 2348, 2361, 147 L.Ed.2d 435 (2000).

> The term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term "sentence enhancement" is used to describe an increase beyond the maximum authorized sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an "element" of the offense.

Id. at 494 n.19, 120 S.Ct. at 2365.

a ‘machinegun’ (or any of the othe listed firearms types) ....” Id., 530 U.S. at 131, 120 S.Ct. at 2096.

3. Apprendi v. New Jersey

At issue in Apprendi v. New Jersey was the lawfulness of New Jersey’s statutory scheme which:

> allow[ed] a jury to convict a defendant of a second-degree offense based on its finding beyond a reasonable doubt that he unlawfully possessed a prohibited weapon; after a subsequent and separate proceeding, it then allow[ed] a judge to impose punishment identical to that New Jersey provide[d] for crimes of the first degree ... based upon the judge’s finding, by a preponderance of the evidence , that the defendant’s “purpose” for unlawfully possessing the weapon was “to intimidate” his victim on the basis of a particular characteristic the victim possessed.

Apprendi v. New Jersey, 530 U.S. at 491, 120 S.Ct. at 2363. Apprendi had pled guilty to two counts of second-degree possession of a firearm for an unlawful purpose, an offense punishable under state law by five to ten years imprisonment. See id., 530 U.S. at 469-70, 120 S.Ct. at 22352. However, following an evidentiary hearing before the trial judge, Apprendi was sentenced on one of these counts to a term of twelve years, as authorized by New Jersey’s hate crimes statute, based on the judge’s finding “that the crime was motivated by racial bias,” and “that Apprendi’s actions were taken with a purpose to intimidate.” Id., 530 U.S. at 471; 120 S.Ct. at 2352.

The Court found New Jersey’s procedure violated the constitutional rule announced in Jones v. United States, see id. at 497, 120 S.Ct. at 2366, that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt,” id. at 491, 120 S.Ct. 2362-63. Although Jones involved a federal criminal statute, the Court stated that “[t]he Fourteenth Amendment commands the same answer in this case involving a state statute.”

Id. at 476, 120 S.Ct. at 2355.

Relevant to Petitioner's claim here, the Court in Apprendi specifically noted that:

> Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment. He relies entirely on the fact that the "due process of law" that the Fourteenth Amendment requires the States to provide to persons accused of crime encompasses the right to a trial by jury, and the right to have every element of the offense proved beyond a reasonable doubt. That amendment has not, however, been construed to include the Fifth Amendment right to "presentment or indictment of a "Grand Jury" .... We thus do not address the indictment question separately today.

Apprendi v. New Jersey, 530 U.S. at 477 n.3, 120 S.Ct. at 2356 n.3.

4. Ring v. Arizona

The defendant in Ring v. Arizona was found guilty by a jury of felony murder occurring in the course of a robbery. See 536 U.S. at 591, 122 S.Ct. at 2433. Under Arizona law, he could not be sentenced to death unless further findings were made. See id., at 591, 122 S.Ct. at 2434. Following a sentencing hearing before the trial judge, Ring was sentenced to death. See id. at 594, 122 S.Ct. at 2435. Thus, the question presented to the Supreme Court was "whether the Sixth Amendment's jury trial guarantee, made applicable to the states by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury." Ring v. Arizona, 536 U.S. at 597, 122 S.Ct. at 2437.

The Court answered this question in the affirmative, relying upon its prior holdings in Jones, see 536 U.S. at 600, 122 S.Ct. at 2439 (quoting Jones) and Apprendi, see 536 U.S. at 601-03, 122 S.Ct. at 2441-40.

> If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by

> a jury beyond a reasonable doubt. See [Apprendi] at 482-83, 120 S.Ct. 2348. A defendant may not be "expose[d] ... to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." Id., at 483, 120 S.Ct. 2348; see also id., at 499, 120 S.Ct. 2348 (SCALIA, J., concurring) ("[A]ll the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.").

