

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

GEORGE ROSS : CIVIL ACTION  
 :  
 v. :  
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 DONALD T. VAUGHN, et al. : NO. 00-CV-4902

**MEMORANDUM**

**Padova, J. July , 2001**

Before the Court is George Ross' pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition"). Petitioner is a state prisoner currently incarcerated at the State Correctional Institution in Graterford, Pennsylvania. For the reasons that follow, the Court denies the Petition.

**I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

While the facts of Petitioner's conviction are relatively simple, the procedural history of his case following conviction is complex. The details relevant to the instant Petition are as follows.

On December 19, 1978, an Information was filed charging Petitioner with sexually assaulting Roseanne Schoffield ("Schoffield") on August 16, 1978, and Katherine Allender ("Allender") on October 3, 1978. The charges were consolidated for trial in the Court of Common Pleas of Lehigh County. At trial, Petitioner denied engaging in intercourse with Schoffield and presented an alibi defense. N.T. 3/29/79 at 478-96. In contrast,

Petitioner admitted to engaging in intercourse at the relevant time with Allender, but argued that she consented. Id. at 503-505, 511. On March 29, 1979, a jury convicted Petitioner of two counts each of rape, indecent assault, and simple assault, and one count of robbery and theft. Id. at 579.

On April 3, 1979, Petitioner filed a motion for a new trial. In his motion for a new trial, Petitioner asserted the following grounds for relief: (1) erroneous introduction of color slides depicting the victim's bodily injuries; (2) improper denial of Petitioner's motion for a continuance; (3) improper opinion testimony by Dr. Talbot ("Talbot"), the Commonwealth's medical expert, on whether Allender had been assaulted; (4) improper cross-examination by the Commonwealth of Janice Ross and Sol Maria Xicara; (5) erroneous denial of Petitioner's motion for mistrial, motion to suppress identification evidence, and severance motion; (6) prosecutorial misconduct in implying that Petitioner was mentally unstable and sold marijuana, in expressing a personal belief that Petitioner lied during his testimony, and in appealing to the passions of the jury; and (7) ineffective assistance of counsel in connection with the suppression hearing. At oral argument on the motion, the Court of Common Pleas sitting en banc granted leave for Petitioner to file a supplemental memorandum on or before June 30, 1980. Petitioner's counsel, however, did not submit the supplemental memorandum until around August 14, 1980.

The supplemental memorandum contained several claims not originally asserted in the motion: (1) the prosecutor improperly elicited prejudicial testimony from Schoffield; (2) trial counsel provided ineffective assistance by failing to object to the prejudicial testimony; (3) the prosecutor withheld evidence that Schoffield was pregnant at the time of the rape; (4) trial counsel was ineffective for failing to cross-examine Schoffield on her pregnancy. The supplemental memorandum also sought a hearing to determine if statements made by Allender in a subsequent civil suit constitute newly-discovered evidence in Petitioner's case. On September 5, 1980, the court dismissed Petitioner's new trial motion, ruling on the merits of all claims save those raised in the untimely filed supplemental memorandum. Petitioner was then sentenced on March 10, 1981, to imprisonment for a term of years.

On March 13, 1981, Petitioner filed an appeal of his conviction to the Pennsylvania Superior Court. On March 24, 1981, Petitioner filed pro se a motion to enjoin destruction of the victims' medical records. The trial court dismissed his injunction motion on April 15, 1981, based on the Commonwealth's promise to preserve the records. On March 18, 1982, Petitioner's appeal was dismissed because his counsel failed to file a supporting brief.

On April 4, 1983, Petitioner filed the first of several motions pursuant to the Pennsylvania Post-Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541, in the Court of Common Pleas

of Lehigh County in which he argued (1) ineffective assistance of appellate counsel for failure to litigate his appeal and (2) ineffective assistance of trial counsel for failing to pursue an insanity or diminished capacity defense and failing to examine the victims' medical records. After being appointed counsel, Petitioner filed an amended motion ("First PCRA Motion") in which he again challenged the denial of his severance motion, and alleged ineffective assistance of counsel for failing to object to allegedly perjured testimony by the victims, Talbot, and other Commonwealth witnesses. On June 20, 1985, the court found that post-trial counsel provided ineffective assistance by failing to perfect his appeal, granted him leave to file a nunc pro tunc appeal before the Pennsylvania Superior Court, and dismissed the First PCRA Motion.

Petitioner filed a new Notice of Appeal asserting arguments in connection with the denial of his motion for severance and motion for a continuance. The Pennsylvania Superior Court affirmed the Court of Common Pleas' disposition of those issues on February 21, 1986. The Pennsylvania Supreme Court denied allocatur on April 25, 1988.

Petitioner thereafter filed his second motion for PCRA relief ("Second PCRA Motion") on September 6, 1990, raising the following grounds: (1) improper identification evidence; (2) ineffective assistance of appellate counsel for failing to perfect his appeal;

(3) prosecutorial misconduct in withholding evidence of Schoffield's pregnancy; (4) ineffective assistance of trial counsel for failing to review the victims' medical records; and (5) ineffective assistance of post-conviction counsel for failure to preserve issues raised in the supplemental memorandum that was dismissed by the court, failure to challenge the trial court's jury charge and Talbot's and the victims' allegedly perjured testimony. Petitioner also asserted that his post-conviction counsel had a conflict of interest while representing him. Counsel was again appointed. The Court of Common Pleas dismissed the Second PCRA Motion on July 26, 1993.

Petitioner filed a third motion for PCRA relief ("Third PCRA Motion") on May 26, 1995, arguing that he was not notified or present at the hearing at which his Second PCRA Motion was dismissed. The July 26, 1993 order dismissing his Second PCRA Motion was vacated. On December 16, 1998, Petitioner, in consultation with appointed standby counsel, filed a brief in support of the Third PCRA Motion asserting the following arguments: (1) ineffective assistance of counsel for relying on medical records provided by the Commonwealth; (2) prosecutorial misconduct in concealing exculpatory evidence and knowingly using perjured testimony; (3) improper commentary by the trial court during the jury charge; (4) improper obstruction of his appeals; and (5) the existence of newly-discovered evidence of Schoffield's pregnancy at

the time of the rape. On June 3, 1999, the Court of Common Pleas sitting en banc dismissed the Third PCRA Motion, and the Pennsylvania Superior Court affirmed on November 14, 2000.

On September 28, 2001, Petitioner filed the instant Petition.<sup>1</sup> In accordance with 28 U.S.C. § 636(b)(1)(B) and Local Rule of Civil Procedure 72.1, the Court referred the Petition to United States Magistrate Judge Peter B. Scuderi for a report and recommendation. On May 21, 2001, Magistrate Judge Scuderi filed a report recommending denial of the Petition ("Report"). Petitioner objected to the Report. In accordance with 28 U.S.C. § 636(b), the Court will conduct a de novo determination of the Report.<sup>2</sup>

## **II. STANDARD OF REVIEW**

The instant Amended Petition was filed pursuant to 28 U.S.C. § 2254 which allows federal courts to grant habeas corpus relief to prisoners "in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the

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<sup>1</sup>Between October 15, 1981, and May 17, 1988, Petitioner filed five petitions for habeas corpus in federal court. All of these prior petitions were dismissed for failure to exhaust state court remedies. Accordingly, the instant Petition is not a second or successive petition pursuant to 28 U.S.C. § 2244. Christy v. Horn, 115 F.3d 201, 208 (3d 1997).

<sup>2</sup>Where a habeas petition has been referred to a magistrate judge for a Report and Recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.... [The Court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b) (1994).

Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a) (West Supp. 2001). Since it was filed after April 24, 1996, the Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-132, 110 Stat. 1214. See Lindh v. Murphy, 521 U.S. 320, 326-27 (1997).

Section 2254(d)(1), as amended by AEDPA, provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

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

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

28 U.S.C.A. § 2254(d)(1) (West Supp. 2001).

Under AEDPA, a state court's legal determinations may only be tested against "clearly established Federal law, as determined by the Supreme Court of the United States." See 28 U.S.C.A. § 2254(d)(1) (West Supp. 2001). This phrase refers to the "holdings, as opposed to the dicta" of the Supreme Court's decisions as of the time of the relevant state court decision. Williams v. Taylor, 529 U.S. 362, 412 (2000). Courts look to principles outlined in Teague v. Lane, 489 U.S. 288 (1989), to determine whether a rule of law is

clearly established for habeas purposes. Williams, 529 U.S. at 379-80, 412. "[W]hatever would qualify as an old rule under [the Court's] Teague jurisprudence will constitute clearly established Federal law," except that the source of that clearly established law is restricted to the United States Supreme Court. Id. at 412.

To apply the AEDPA standards to pure questions of law or mixed questions of law and fact, federal habeas courts initially must determine whether the state court decision regarding each claim was contrary to clearly established Supreme Court precedent. Werts v. Vaughn, 228 F.3d 178, 197 (3d Cir. 2000). A state court decision may be contrary to clearly established federal law as determined by the United States Supreme Court in two ways. See Williams, 529 U.S. at 405. First, a state court decision is contrary to Supreme Court precedent where the court applies a rule that contradicts the governing law set forth in United States Supreme Court cases. Id. Alternatively, a state court decision is contrary where the state court confronts facts that are materially indistinguishable from a relevant United States Supreme Court precedent and arrives at an opposite result. Id. at 406. If relevant United States Supreme Court precedent requires an outcome contrary to that reached by the state court, then the court may grant habeas relief at this juncture. Matteo v. Superintendent S.C.I. Albion, 171 F.3d 877, 890 (3d Cir. 1999).

If the state court decision is not contrary to precedent, the court must evaluate whether the state court decision was based on an unreasonable application of Supreme Court precedent. Id. A state court decision can involve an “unreasonable application” of Supreme Court precedent if the state court identifies the correct governing legal rule but unreasonably applies it to the facts of the particular state prisoner’s case. Williams, 529 U.S. at 407. A state court determination also may be set aside under this standard if the court unreasonably refuses to extend the governing legal principle to a context in which the principle should control or unreasonably extends the principle to a new context where it should not apply. Ramdass v. Angelone, 530 U.S. 156, 166 (2000); Williams, 529 U.S. at 407.

To grant a habeas corpus writ under the unreasonable application prong, the federal court must determine that the state court’s application of clearly established federal law was objectively unreasonable. Williams, 529 U.S. at 409; Werts, 228 F.3d at 197. A federal court cannot grant habeas corpus simply by concluding in its independent judgment that the state court applied clearly established federal law erroneously or incorrectly; mere disagreement with a state court’s conclusions is insufficient to justify relief. Williams, 529 U.S. at 411; Matteo, 171 F.3d at 891. In determining whether the state court’s application of the Supreme Court precedent is objectively reasonable, habeas courts

may consider the decisions of inferior federal courts. Matteo, 171 F.3d at 890.

Section 2254 further mandates heightened deference to state court factual determinations by imposing a presumption of correctness. 28 U.S.C.A. § 2254(e)(1) (West Supp. 2001). The presumption of correctness is rebuttable only through clear and convincing evidence. Id. Clear and convincing evidence is evidence that is "so clear, direct, weighty and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." United States Fire Ins. Co. v. Royal Ins. Co., 759 F.2d 306, 309 (3d Cir. 1985).

The district court may only grant relief on a habeas claim involving state court factual findings where the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C.A. § 2254 (d)(2) (West Supp. 2001); see Weaver v. Bowersox, 241 F.3d 1024, 1030 (8th Cir. 2001); Watson v. Artuz, No. 99Civ.1364(SAS), 1999 WL 1075973, at \*3 (S.D. N.Y. Nov. 30, 1999) (listing cases). The district court must conclude that the state court's determination of the facts was objectively unreasonable in light of the evidence available to the state court. Weaver, 241 F.3d at 1030 (citing Williams, 529 U.S. at 409); Torres v. Prunty, 223 F.3d 1103, 1107-8 (9th Cir. 2000); see also Watson, 1999 WL 1075973, at \*3. Mere disagreement with the state court's

determination, or even erroneous factfinding, is insufficient to grant relief if the court acted reasonably. Weaver, 241 F.3d at 1030.

### **III. DISCUSSION**

The Petition asserts seven claims for relief. First, Petitioner claims ineffective assistance of his trial, appellate, and post-conviction counsel. Second, Petitioner argues that the Commonwealth engaged in misconduct by concealing Schoffield's pregnancy at the time of the rape, knowingly eliciting allegedly false testimony from Schoffield and Allender. Third, Petitioner challenges statements by the trial court during the jury charge as creating a presumption of guilt. Fourth, Petitioner asserts that litigation of his direct appeal and Brady claim was obstructed by government officials. Fifth, Petitioner claims to have newly-discovered evidence from the victims' medical reports of Schoffield's pregnancy during the rape and the presence of sperm in Allender. Sixth, Petitioner contends that the Commonwealth destroyed the victims' medical records in bad faith. Seventh, Petitioner asserts that the trial judge enjoyed a close relationship with Allender at the time of his trial.

In the Report, Judge Scuderi first determines that Claims Two, Six, and Seven are procedurally defaulted, having raised the issue sua sponte. Petitioner objects to the injection of the default issue in his case and alternatively disputes that any claims are

defaulted. Judge Scuderi further concludes that the remaining claims are without merit. Petitioner seeks a de novo review of the Report. The Court will address each issue in turn.

A. Exhaustion and Procedural Default

Under § 2254, a writ of habeas corpus may not be granted unless the applicant has exhausted all remedies available in state court. 28 U.S.C.A. § 2254(b)(1)(A) (West Supp. 2001). "The exhaustion requirement ensures that state courts have the first opportunity to review federal constitutional challenges to state convictions and preserves the role of state courts in protecting federally guaranteed rights." Caswell v. Ryan, 953 F.2d 853, 857 (3d Cir.), cert. denied, 504 U.S. 944 (1992). To exhaust the available state court remedies, a petitioner must fairly present all the claims that he will make in his habeas corpus petition in front of the highest available state court, including courts sitting in discretionary appeal. O'Sullivan v. Boerckel, 526 U.S. 838, 847-48 (1999); Henderson v. Frank, 155 F.3d 159, 164 (3d Cir. 1998). To "fairly present" a claim, a petitioner must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted. McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999). A petitioner who has raised an issue on direct appeal, however, need not raise it again in state post-conviction proceedings. Evans v. Court of Common Pleas, Delaware County, Pa., 959 F.2d

1227, 1230 (3d Cir. 1992). Nor must the state court discuss or base its decisions upon the presented claims for those claims to be considered exhausted. Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996). The burden of establishing that a habeas claim was fairly presented falls upon the petitioner. Lines v. Larkins, 208 F.3d 153, 159 (3d Cir. 2000).

A habeas corpus petition containing both exhausted and unexhausted claims ordinarily must be dismissed so that the petitioner may present the unexhausted claims to the state courts. Rose v. Lundy, 455 U.S. 509, 510 (1982). A petition containing unexhausted claims, however, is not subject to dismissal when those claims are procedurally barred under state law. Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993) (citations omitted). In the event that a petition contains both exhausted and procedurally defaulted claims, the habeas court may adjudicate the exhausted claims but may not address the defaulted claims on the merits unless the petitioner shows either (a) that there was cause for the procedural default and that it resulted in prejudice; (b) that the failure to entertain the claim would produce a miscarriage of justice; or (c) that the procedural rule was not independent and adequate. Coleman v. Thompson, 501 U.S. 722, 750 (1991); Doctor, 96 F.3d at 683 (citing Harris v. