State of North Carolina

ROY COOPER
ATTORNEY GENERAL

Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629

REPLY TO: Clarence J. DelForge,, III
Assistant Attorney General
Capital Litigation/Federal Habeas Section
Telephone: (919) 716-6571
Facsimile: (919) 716-0001
E-mail: cdelforg@ncdoj.gov

November 9, 2012

Honorable William K. Suter
Clerk, United States Supreme Court
1 First Street North East
Washington, D.C. 20543

Re: Josiah Jacob Deyton, Andrew Ryan Deyton, Jonathan Neil Koniak v. Reuben Franklin Young, Secretary of the North Carolina Department of Public Safety, and Lander Corpening, Administrator, Foothills Correctional Institution, No. 12-6230

Dear Honorable Suter,

Enclosed for filing please find the original and ten copies of the RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI in the above-captioned non-capital case. Petitioner's counsel has been served this same date under cover of this forwarding letter.

Also, As of January 1, 2012, the North Carolina Department of Correction (DOC) was re-organized as the Division of Adult Correction (DAC), falling within the Department of Public Safety, headed by the Secretary of Public Safety, Mr. Reuben Franklin Young. See N.C.G.S. § 143B-259 (2011). Therefore, Mr. Young automatically replaces former Secretary of the N.C. Department of Correction (DOC), Mr. Alvin W. Keller, Jr. See Supreme Court Rule 35(3) (2012).

Thank you for your assistance in the filing of these documents and bringing this RESPONDENTS' BRIEF IN OPPOSITION to the attention of the Court.

Sincerely,

Clarence J. DelForge, III
Assistant Attorney General

cjd/jra

cc: Hoang V. Lam

No. 12-6230

IN THE
SUPREME COURT OF THE UNITED STATES

JOSIAH JACOB DEYTON, ANDREW RYAN DEYTON, JONATHAN NEIL KONIAK,

Petitioners-Appellants,

v.

REUBEN FRANKLIN YOUNG, Secretary of the North Carolina Department of Public Safety, and **LANDER CORPENING**, Administrator, Foothhills Correctional Institution,

Respondents-Appellees.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ROY COOPER
Attorney General of
North Carolina

Clarence Joe DelForge, III*
Assistant Attorney General

N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Telephone: (919) 716-6500
Facsimile: (919) 716-0001

*Counsel of Record for
Respondents-Appellees

QUESTIONS PRESENTED

I. WHETHER THE DISTRICT AND CIRCUIT COURTS CORRECTLY UPHELD, UNDER THE HIGHLY DEFERENTIAL STANDARDS OF REVIEW CONTAINED IN 28 U.S.C. § 2254(d) AND (e), THE STATE POST-CONVICTION COURT'S RULING THAT THE TRIAL COURT'S RELIGIOUS COMMENTS AT SENTENCING, DID NOT VIOLATE DUE PROCESS?

II. WHETHER THE STATE POST-CONVICTION COURT CORRECTLY RULED THAT PETITIONER'S ELEVEN CONSECUTIVE SENTENCES OF 64-86 MONTHS, PLUS ONE CONSECUTIVE, CONSOLIDATED, SUSPENDED SENTENCE OF 25-39 MONTHS IMPRISONMENT, FOR ELEVEN COUNTS OF ARMED ROBBERY AND ONE COUNT OF CONSPIRACY TO COMMIT ARMED ROBBERY, COMPLY WITH THE EIGHTH AMENDMENT?

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

STATE STATUTE

FEDERAL RULES

No. 12-6230

IN THE
SUPREME COURT OF THE UNITED STATES

JOSIAH JACOB DEYTON, ANDREW RYAN DEYTON, JONATHAN NEIL KONIAK,

Petitioners-Appellants,

v.

REUBEN FRANKLIN YOUNG, Secretary of the North Carolina Department of Public Safety, and **LANDER CORPENING**, Administrator, Foothhills Correctional Institution,

Respondents-Appellees.

BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The Respondents, Mr. Reuben Franklin Young, Secretary of the North Carolina Department of Public Safety[1], Lander Corpening, Administrator of Foothills Correctional Institution, the Honorable Roy Cooper, Attorney General of North Carolina and Assistant Attorney General Clarence Joe DelForge, III, respectfully opposes

---

[1] As of January 1, 2012, DOC was re-organized as the Division of Adult Correction (DAC), falling within the Department of Public Safety, headed by the Secretary of Public Safety, Mr. Reuben Franklin Young. See N.C.G.S. § 143B-259 (2011). Therefore, Mr. Young automatically replaces former Secretary of the N.C. Department of Correction (DOC), Mr. Alvin W. Keller, Jr. See Supreme Court Rule 35(3) (2012). See also FRAP, Rule 43(c)(2) (2012) and FRCP, Rule 25(d) (2012)

and requests this Court deny the Petition for Writ of Certiorari filed by Petitioners on September 13, 2012 seeking review of the June 15, 2012 decision of the United States Court of Appeals for the Fourth Circuit in Deyton v. Keller, 682 F.3d 340 (4th Cir. 2012) (copy filed with Petitioner's certiorari petition).

STATEMENT OF THE CASE

Josiah Jacob Deyton, and his brother Andrew Ryan Deyton, pled guilty on July 22, 2008, in the Superior Court of Mitchell County, Honorable James L. Baker, Jr., judge presiding, to eleven counts of robbery with a dangerous weapon and one count of conspiracy to commit robbery with a dangerous weapon. The third co-defendant, Jonathan Neil Koniak, pled guilty on August 25, 2008 before Judge Baker to the same charges. None of the Petitioners had any agreement in their plea bargains as to what sentences they would receive. After Koniak entered his plea, Judge Baker held a consolidated sentencing proceeding for all three co-defendants and sentenced each one to ten consecutive presumptive range terms of 64-86 months for the robbery convictions, a consecutive, consolidated, suspended sentence of 25-39 months for the conspiracy and larceny convictions. Josiah was 18 years old at the time of the crimes, Andrew was 19, and Koniak was 20. (JA 58-61, 88-163)[2]

[2] Respondents' "JA" citations are to the Joint Appendix filed in the Fourth Circuit. In addition, Petitioners were charged with the same crimes arising from the same incident. Their state post-conviction pleadings and resulting orders are identical, as were their federal habeas petitions. Respondents therefore have cited only to the record of the lead case in this consolidated action. In addition, Petitioner Josiah Jacob Deyton was charged with one count of felonious larceny occurring on a different date.

(see copy of transcript of plea proceeding filed with certiorari petition). Josiah was represented by Mr. Shelley Blum, Andrew by Mr. Charlie A. Hunt, Jr., and Koniak by Mr. Jack W. Stewart, Jr. Petitioners did not appeal. On August 21, 2009, Petitioners filed motions for appropriate relief (MARs) in the Superior Court of Mitchell County, through counsel Ms. Mary Pollard and Mr. Hoang Lam, Staff Attorneys with North Carolina Prisoner Legal Services, Inc. (JA 262-70) On January 29, 2010, the state filed a response to the MARs. On May 11, 2010, Honorable James U. Downs summarily denied Petitioners' MARs. (JA 313-14) (see copies of MAR orders filed with certiorari petition) On June 2, 2010, Petitioners filed certiorari petitions in the North Carolina Court of Appeals. (JA 315-333) Certiorari was denied on June 17, 2010. (JA 334) (see copies of orders filed with certiorari petition) On June 21, 2010, Petitioners simultaneously filed certiorari petitions in the Supreme Court of North Carolina, and federal habeas petitions in the United States District Court for the Western District of North Carolina, Asheville Division, along with motions to hold in abeyance, through counsel. (JA 335-355) Honorable Dennis L. Howell, United States Magistrate Judge, allowed the motions on August 20, 2010. The Supreme Court of North Carolina dismissed Petitioners' certiorari petition on August 27, 2010. (see copies of orders filed with certiorari petition) Respondents filed a motion to consolidate these three cases on September 15, 2010, which Magistrate Judge Howell granted on September 21, 2010. On November 1, 2010, Magistrate Judge Howell filed a memorandum and

recommendation, recommending that Petitioners' federal habeas petitions be summarily denied. (JA 568-600) (see copy filed with certiorari petition) On September 27, 2011, Honorable Martin Reidinger entered a final memorandum of decision and order and final judgment, denying federal habeas relief. (JA 610-631) (see copy filed with certiorari petition) Judge Reidinger declined to address the Eighth Amendment issue because Petitioners failed to specifically object to that point in their objections to the memorandum and recommendation of the magistrate judge. (JA 610-631) (see copy filed with certiorari petition) Petitioner filed a timely notice of appeal on October 17, 2011. (JA 632-33) On June 15, 2012, the United States Court of Appeals for the Fourth Circuit affirmed the district court's decision. Deyton v. Keller, 682 F.3d 340 (4th Cir. 2012). (copy filed with certiorari petition)