Ring, 536 U.S. at 602, 122 S.Ct. at 2439-40.

The Court found that "the required finding of [of an aggravated circumstance] exposed [Ring] to a greater punishment that authorized by the jury's guilty verdict." Id. at 604, 122 S.Ct. at 2440. Therefore, "[b]ecause Arizona's enumerated aggravated factors operate as "the functional equivalent of an element of a greater offense, Apprendi, 530 U.S. at 494 n. 19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury." Ring, 536 U.S. at 609, 122 S.Ct. at 2443.

As was the case in Apprendi, the defendant in Ring did not allege that the indictment was in any way deficient. See Ring, 536 U.S. at 597 n.4, 122 S.Ct. at 2437 ("Ring's claim is tightly delineated: ... Ring does not contend that his indictment was constitutionally deficient." (citations omitted).

5. United States v. Blakely

The final case in the line cited by Petitioner, United States v. Blakely, invalidated Washington's Sentencing Reform Act because it allowed a judge to "impose a sentence above the standard range if he finds 'substantial and compelling reasons justifying an exceptional sentence." ___ U.S. ___, 124 S.Ct. at 2535 (quoting Wash. Rev. Cod Ann. § 9.994A.120(2)). The Supreme Court found that Washington's procedure violated the rule expressed in Apprendi: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Blakely, ___ U.S. ____, 124 S.C. at 2536 (quoting Apprendi, 530 U.S. at 490, 120

S.Ct. at 2362-63. The Court observed in Blakely that

> This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that "an accusation which lacks any particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and it is no accusation in reason," 1 J. Bishop, Criminal Procedure S 87, p. 55 (2d ed. 1872).

Blakely, ___U.S. ___, 124 S.Ct. at 2536 (footnote omitted).

The Court also explained:

> that the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.

Id. at 2537 (citations omitted).

6. State v. Edwards

The Rhode Island Supreme Court considered and rejected Petitioner's claim that his rights under the United States Constitution were violated by the imposition of a life without parole sentence even though the indictment did not set forth factual allegations or a statutory reference regarding such punishment. See State v. Edwards, 810 A.2d 226, 231-235 (R.I. 2002). The state supreme began its analysis by observing that "[i]t is indisputed that within twenty days after defendant's arraignment, the Attorney General, pursuant to § 12-19.2-1 et seq.[,] gave notice of his intention to recommend an enhanced sentence of life imprisonment without parole." Id. at 231 (footnote omitted). After discussing the Supreme Court's opinions in Jones, Castillo, Apprendi, Ring, and Harris v. California, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 525

(2002),[4] see Edwards, 810 A.2d at 231-34, the court held that "[t]here is no settled constitutional requirement that the aggravating factor set forth in § 11-23-2 be set forth in the grand jury indictment," id. at 234.

In reaching this conclusion, the court noted that "Fourteenth Amendment has not been construed to include the Fifth Amendment right to presentment or indictment by a grand jury." Id. at 233 (citing Ring, 536 U.S. at 597 n. 4, 122 S.Ct. at 2437 n. 4, 153 L.Ed.2d at 569 n. 4; Apprendi, 530 U.S. at 477 n. 3, 120 S.Ct. at 2355 n. 3, 147 L.Ed.2d at 447 n. 3). It also noted the decision of the United Sates Supreme Court in Hurtado v. California, 110 U.S. 516, 538, 4 S.Ct. 111, 122, 28 L.Ed. 232, 239 (1884), that the requirement of a grand jury indictment set forth in the Fifth Amendment to the Constitution of the United States was not applicable to the states. See Edwards, 810 A.2d at 233-34 ("In its long course of selective incorporation, the Supreme Court has never overruled Hurtado. Thus, as recognized in both Apprendi and Ring, there is no federal requirement that a felony prosecution, capital or otherwise, be commenced by an indictment issued by a grand jury in a state prosecution.").

The court found the suggestion that the inclusion of a

---

[4] Explaining its reference to Harris v. United States, the Rhode Island Supreme Court stated:

> Th[e] case is not directly applicable to the case at bar but merely holds that it is unnecessary for a jury to determine the existence of a factor that would trigger mandatory minimum sentencing by virtue of an aggravating factor as long as the mandatory minimum is within the maximum authorized by the basic statute. In Harris, the aggravating factors that triggered mandatory minimum sentences were brandishing (minimum of seven years) or discharging (minimum of ten years) a firearm (pursuant to a federal statute, 18 U.S.C. S 924(c)1(A)) which forbade the use or carrying of a firearm in furtherance of a crime. This case is of interest only because it established that a mandatory minimum sentence may be triggered by sentencing factors that may be found by a judge without the intervention of the jury.

Harris v. United States, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002)(citations omitted).

statutory reference to § 11-23-2 in the indictment would have given Petitioner more effective notice to be "totally unpersuasive." State v. Edwards, 810 A.2d at 234. Equally unpersuasive was the suggestion that "a grand jury would have declined to issue an indictment had reference to § 11-23-2 been set forth therein." Id.

B. Waiver

The State asserts in a footnote that Petitioner has waived the indictment issue by failing to raise it prior to trial. See State's Mem. at 8 n.4. In support of this assertion, the State notes that Rule 12(b)(2) of the Rhode Island Superior Court Rules of Criminal Procedure requires that defenses and objections be raised by motion prior to trial. See id.

Petitioner responds "that there is no defect in the indictment; the defect is in the attempt to impose punishment for an offense which was not set forth in the indictment." Pet. Mem. in Opp. at 1. He notes he raised "this issue prior to the imposition of sentence, which was the appropriate time to do so." Pet. Mem. in Opp. at 2. While this court does not share Petitioner's view that it was "appropriate" for him to remain silent about this matter until after he was convicted of first degree murder,[5] there is no evidence in the record that either

---

[5] Petitioner was aware for more than a year before his trial commenced that if he was convicted of first degree murder the State intended to seek imposition of a sentence of life imprisonment without possibility of parole. See Pet. Mem. at 1. If Petitioner believed that he had a constitutional right to have a grand jury determine whether his offense qualified for such punishment, it is not too much to expect that he make his position known while the opportunity for addressing the issue via a superceding indictment still exists. Remaining silent until after Petitioner has been convicted at least raises the possibility of "sandbagging." Cf. Heath v. Vose, 747 A.2d 475, 479 (R.I. 2000) ("'Sandbagging'" has been described as 'defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims ... [later] ... if their initial gamble does not pay off.'" (quoting State v. McGehearty, 121 R.I. 55, 62 n. 7, 394 A.2d 1348, 1352 n. 7 (1978) (quoting Wainwright v. Sykes, 433 U.S. 72, 89, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594, 609 (1977)). While this court has concluded

the trial justice or the Rhode Island Supreme Court rejected Plaintiff's argument on the ground that he had waived the issue. See State v. Edwards, 810 A.2d at 231-235 (considering and rejecting Petitioner's argument on the merits). Accordingly, this court declines to find that Petitioner has waived this issue.

C. Analysis

Although Petitioner cites the proper standard, see Pet. Mem. at 1 (citing 28 U.S.C. § 2254(d)(1), he does not specifically state whether he contends that the decision of the Rhode Island Supreme Court rejecting his claim regarding the indictment "was contrary to ... clearly established Federal law as determined by the United States Supreme Court, 28 U.S. C. § 2254(d)(1), or whether it involved "an unreasonable application of" such law, id.; see also Williams v. Taylor, 529 U.S. 362, 404-05, 120 S.Ct. 1495, 1519, 146 L.Ed.2d 389 (2000)(noting that Court of Appeals properly accorded independent meaning to the "contrary to" and "unreasonable application" clauses). It is clear that the Edwards decision cannot be considered "contrary to" Supreme Court precedent because the Rhode Island Supreme Court did not apply "a test that is inconsistent with the one announced by the Court or reach the opposite conclusion on materially indistinguishable facts." Rashad v. Walsh, 300 F.3d at 34-35 (citing Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495). Indeed, as the State points out in its reply memorandum, none of relevant Supreme Court cases hold that a state indictment must refer to aggravating circumstances. See Reply to Petitioner's Supplemental Memorandum ("State Reply Mem.") at 1.

Moreover, the facts in Petitioner's case are easily distinguishable from those in the Jones Blakely line. In Jones

---

that Petitioner did not waive the issue (because his claim was entertained by the Rhode Island Supreme Court), he should consider himself lucky that the state supreme court did not rejected it on that basis.

the defendant was told at arraignment that he faced a maximum sentence of fifteen years, but after trial was sentenced to twenty-five years. See Jones, 526 U.S. at 230-31, 119 S.Ct. at 1218. Here Petitioner was given prompt notice of the state's intent to seek imposition of a sentence of life without parole. See Edwards, 810 A.2d at 231. There has been no violation in Petitioner's case of the key principle stated in Apprendi, Ring, and Blakely, i.e., that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," Apprendi, 530 U.S. at 490, 120 S.Ct. at 2361-62; accord Blakely, ___ U.S. at ___, 124 S.Ct. at 2536 (quoting Apprendi); Ring, 536 U.S. at 602, 122 S.Ct. at 2439-40 (noting proposition). Petitioner waived a jury and the facts which resulted in the imposition of a life without parole sentence were found by the trial justice beyond a reasonable doubt. See Edwards, 810 A.2d at 227.

For virtually the same reasons that the decision of the Rhode Island Supreme Court is not "contrary to" Supreme Court precedent, it is also not an "unreasonable application" of that law. Additionally, as the Edwards court accurately noted, existing Supreme Court law holds that the requirement of a grand jury indictment set forth in the Fifth Amendment of the U.S. Constitution is not applicable to the states. See id. at 233-34 (citing Hurtado v. California, 110 U.S. 516, 538, 4 S.Ct. 111, 122, 28 L.Ed. 232, 239 (1884). Rhode Island could, if it so desired, dispense entirely with the grand jury process for prosecuting capital cases and proceed by way of criminal information without violating existing federal constitutional law. If the criminal information provided the defendant with notice of the charge and of the state's intention to seek a sentence of life without parole, it would not be contrary to the law as announced by the Supreme Court in the Jones Blakely line of cases. Given that Petitioner has no federal constitutional

right to indictment by a grand jury and the facts which justified the imposition of a life parole sentence were determined by the trier of fact using a beyond a reasonable doubt standard, this court is cannot say that the decision of the Rhode Island Supreme Court "was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). That court's statement that "[t]here is no settled constitutional requirement that the aggravating factor set forth in § 11-23-2 be set forth in the grand jury indictment," Edwards, 810 A.2d at 234, is an accurate statement of the present law.

Petitioner under domestic circumstances

asserts that he was denied due process of law when the Rhode Island Supreme Court affirmed his sentence of life imprisonment without possibility of parole even though "the indictment against him did not accuse him of an offense for which that sentence was available." Pet. Mem. at 6. He contends that the state supreme court's judgment is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the United States Supreme Court." Pet. Mem. at 6 (quoting 28 U.S.C. § 2254(d)(1)).

Second, he claims that has been deprived of due process of law by the trial justices rejection of his diminished capacity defense. See id. at 16. Third, Petition alleges that the trial justice's refusal to consider intoxication as a mitigating factor deprived him of due process of law. See id. at 31. The

court addresses these claims seriatim.

Petitioner also argues that the "judgment resulted from "an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." Id. (quoting 28 U.S.C. § 2254(d)(2).

Conclusion

For the reasons stated above, I recommend that the Petition be transferred to the First Circuit. Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt. See Fed. R. Civ. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

DAVID L. MARTIN
United States Magistrate Judge
December 28D, 2004