

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

SALVATORE CHIMENTI,	:	
Petitioner,	:	CIVIL ACTION
	:	
v.	:	No. 98-6151
	:	
FREDERICK K. FRANK, ET AL.,	:	
Respondents.	:	

MEMORANDUM

GREEN, S.J.

January , 2001

Before the court is a counseled petition for writ of habeas corpus filed on November 23, 1998, pursuant to 28 U.S.C. § 2254 of the Antiterrorism and Effective Death Penalty Act (AEDPA), on behalf of Salvatore Chimenti, an inmate currently incarcerated in the State Correctional Facility at Huntingdon, Pennsylvania. For the reasons set forth below, the Petition will be denied.

I. FACTS AND PROCEDURE

The factual and procedural history set forth in the Report and Recommendation of Magistrate Judge Arnold C. Rapoport are adopted by this court. Petitioner seeks federal habeas relief on four grounds: (1) prosecutorial misconduct; (2) ineffective assistance of trial counsel; (3) abrogation by the District Attorney of a properly executed co-operation agreement; and (4) ineffective assistance of post-trial and direct appeal counsel. In his Report, Judge Rapoport recommended an evidentiary hearing on the second and third grounds for relief because Petitioner was “prevented from developing the factual basis of his claims in state court.”¹ I

¹28 U.S.C. § 2254(e)(2) states:

If the applicant has failed to develop the factual basis of a claim in

approved and adopted the Report and Recommendation and held an evidentiary hearing on July 5, 2000. Four (4) witnesses testified at said hearing, including Frank Cioffi, Maria Elizabeth Convery (now Dougherty), Frank Martorano, and Joel S. Moldovsky, Esq.

II. DISCUSSION

For habeas corpus review, a state court’s factual findings “shall be presumed to be correct,” and a habeas petitioner “shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1); Berryman v. Morton, 100 F.3d 1089 (3d Cir. 1996). An application for a writ of habeas corpus shall not be granted unless the petitioner shows that 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 “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”² 28 U.S.C. § 2254(d)(1)(2).

State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

A. the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

B. the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

²A state court decision is contrary to established Supreme Court precedent if “the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases” or if “the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [that] precedent.” Williams v. Taylor, 120 S. Ct. 1495, 1519-20 (2000). Moreover, a state court decision is an unreasonable application of established Supreme Court precedent if “the state court identifies the

In addition, “[a]n application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State.” 28 U.S.C. § 2254 (b)(1)(A). The burden is on the petitioner to show that he has exhausted available state remedies. Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997). The exhaustion requirement is excused where no available state corrective process exist or the particular circumstances of the case render the state process ineffective to protect the petitioner’s rights. Id. In that event, the petitioner’s claims are procedurally defaulted. Id. Federal habeas review of those claims is barred unless the petitioner shows cause for his default and prejudice resulting therefrom³ or that a miscarriage of justice would otherwise occur.⁴ See Sistrunk v. Vaughn, 96 F.3d 666, 673 (3d Cir. 1996) (citing Coleman v. Thompson, 501 U.S. 722, 750 (1991)). See also Castille v. Peoples, 489 U.S. 346, 351 (1989).

A. Prosecutorial Misconduct

correct governing legal rule from [the Supreme] Court’s cases but unreasonably applies it to the facts of the particular state prisoner’s case” or if it “either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.” Id. at 1520. These standards apply to questions of law or mixed questions of law and fact. See Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996); Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996), rev’d on other grounds, 117 S. Ct. 2059 (1997).

³“[I]f a defendant fails to comply with state procedural rules and is barred from litigating a particular constitutional claim in state court, the claim can be considered on federal habeas only if the defendant shows cause and prejudice for the default and actual prejudice resulting therefrom.” Teague v. Lane, 489 U.S. 288, 308 (1988); Wainright v. Sykes, 433 U.S. 72 (1976).

⁴In order to show a fundamental miscarriage of justice, the petitioner is required to show that a “constitutional violation has probably resulted in the conviction of one who is actually innocent.” Schlup v. Delo, 513 U.S. 298, 327 (1995) (citing Murray v. Carrier, 477 U.S. 478, 496 (1986)).