REASONS WHY THE WRIT SHOULD NOT ISSUE

First, the writ should not issue because the state court adjudication on the merits is neither contrary to, nor involves an unreasonable application of clearly established federal law, as determined by this Court. See 28 U.S.C. § 2254(d) and (e). Second, Petitioners' claims are barred by Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). Third, Petitioners waived their Eighth Amendment claims by failing to make specific objections on this point to the memorandum and recommendation of the Magistrate Judge. In short, Petitioners' claims do not present any issues worthy of an exercise of this Court's jurisdiction. Finally, for the reasons below, Respondents deny that the lower

courts erred in their fact findings or applied any materially incorrect legal standards.

I. THE DISTRICT AND CIRCUIT COURTS CORRECTLY UPHELD, UNDER THE HIGHLY DEFERENTIAL STANDARDS OF REVIEW CONTAINED IN 28 U.S.C. § 2254(d) AND (e), THE STATE POST-CONVICTION COURT'S RULING THAT THE TRIAL COURT'S RELIGIOUS COMMENTS AT SENTENCING, DID NOT VIOLATE DUE PROCESS.

A. Applicable Standard of Review

The standard for reviewing the lower federal court decisions is de novo. See United States v. Hopkins, 268 F.3d 222, 224 (4th Cir. 2001). The standard for reviewing the state court's decision under 28 U.S.C. § 2254(d) and (e), is highly deferential. This Court may grant relief only if the state-court adjudication on the merits, even in a summary or unexplained order, "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by [this Court]" or "was based on an unreasonable determination of facts, in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) and (d)(2). See Harrington v. Richter, ___ U.S.___, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). The Harrington opinion includes the following guidance and mandates:

> [a.] For purposes of § 2254(d)(1), "an unreasonable application of federal law is different from an incorrect application of federal law." []
>
> [b.] A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fairminded jurists could disagree" on the correctness of the state court's decision. [] ...
>
> [c.] [A] habeas court must determine what arguments or

> theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court. ...
>
> [d.] It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable. []
>
> [e.] If this standard is difficult to meet, that is because it was meant to be. [AEDPA] preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther. ... As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling ... was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.
>
> The reasons for this approach are familiar. "Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." [] It "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." []...
>
> [f.] Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions.

Harrington, ___ U.S. at ___, 131 S. Ct. at 786-88, 178 L. Ed. 2d at 640-43. In addition, this Court has held that under section 2254(d)(1), a federal habeas court may not consider new evidence in support of a claim, when that evidence was not presented in support of the claim in state court. Cullen v. Pinholster, ___ U.S. ___, 131 S. Ct. 1388, 159 L. Ed. 2d 557 (2011).

In light of Harrington and Cullen, Petitioners cannot prevail

on their current claims. There is no question that "fair minded jurists" could disagree, or for that matter agree, with the correctness of the state court decision, based on the record before the state court. See Harrington supra; see also Bell v. Cone, 543 U.S. 447, 455, 1255 S. Ct. 847, 160 L. Ed. 2d 881 (2005) (federal habeas statute "dictates a highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt").

B. Discussion of Argument

The district and circuit courts correctly denied Petitioners' due process claims under the highly deferential standards of review contained in 28 U.S.C. § 2254(d) and (e). In arguing that the sentencing judge took his own religious views into account, Petitioner points to statements Judge Baker made after reviewing the victim impact statement.

> I do not have any great words of wisdom for you all. You know that as you've gone over and negotiated the pleas that the charges of robbery with a dangerous weapon require an active sentence. So you know that you are going to have active sentences to some degree and you just don't know at this point how long that sentence is going to be. I was interested in reading what the church members might have thought that should be done to you and the church members after describing what they went through have indicated that the experience was a horrible experience for them. I mean even more so than being robbed in a store or being robbed on a street or a highway or even worse than being broken in in their home. I mean if there's one place in the whole world that you ought to have the right to feel like that for just a few minutes -- for just a few minutes you can put the dangers of the world away and that you can step to some degree of peace and solitude and serenity with some degree of safety it would be in a church. I think it was very appropriate what one person wrote that coming in God's house using God as a curse and to make people give up

> their possessions and taking God's money and threatening God's people, I can't imagine how evil these men are to have done this. That is the feeling of one person and I hope you realize that's an opinion that is or a feeling that is justified. I mean you didn't just steal money from people. You took God's money. You took the Lord's money and those of us that believe that there is an Almighty and that there is a being that created this world to go in and then steal money that is being tendered by people for the furtherance of an earthly kingdom is just outrageous. It actually defies description and I think that is something that Mr. Stewart [defense counsel] even had to say in describing his reaction that even as a defense counsel that the action defies description, defies explanation. Mr. Blum [defense counsel] also I think said that there could be no explanation for what you've done. Even Mr. Hunt [defense counsel] indicated that his client was ashamed for what he'd done. Even your mother indicated that it was [a] stupid horrible thing to do with no excuse and that best describes it. There is no excuse. There is absolutely no excuse. I mean you break in a church and you hold people at gunpoint . . . . Gentlemen, this is just something that can't be tolerated and your attorneys have all asked for leniency and mercy but there are times when you have to kind of draw the line and you have to say that there are some things that just can't be tolerated by society. I mean you can't just go in a church armed and tie people up or hold them at gunpoint, threaten to kill them and rob the collection plate and rob them while they are in the worship service and expect that the law is not going to come down just about as strongly as it can on you. There is scripture that says "Vengeance is mine sayeth the Lord" but every now and then I think the judicial system has to contribute what it can.

(JA 147-150) (see copy of transcript filed with certiorari petition at Tpp 34-36) (emphasis added)

Petitioner argues that these statements are similar to the judge's statement in United States v. Bakker, 925 F.2d 728, 740 (4th Cir. 1991). In Bakker, the Fourth Circuit held that a district judge's statement indicating he may have imposed a lengthy sentence on televangelist Jim Bakker because the judge's own sense

of religious propriety had been betrayed, constituted an abuse of discretion in violation of due process, i.e., "[h]e had no thought whatever about his victim's and *those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests.*" Id. (emphasis original). The Fourth Circuit wrote:

> Our Constitution, of course does not require a person to surrender his or her religious beliefs upon the assumption of judicial office. Courts, however, cannot sanction sentencing procedures that create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it. Whether or not the trial judge has a religion is irrelevant for purposes of sentencing. Regrettably, we are left with the apprehension that the imposition of a lengthy prison term here may have reflected the fact that the court's own sense of religious propriety had somehow been betrayed. In this way, we believe the trial court abused its discretion in sentencing Bakker.

Id., at 740-41. In the case at bar, however, viewed in context, Judge Baker's statements had no such effect. Judge Baker's statements regarding "God's money" and "God's people" referred to what the victims reported. Furthermore, the thrust of Judge Baker's comments was the fact that these crimes were especially serious because they involved traumatizing people at gunpoint where ordinarily they would feel safe and give their money for a specific purpose. It is obviously appropriate for the court to consider the specific facts of the case before sentencing.

Unlike Bakker, the case at bar is closer to United States v. Roth, 934 F.2d 248 (10th Cir. 1991), cert. denied, 506 U.S. 1026, 113 S. Ct. 672, 121 L. Ed. 2d 595 (1992). In Roth, a serviceman was convicted of stealing property from the U.S. Air Force. Before

sentencing, the judge said:

> As one who has been privileged to wear the uniform of the Armed Forces namely the United States Air Force, I am convinced that any sentence less than that which the Court proposes to impose and which I will impose, would have a serious adverse effect, impact upon the pride and morale of our military personnel and the citizenry of this great nation.

Id., at 252. On appeal, relying on Bakker, Roth argued this statement violated due process. The Tenth Circuit rejected this argument and distinguished Bakker, explaining that "[a]lthough the instant sentencing judge referred to his own military service, we think that, fairly construed, his statement simply highlighted the seriousness of defendant's offense." Id., at 253. Similarly, in the case at bar, the first challenged statements considered in context, merely highlighted the seriousness of the crimes.

The second part of Judge Baker's challenged statements, did not show he was following the scripture, "[v]engeance is mine sayeth the Lord," in sentencing Petitioners. Instead, viewed in context, he was saying that secular law needed to strongly punish this outrageous conduct, i.e., "[t]here is scripture that says '[v]engeance is mine sayeth the Lord' but every now and then I think the judicial system has to contribute what it can." (JA 150) The latter part of this statement shows Judge Baker was saying the judicial system, not divine law, should punish Petitioners. In light of the fact Petitioners burst into a church during Sunday worship service wearing ski masks and robbed the congregation at gunpoint, it was appropriate for Judge Baker to refer to the church and religion, the violation of the congregation's sense of safety

in church, and the shocking intolerable nature of the crimes. These statements merely reflect the facts of the crime and do not show the judge's religious beliefs influenced the sentences. In fact, Judge Baker sentenced Petitioners in the presumptive range to less active time than he could have by consolidating some of the convictions for sentencing and suspending the conspiracy sentences.

Next, Petitioners raised the substance of their current due process claims in their MARs. (JA 262-271) Judge Downs summarily denied the MARs on the merits as follows;

> (1) The defendant pled guilty to eleven (11) counts of robbery with a dangerous weapon and one (1) count of conspiracy to commit robbery with a dangerous weapon arising out of the defendant and his co-defendants entering the Ridgeview Presbyterian Church on or about April 13, 2008, and robbing and terrorizing members of the congregation through the use of firearms and threats of killing members if they called the police after the intruders had completed their crimes.
>
> (2) The defendant received punishments of consecutive sentences of a substantial number of the offenses, but not all of them, and the punishments imposed were within the presumptive ranges in each case.
>
> (3) The defendant entered his plea of guilty without any assurances of whether any of his sentences would be consecutive or not.
>
> (4) Notwithstanding any comments that the sentencing Judge made regarding activities of the defendant and his cohorts, the Court obviously exercised his discretion in sentencing the defendant to less than that to which he pled to.
>
> (5) The Court finding nothing motivated the sentencing Judge, except for the atrocious conduct of the defendant and his cohorts in accomplishing the crimes they committed.

(JA 313-314) (see copy of MAR orders filed with certiorari petition) This state court adjudication and denial on the merits

is correct.

Furthermore, the Sixth Circuit reviewed an Ohio state court conviction in a § 2254 habeas case, in which the state trial judge before sentencing a child sex offender, referred to the Biblical passage that whosoever offends little children would be better off having a millstone hung on his neck and drowned in the sea. Arnett v. Jackson, 393 F.3d 681 (6th Cir.), cert. denied, 546 U.S. 886, 126 S. Ct. 207, 163 L. Ed. 2d 193 (2005). Arnett, as Petitioners in the case at bar, relied on Bakker, to support his argument that the state judge violated due process by relying on religion at sentencing. The Sixth Circuit majority rejected that argument, however, noting that under AEDPA the petitioner can no longer rely on federal circuit precedent like Bakker to obtain relief.

> Under the AEDPA, this Court "may not look to lower federal court decisions in deciding whether the state decision is contrary to, or an unreasonable application of, clearly established federal law." Doan v. Brigano, 237 F.3d 722, 729 (6th Cir. 2001)(quotation marks omitted). Lower federal court decisions, however, may be considered "to determine whether a legal principle or right had been clearly established by the Supreme Court" at the time of the Ohio Supreme Court's decision in this case. Hill v. Hofbauer, 337 F.3d 706, 716 (6th Cir. 2003). Bakker cites only one Supreme Court decision on this issue, Gardner v. Florida, 430 U.S. 349, 51 L. Ed. 2d 393, 97 S. Ct. 1197 (1977).
>
> In Gardner, the Supreme Court stated that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." Id. at 358. More specifically, Gardner holds that the constitutional guarantees of due process prohibit a court from imposing the death penalty based in part on information contained in a presentence report that is not disclosed to the defendant. Id. at 362. Nothing in Gardner, however, established the legal principle that a trial judge's comments made during a sentencing regarding his or her personal religious beliefs violate a defendant's right to

> due process. Bakker is therefore not determinative of this Court's inquiry concerning the instant case.

Arnett, 393 F.3d at 688. The Arnett majority then denied federal habeas relief. Similarly, in the case at bar, Bakker is not determinative of this Court's inquiry under AEDPA and this Court should also deny relief. As did Arnett, Petitioner also cites Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) for the general proposition that sentencing discretion must be exercised within the bounds of due process. Gardner does not hold, however, that a trial judge's mention of religion or his religious beliefs during sentencing violates due process.

Petitioners also cite Zant v. Stephens, 462 U.S. 862, 885, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983) for the general proposition that due process prohibits sentencing based on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant...." Zant does not hold, however, that a trial judge's mention of religion or his religious beliefs during sentencing violates due process. Furthermore, Petitioners cite other decisions of this Court for the general proposition that due process requires a fundamentally fair trial, and/or a fair trial before an unbiased judge, i.e., Payne v. Tennessee, 501 U.S. 808, 825, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991); Johnson v. Mississippi, 403 U.S. 212, 215, 91 S. Ct. 1778, 29 L. Ed. 2d 432 (1971); Bloom v. Illinois, 391 U.S. 194, 205, 88 S. Ct. 1477, 20 L. Ed. 2d 522 (1968); Mayberry v. Pennsylvania, 400

U.S. 455, 465, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971); Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927). None of these cases hold, however, that a trial judge's mention of religion or his religious beliefs during sentencing violates due process or any other constitutional provision.

Next, Petitioner's reliance on North Carolina Civil Liberties Union Legal Foundation v. Constangy, 947 F.2d 1145 (4th Cir. 1991), cert. denied, 505 U.S. 1219, 112 S. Ct. 3027, 120 L. Ed. 2d 898 (1992), is wholly misplaced. In addition, to not being "clearly established federal law" as determined by this Court, as required by section 2254(d)(1), Constangy, involved a state judge's practice of opening court with a prayer, found to be in violation of the Establishment Clause. Constangy does not hold that a state trial judge's mention of religion or his religious beliefs during sentencing violates due process or any other constitutional provision. The crimes in the case at bar involved traumatizing people at gunpoint in a church during Sunday worship services, where ordinarily they would feel safe and give their money for a specific purpose. It was obviously appropriate for the court to consider the specific facts of the case before sentencing. The state sentencing judge's mention of religion or his religious beliefs in the case at bar, comes no where near the invocation of an opening prayer, as prohibited by Constangy.

In short, the above quoted state post-conviction MAR court's summary adjudication and denial of Petitioner's due process claim on the merits, did not result in a decision contrary to, or involve

an unreasonable application of, clearly established federal law, as determined by this Court. Nor was the summary state court MAR order based on an unreasonable determination of facts, in light of the evidence presented in the state court proceedings. Therefore, Judge Downs' summary state court MAR order should be upheld under the highly deferential standards of review contained in section 2254(d) and (e). See Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770, 784-85 (summary unexplained state court order entitled to deferential review under AEDPA) and Cullen v. Pinholster, ___ U.S. ___, 131 S. Ct. 1388, 159 L. Ed. 2d 557 (federal habeas court may not consider evidence in support of claim, when that evidence was not presented in support of the claim when raised in state court).

In addition, for this Court to accept Petitioners' current due process claims would constitute a "new rule" of constitutional adjudication prohibited on federal habeas review by Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) and its progeny. Neither at the time Petitioners' cases became final on direct review (on date of August 25, 2008 guilty plea and judgments), nor currently (nor at any point in between), would the state courts have felt compelled by any existing authority from this Court to hold that a state trial court's mere mention of his religious views during sentencing violates due process.

Therefore, for this Court to accept Petitioners' current due process claims would create a "new rule" of constitutional adjudication prohibited on federal habeas review by Teague. See Butler v. McKellar, 494 U.S. 407, 110 S. Ct. 1212, 108 L. Ed. 2d

347 (1990) ("new rule" is anything subject to debate among reasonable minds on date of finality); Stringer v. Black, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992) (extension of old rule to new or novel setting, thereby extending the precedent can constitute a "new rule" of constitutional adjudication prohibited by Teague); Lambrix v. Singletary, 520 U.S. 518, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997) (where reasonable jurist at the time could have disagreed, "new rule" cannot be applied retroactively). See also, Beard v. Banks, 542 U.S. 406, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004) (employing Teague analysis). Furthermore, the "new rule" Petitioners seek does not decriminalize a class of conduct or establish a watershed rule of criminal procedure implicating fundamental fairness. Therefore, Petitioners' proposed "new rule" falls within neither Teague exception. See Teague, Stringer, and Butler. See also, Saffle v. Parks, 494 U.S. 484, 493-495, 110 S. Ct. 1257, 1263, 108 L. Ed. 2d 415, 428-29 (1990). Thus, Petitioners' due process claims are Teague barred.

In sum, the district and circuit courts correctly denied Petitioners' due process claims pursuant to the highly deferential standards of review contained in section 2254(d) and (e), and the claims are Teague barred.

II. THE STATE POST-CONVICTION COURT CORRECTLY RULED THAT PETITIONER'S ELEVEN CONSECUTIVE SENTENCES OF 64-86 MONTHS, PLUS ONE CONSECUTIVE, CONSOLIDATED, SUSPENDED SENTENCE OF 25-39 MONTHS IMPRISONMENT, FOR ELEVEN COUNTS OF ARMED ROBBERY AND ONE COUNT OF CONSPIRACY TO COMMIT ARMED ROBBERY, COMPLY WITH THE EIGHTH AMENDMENT.

A. Applicable Standard of Review.

The standard of review is the same as above in Argument I.

B. Discussion of Argument

As quoted above, the state post-conviction MAR court correctly, albeit summarily without specifically mentioning the Eighth Amendment, denied Petitioners' Eighth Amendment claims. (JA 313-314) (see copy of MAR orders filed with certiorari petition) First, however, Petitioners waived their current Eighth Amendment claims by failing to make specific objections on this point, to the memorandum and recommendation of Magistrate Judge Howell, as required by 28 U.S.C. § 636(b) (2010). (JA 568-631) (see copy of memorandum and recommendation of Magistrate Judge Howell filed with certiorari petition) See United States v. Midgette, 478 F.3d 616, 621 (4th Cir.) ("Section 636(b)(1) does not countenance a form of generalized objection to cover all issues addressed by the magistrate judge; it contemplates that a party's objection to a magistrate judge's report be specific and particularized, as the statute directs the district court to review only those portions of the report or *specific* proposed findings or recommendations *to which objection is made*."), cert. denied, 551 U.S. 1157, 127 S. Ct. 3032, 168 L. Ed. 2d 749 (2007) and Wells v. Shriners Hospital, 109

F.3d 198, 200 (4th Cir. 1997) (boiler plate objections will not avoid the consequences of failing to object altogether). Judge Reidinger therefore correctly declined to address the Eighth Amendment issue in the district court's final order. (JA 610-631) (see copy of Judge Reidinger's final order filed with certiorari petition) As a result, Petitioner never fairly raised, and the Fourth Circuit never addressed, the Eighth Amendment issue on appeal. Deyton v. Keller, 682 F.3d 340 (4th Cir. 2012) (copy filed with certiorari petition). Petitioners have waived their Eighth Amendment claims and this Court should not consider the issue.

Second, Petitioners' Eighth Amendment claims are without merit. Petitioners, all of whom were 18 years of age or older at the time of their crimes, are implying that they committed only one crime, their first, and received de facto life sentences. They are incorrect. Instead, they were convicted of 11 separate armed robberies, and one conspiracy to commit armed robbery. They were sentenced to ten consecutive presumptive range terms of 64-86 months for the armed robbery convictions, a consecutive, consolidated, suspended sentence of 25-39 months for the conspiracy. These sentences are constitutionally valid. See e.g., United States v. Khan, 461 F.3d 477, 494-95 (4th Cir. 2006) (rejecting Eighth Amendment challenge to consecutive sentences of 120 months, 300 months, and life imprisonment imposed pursuant to the "count stacking" provisions of § 924(c)(1) as the Supreme Court has upheld severe mandatory penalties and has never held that "'a sentence to a specific term of years, even if it might turn out to

be more than the reasonable life expectancy of the defendant, constitutes cruel and unusual punishment.'") (citing Harmelin v. Michigan, 501 U.S. 957, 994, 111 S. Ct. 2680, 115 L. Ed. 2d 826 (1991) and United States v. Beverly, 369 F.3d 516, 537 (6th Cir.), cert. denied, 543 U.S. 910, 125 S. Ct. 122, 160 L. Ed. 2d 188 (2004)); United States v. Wiest, 596 F.3d 906, 912 (8th Cir. 2010) (consecutive sentences imposed for three bank robberies and three related firearms charges totaling 58 years was not grossly disproportionate and did not violate Eighth Amendment), cert. denied, ___ U.S. ___, 131 S. Ct. 339, 178 L. Ed. 2d 220 (2010); United States v. Walker, 473 F.3d 71, 83 (3rd Cir.) (consecutive mandatory sentences totaling 55 years for three counts of armed robbery, corresponding firearms charges, and drug charges not grossly disproportionate and no Eighth Amendment violation), cert. denied, 549 U.S. 1327, 127 S. Ct. 1924, 167 L. Ed. 2d 576 (2007); United States v. McDonel, 362 Fed. Appx. 523 (6th Cir.) (upholding consecutive mandatory sentences totaling 107 years on a 19-year-old offender for five violations of § 924(c)), cert. denied, ___ U.S. ___, 131 S. Ct. 636, 178 L. Ed. 2d 477 (2010). See also, Ewing v. California, 538 U.S. 11, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003) (sentence of 25 years to life for theft of golf clubs under California's "three strikes" law upheld under Eighth Amendment); Lockyer v. Andrade, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) (two consecutive terms of 25 years to life for two counts of petty theft under California's "three strikes" law upheld; the gross disproportionality principle under Eighth Amendment reserved

only for extraordinary cases); Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (mandatory life without parole for possessing more than 650 grams of cocaine does not violate Eighth Amendment); Graham v. Florida, ___ U.S. ___, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (prohibition against life sentence without parole expressly limited to offender under 18 years of age who did not commit homicide).

Thus, Petitioners have failed to show that Judge Downs' above quoted summary MAR order, denying Petitioners' current Eighth Amendment claims, resulted in a decision contrary to, or involved an unreasonable application of, clearly established federal law, as determined by this Court. Or that his decision was based on an unreasonable determination of facts, in light of the evidence presented in the state court proceedings. Therefore, Judge Downs' summary MAR order should be upheld under the highly deferential standards of review contained in section 2254(d) and (e). See Harrington v. Richter, ____ U.S. _____, 131 S. Ct. 770, 784-85 (summary unexplained state court order entitled to deferential review under AEDPA) and Cullen v. Pinholster, ___ U.S. ___, 131 S. Ct. 1388, 159 L. Ed. 2d 557 (federal habeas court may not consider evidence in support of claim, when that evidence was not presented in support of the claim when raised in state court).

In addition, for this Court to accept Petitioners' current Eighth Amendment claims would constitute a "new rule" of constitutional adjudication prohibited on federal habeas review by Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334

and its progeny. Neither at the time Petitioners' cases became final on direct review (on date of August 25, 2008 judgments), nor currently (nor at any point in between), would the state courts have felt compelled by any existing authority from this Court to hold that these consecutive sentences for multiple crimes, committed by adults, violate the Eighth Amendment.

Therefore, for this Court to accept Petitioners' current Eighth Amendment claims would create a "new rule" of constitutional adjudication prohibited on federal habeas review by Teague. See Butler v. McKellar, 494 U.S. 407, 110 S. Ct. 1212, 108 L. Ed. 2d 347 ("new rule" is anything subject to debate among reasonable minds" on date of finality); Stringer v. Black, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (extension of old rule to new or novel setting, thereby extending the precedent can constitute a "new rule" of constitutional adjudication prohibited by Teague); Lambrix v. Singletary, 520 U.S. 518, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (where reasonable jurist at the time could have disagreed, "new rule" cannot be applied retroactively). See also, Beard v. Banks, 542 U.S. 406, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (employing Teague analysis). Furthermore, the "new rule" Petitioners seek does not decriminalize a class of conduct or establish a watershed rule of criminal procedure implicating fundamental fairness. Therefore, Petitioners' proposed "new rule" falls within neither Teague exception. See Teague, Stringer, and Butler. See also, Saffle v. Parks, 494 U.S. 484, 493-495, 110 S. Ct. 1257, 1263, 108 L. Ed. 2d 415, 428-29 (1990). Thus, Petitioners' Eighth Amendment claims are

Teague barred.

In sum, Petitioners waived their Eighth Amendment claims by failing to specifically object to that point in the memorandum and recommendation of the Magistrate Judge. Furthermore, Petitioners' Eighth Amendment claims should be denied pursuant to the highly deferential standards of review contained in section 2254(d) and (e), and the claims are Teague barred.

CONCLUSION

For the forgoing reasons this Court should deny certiorari.

Respectfully submitted, this 9th day of November, 2012.

ROY COOPER
Attorney General of
North Carolina

Clarence Joe DelForge, III
Assistant Attorney General

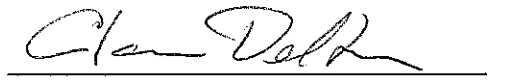
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Telephone: (919) 716-6500
Facsimile: (919) 716-0001

CERTIFICATE OF SERVICE

This is to certify that I have served the foregoing BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI upon Petitioner by mailing a copy to counsel at the following address:

Hoang V. Lam, Staff Attorney
North Carolina Prisoner Legal Services, Inc.
P.O. Box 25397
Raleigh, N.C. 27611

This, the 9th day of November, 2012.



Clarence Joe DelForge, III
Assistant Attorney General