Habeas relief is available only if the prosecutor's acts so infected the trial as to make the resulting conviction a denial of due process. Greer v. Miller, 483 U.S. 756, 765 (1987); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). The due process clause is not violated by an event at a state trial that is merely "undesirable, erroneous, or even 'universally condemned.'" Darden v. Wainwright, 477 U.S. 168, 181 (1986); Todaro v. Fulcomer, 944 F.2d 1079, 1082 (3d Cir. 1991), cert. denied, 503 U.S. 909 (1992). Instead, the petitioner must show that he was deprived of a fair trial. Smith v. Phillips, 455 U.S. 209, 221 (1982); Todaro, 944 F.2d at 1082. In evaluating whether the alleged misconduct rose to the level of a constitutional violation, the court must examine the prosecutor's conduct in the context of the trial as a whole. Greer, 483 U.S. at 766.

Petitioner alleges that he was deprived of a fair trial because the prosecutor engaged in persistent and deliberate misconduct during all stages of Petitioner's jury trial. Petitioner alleges prosecutorial misconduct in seven instances which are herein discussed.⁵

1. First and Second Allegations of Prosecutorial Misconduct

Petitioner alleges that he was prejudiced when the prosecutor (1) falsely stated that Petitioner planted a gun on the victim's body; and (2) vouched for Elizabeth "Cookie" Harris, a prosecution witness. By his own admission, Petitioner did not present those allegations to the highest appropriate level of the Pennsylvania state courts. (Pet. Reply at 8.) Moreover, there are no further state law remedies available for litigating those claims in the Pennsylvania state

⁵For purposes of clarity, all of Petitioner's allegations are identified by the numbers used in Petitioner's Brief.

courts.⁶ Thus, those allegations are procedurally defaulted. Although a petitioner's default may be excused if the petitioner proves cause and prejudice or a miscarriage of justice, Petitioner has proven neither.⁷ Therefore, Petitioner's default is not excused. Petitioner's first and second allegations of prosecutorial misconduct remain unreviewable for the instant petition.

2. Remaining Allegations of Prosecutorial Misconduct

Petitioner's remaining allegations of prosecutorial misconduct include: (3) the prosecutor's references to Petitioner's family and his family's alleged connection to organized crime; (4) the prosecutor's statement that he possessed tapes which proved that a conversation occurred between Petitioner and his Uncle Harry in which Petitioner told his uncle that he had \$150,000 and wanted to run a bookie operation; (5) the prosecutor's reference to petitioner's failure to volunteer to take a polygraph examination on his current charges; (6) the prosecutor's portrayal of Petitioner as a drug dealer; and (7) other improper prosecutorial comments.

The Pennsylvania Superior Court evaluated the merits of Petitioner's allegations using the following standard: "although a prosecutor's statement may be inappropriate, a new trial will not be granted unless it is inevitable that the prosecutor's remark prejudices the defendant to such a degree that it prevents the jury from weighing the evidence and rendering a true verdict."

⁶Petitioner is foreclosed from litigating those claims in state court because (1) the claims were previously litigated in his P.C.H.A. Petition; and (2) the claims are time-barred. Under Pennsylvania law, review of previously litigated claims are prohibited. See 42 Pa.C.S.A. § 9543(a)(3), Commonwealth v. Christy, 656 A.2d 877, 881 (Pa. 1995), cert. denied, 516 U.S. 872 (1995). In addition, the statute of limitations for filing collateral actions is one year of the date the conviction becomes final. See 42 Pa.C.S.A. § 9545(b). There are several exceptions to the statute of limitations requirement, but they are inapplicable to the instant petition. See id.

⁷Petitioner attempts to excuse his default by arguing that his trial counsel was ineffective. As the following discussion will illustrate, however, Petitioner's claim for ineffective assistance of trial counsel is meritless.

Chimenti, 524 A.2d at 920 (citing Commonwealth v. Upsher, 444 A.2d 90, 92 (Pa. 1992)). The court concluded that Petitioner's allegations were either not preserved for review or meritless. Id. at 920-29. Specifically, the court found that the prosecutor's references to Petitioner's family were appropriate trial advocacy, because Petitioner's trial counsel was (1) first to elicit testimony about Petitioner's family from a witness; and (2) referred to Petitioner's family in his closing argument. Id. at 921-24. The court also found that Petitioner's fourth, fifth, sixth and seventh allegations were waived, because Petitioner's counsel failed to make an objection to preserve those issues for review. Id. at 924-29.

Assuming those issues were preserved for review, the court opined that it would find (1) Petitioner's fourth allegation meritless because the prosecutor's statements were in response to statements made by the court and Petitioner's counsel; (2) Petitioner's fifth allegation meritless because the prosecutor's reference to the polygraph test was in response to Petitioner's voluntary statement that he had offered to take a polygraph examination; (3) Petitioner's sixth allegation meritless because Petitioner introduced a drug motive into the case; and (4) Petitioner's seventh allegation meritless because the prosecutor's statements were in response to statements made by witnesses and Petitioner's counsel. Id.

Petitioner refers to several instances that he believes constitute prosecutorial misconduct. However, Petitioner fails to show that the Pennsylvania Superior Court decision regarding those issues were contrary to, or an unreasonable application of, Supreme Court precedent or were based on an unreasonable determination of the facts. As previously stated, a petitioner seeking habeas relief must prove that the state court decision is either contrary to, or involved an unreasonable application of, Supreme Court precedent or was based on an unreasonable

determination of the facts presented to the state court. 28 U.S.C. § 2254(d)(1)(2). Because Petitioner failed to satisfy that burden, the Petition for relief on grounds of prosecutorial misconduct will be denied.

B. Ineffective Assistance of Trial Counsel

Counsel is presumed effective and petitioner bears the burden of proving ineffectiveness. Strickland v. Washington, 466 U.S. 688, 686-89 (1984). To prevail on a claim of ineffective assistance of counsel, the petitioner must demonstrate that counsel’s representation was objectively deficient and that prejudice resulted from counsel’s alleged deficiencies. See Roe v. Flores-Ortega, 120 S. Ct. 1029, 1037 (2000); Strickland, 466 U.S. at 687-88. A lawyer’s representation is considered objectively deficient if it “fell below an objective standard of reasonableness.” Strickland, 466 U.S. at 688. To establish prejudice, a defendant must demonstrate that there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 694.

1. First and Fourth Allegations of Trial Counsel’s Ineffectiveness

Petitioner alleges that his trial counsel was ineffective in seven (7) respects. The Pennsylvania Superior Court only reviewed the first and fourth allegations, which are herein discussed. Chimenti, 524 A.2d at 917-20. First, Petitioner alleges that his trial counsel was ineffective for suborning perjury from trial witnesses over Petitioner’s objections. Petitioner also alleges that his trial counsel was ineffective for failing to call Maria Elizabeth Convery (“Convery”) and Frank Cioffi (“Cioffi”) as trial witnesses after promising their testimony to the jury in his opening statement.

The Pennsylvania Superior Court evaluated the merits of Petitioner’s allegations using a

two-prong test: (1) whether the underlying claim was of merit; and (2) if so, whether the course chosen by counsel had some reasonable basis in promoting Petitioner's interest. Chimenti, 524 A.2d at 917-18. In addition, the court required Petitioner to show that he was prejudiced by counsel's alleged ineffectiveness. See id. at 918. Applying those principles, the court held that Petitioner's allegations were without merit. See id.

Specifically, the court found that the official record was "devoid of any proof that [Petitioner's] trial counsel suborned perjured testimony" Id. at 919-20. In addition, the court stated that "the failure to call potential witnesses will not be equated with a conclusion of ineffectiveness absent some positive demonstration that their testimony would have been helpful to the defense." Id. at 918 (citing Commonwealth v. Wallace, 500 A.2d 816, 818 (Pa. Super. 1985)). While the two potential witnesses, Cioffi and Convery, may have weakened the prosecution's claim that the .38 caliber gun found next to the victim's body was planted by Petitioner, the court concluded that their testimony would have also impeached aspects of Petitioner's self-defense theory. Id. Thus, the court found that the testimony of Cioffi and Convery would not have been helpful to Petitioner's defense at trial. Id.

An evidentiary hearing was held, in part, because the record showed that Petitioner failed to develop the factual basis of his ineffective assistance of trial counsel claim in state court. At said hearing, Petitioner's trial counsel testified that he did not "suborn perjury." (Tr. at 130). He also testified that he made a tactical decision not to call Cioffi and Convery, because their testimony would contradict Petitioner's sworn testimony and defense strategy. (Tr. at 153-155). During the course of the hearing, Petitioner failed to offer any evidence that his trial counsel suborned perjury. Nor was there any evidence that Petitioner's own testimony, which was

consistent with the alleged perjured testimony, was the result of counsel overcoming Petitioner's will. There was also no evidence that trial counsel was ineffective for failing to call Cioffi and Convery as witnesses.⁸ Moreover, Petitioner failed to demonstrate that he was prejudiced by his trial counsel's alleged deficiencies. To prevail on a claim of ineffective assistance of counsel, defendant must show not only that his counsel was deficient, but that prejudice resulted from counsel's alleged deficiencies. See Strickland, 466 U.S. at 687-688. Because he failed to meet this burden, Petitioner's first and fourth allegations must fail.

2. Remaining Allegations of Trial Counsel's Ineffectiveness

Petitioner's remaining allegations of ineffective assistance of trial counsel include: (2) failing to function as an advocate due to a conflict of interest; (3) failing to object to prosecutorial comments and testimony vouching for Elizabeth "Cookie" Harris and other prosecution witnesses; (5) failing to present evidence to rebut to prosecution's "planted gun" theory; (6) failing to object to, and/or preserve claims of, trial error; and (7) failing to explore a plea bargain to third degree murder.

By his own admission, Petitioner did not present the third, fifth, sixth and seventh allegations of ineffective assistance of trial counsel to the highest appropriate level of the Pennsylvania state courts. (Pet. Brief at 72.) However, Petitioner claimed that adequate cause and prejudice excuses his default. Thus, the aforementioned evidentiary hearing was held. At

⁸The decisions on which witnesses should be called to testify are strategic and therefore left to counsel. United States v. Merlino, 2 F.Supp. 2d 647, 662 (E.D. Pa. 1997) (citing Diggs v. Owens, 833 F.2d 439, 446 (3d Cir. 1987), cert. denied, 485 U.S. 979 (1988)). Furthermore, under Pennsylvania law, a defense counsel is not ineffective for failing to call certain witnesses that will contradict defendant's own testimony. Commonwealth v. Pirela, 507 A.2d 23, 29 (Pa. 1986), cert. denied, 120 S. Ct. 804 (2000). At present, there is no United States Supreme Court decision to the contrary.

said hearing, however, Petitioner failed to present evidence to adequately support his allegations. Petitioner failed to establish that, but for trial counsel's alleged deficiency, the result of his trial proceeding would have been different. Assuming that his trial counsel's representation was objectively unreasonable, Petitioner must still show prejudice resulting therefrom. Because he failed to satisfy this burden, coupled with the strong presumption that counsel rendered adequate assistance, Petitioner's second, third, fifth, sixth and seventh allegations of ineffectiveness of trial counsel must fail. Accordingly, the Petition for habeas relief on grounds of ineffectiveness of trial counsel will be denied.

C. Unilateral Abrogation by District Attorney of Agreement

A state prisoner can obtain federal habeas relief "only if his custody is in violation of the Federal Constitution." Mabry v. Johnson, 467 U.S. 504, 507 (1984). Under Pennsylvania law, a defendant's conviction and mandatory sentence may not be set aside merely by agreement of the parties. Commonwealth v. Moran, 636 A.2d 612 (Pa. 1993), cert. denied, 511 U.S. 1152 (1994).

A brief description of the procedural history is necessary for this discussion. Petitioner seeks specific performance of a post-verdict agreement ("Agreement") between the Deputy District Attorney, Arnold Gordon, and Petitioner's post-trial counsel, Michael M. Mustokoff. Under the Agreement, Petitioner deferred filing a post-trial claim of ineffective assistance of trial counsel for suborning perjury until the District Attorney's Office completed its investigation of Petitioner's allegation. The District Attorney's Office agreed not to oppose Petitioner's P.C.H.A. (now P.C.R.A.) Petition,⁹ if it deemed Petitioner's allegation of subornation of perjury by his trial

⁹P.C.H.A. is an acronym for Post Conviction Hearing Act. See 42 Pa.C.S.A. §§ 9541-9551 (repealed). In 1988, the P.C.H.A. was modified and renamed the Post Conviction Relief Act (P.C.R.A.). See 42 Pa.C.S.A. §§ 9541-9546 (1988).

counsel reliable. In addition, both parties agreed to seek and obtain a remand of Petitioner's appeal of his conviction to the Court of Common Pleas of Philadelphia. Petitioner would then plead guilty of third degree murder. The presiding court was required to accept Petitioner's negotiated plea.

After the Agreement was signed, both parties entered into a Joint Petition for Remand ("Joint Petition"). The Joint Petition incorporated essential terms of the Agreement.¹⁰ The Joint Petition was presented to the Honorable Edmund B. Spaeth, Jr., then President Judge of the Pennsylvania Superior Court, who, acting in camera, granted the petition and issued an order remanding the case to the Court of Common Pleas of Philadelphia. Before the order was executed, however, the Pennsylvania Supreme Court, sua sponte, held that Judge Spaeth lacked jurisdiction to issue the order. See Commonwealth v. Chimenti, 507 A.2d 79 (Pa. 1986). Furthermore, the court held that the terms of the Joint Petition violated the Pennsylvania Rules of

¹⁰The Joint Petition states in pertinent part:

The parties, by MICHAEL M. MUSTOKOFF, Esquire, Counsel for Salvatore Chimenti, and ERIC B. HENSON, Deputy District Attorney, representing the Commonwealth, respectfully petition the Court as follows:

1. Chimenti has appealed from judgment of sentence for first degree murder.
2. The Commonwealth and Chimenti have agreed that his sentence should be vacated in exchange for his entry of a negotiated guilty plea to murder generally, certified to rise no higher than third degree.
3. To effectuate this agreement, the case must be remanded to the Common Pleas Court for special assignment to a judge who, after sentence has been vacated, will accept Chimenti's negotiated guilty plea.

WHEREFORE, the parties respectfully, request that this Court enter the attached remand order.

Joint Petition, R. 341.

Criminal Procedure by directing a hearing judge to vacate the prior judgment of sentence and to accept the guilty plea of the defendant.¹¹ *Id.* at 83. The case was remanded to the Pennsylvania Superior Court for proceedings on Petitioner’s appeal.

On appeal, the District Attorney’s Office opposed granting relief to Petitioner. The Superior Court affirmed Petitioner’s conviction and sentence. Petitioner then filed a P.C.H.A. Petition and raised the present claim regarding the enforceability of the Agreement. Petitioner’s P.C.H.A. Petition was denied. On P.C.H.A. appeal, the Pennsylvania Superior Court held that the Agreement was invalid, because the Pennsylvania Supreme Court stated that the Agreement “effectively abrogated a jury verdict without any semblance of a record.” (Pet. Brief app. at 310.) Petitioner disagrees stating that the Pennsylvania Supreme Court invalidated the Joint Petition and Judge Spaeth’s Order but not the entire Agreement. Petitioner argues that the District Attorney’s opposition to Petitioner’s P.C.H.A. Petition breached the Agreement,¹² thus violating Petitioner’s due process rights. Therefore, Petitioner contends that the Agreement is valid and should be enforced.

¹¹Under Pa.R.Crim.P. 319(a), a presiding judge, faced with a guilty plea, may refuse to accept it.

¹²The Agreement provides in relevant part that:
In the event that Philadelphia District Attorney’s Office deems the Defendant’s allegations of subornation of perjury to be reliable, (worthy of belief), then the Defendant will enter a guilty plea under the following conditions:

- (a) the matter will first be presented to the President Judge of the Philadelphia Court of Common Pleas for the appointment of a judge without previous involvement in this case who will grant the Defendant’s uncontested PCHA Petition, conditioned upon Defendant’s agreement to plead guilty and to cooperate fully and truthfully in any criminal proceeding brought by the District Attorney’s Office as a result of Defendant’s allegations that his trial counsel suborned perjury. The judge will then accept this negotiated plea and impose sentence

The issue raised by Petitioner does not constitute a ground for granting habeas relief. The Due Process Clause is concerned with the manner in which persons are deprived of their liberty. See Mabry, 467 U.S. at 511. Contrary to Petitioner's contention, the Due Process Clause is not violated here. Petitioner is not incarcerated pursuant to the Agreement. Rather, Petitioner is incarcerated because he was tried and convicted by a jury and sentenced by a judge. Therefore, the District Attorney's failure to enforce the Agreement did not deprive Petitioner of his liberty.

Furthermore, this court is bound by the Pennsylvania Supreme Court's decision, which I interpret to hold that the Agreement is unenforceable at least in as so far as it could work to modify Petitioner's conviction or sentence. The Pennsylvania Superior Court reached the same conclusion. (Pet. Brief app. at 310.) Thus, the District Attorney's Office was under no legal obligation to comply with the Agreement. Instead, it was bound to accept the Pennsylvania Supreme Court's decision. Petitioner failed to show that the decisions of the Pennsylvania Superior Court or Supreme Court were contrary to, or involved an unreasonable application of, United States Supreme Court precedent or was an unreasonable determination of the facts. For the foregoing reasons, the Petition for habeas relief will be denied on this ground.

D. Ineffective Assistance of Post Trial and Direct Appeal Counsel

Ineffective assistance of counsel is cognizable only where there is a federal constitutional right to counsel; i.e., only through trial and first appeal as of right. See Coleman v. Thompson, 501 U.S. 722, 756-57 (1991). To prevail on a claim of ineffective assistance of counsel, the petitioner must demonstrate that counsel's representation was objectively deficient and that

prejudice resulted from counsel's alleged deficiencies. See Strickland, 466 U.S. at 687-88.¹³ A court need not address both components of the inquiry if the petitioner makes an insufficient showing on one. See id. at 694. Counsel cannot be held ineffective for failing to raise a meritless claim. See id. at 686.

Petitioner alleges that he received ineffective assistance from post-trial counsel, A. Charles Peruto, Jr. ("Peruto") and Michael M. Mustokoff ("Mustokoff"), and direct appeal counsel, Paul Schechtman ("Schechtman"). First, Petitioner claims that Peruto was ineffective for failing to raise the issue of trial counsel's ineffectiveness. Having previously determined that trial counsel was not ineffective, however, Petitioner is unable to support this allegation.

Second, Petitioner claims that Mustokoff was ineffective for (1) failing to preserve the issue of Peruto's ineffectiveness; (2) entering into an unenforceable agreement with the District Attorney, if the Agreement is deemed void; (3) deviating from an enforceable agreement by filing the Joint Petition, if the Agreement is deemed valid; and (4) waiving post-trial motions. Petitioner's first allegation against Mustokoff fails, because Petitioner did not adequately support his allegation that Peruto was ineffective. Petitioner's remaining allegations fail, because Petitioner is unable to show prejudice. Assuming that Mustokoff's conduct was objectively unreasonable, Petitioner must still show that he was prejudiced by that conduct. Petitioner has failed to satisfy that burden. Thus, Petitioner's allegations fail.

Finally, Petitioner claims that Schechtman was ineffective for (1) failing to raise the claims that Mustokoff was ineffective; (2) negotiating a void agreement; (3) deviating from the

¹³Although Strickland concerned trial counsel's effectiveness, the same standard is used to measure the adequacy of appellate counsel's representation. Love v. Fulcomer, 729 F. Supp. 1514, 1516 (E.D. Pa. 1990).

Agreement by filing the Joint Petition; and (4) waiving post-trial motions. Once again, Petitioner's allegations fail because the underlying claims are without merit. Furthermore, Petitioner failed to show the required prejudice.

On Petitioner's P.C.H.A. appeal, the Pennsylvania Superior Court rejected all of Petitioner's ineffective assistance claims. Petitioner fails to demonstrate how the state court decision is contrary to, or an unreasonable application of Supreme Court precedent. Furthermore, since Petitioner's underlying allegations of trial counsel ineffectiveness are without merit, his serial ineffectiveness claims are also meritless. Accordingly, the Petition for habeas relief on grounds of ineffective assistance of post-trial and appellate counsel will be denied.

III. CONCLUSION

In the present matter, Petitioner failed to show that the state court decisions regarding his allegations were contrary to, or an unreasonable application of, Supreme Court precedent or was an unreasonable determination of the facts presented to the state court. In addition, Petitioner did not present sufficient evidence at the evidentiary hearing to support his allegations of ineffective assistance of trial counsel or unilateral abrogation of a valid post-verdict agreement. In view of the foregoing, the Petition for Habeas Corpus relief must be denied.

An appropriate Order follows.

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

SALVATORE CHIMENTI,	:	
Petitioner,	:	CIVIL ACTION
	:	
v.	:	No. 98-6151

FREDERICK K. FRANK, ET AL.,
Respondents.

:
:
:

ORDER

AND NOW, this day of January 2001, after careful and independent
consideration of the Petition for Writ of Habeas Corpus filed on behalf of Salvatore Chimenti, **IT**

IS HEREBY ORDERED that:

1. The Petition filed pursuant to 28 U.S.C. 2254 is DENIED;
2. All pending motions relating to this matter are DISMISSED; and,
3. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.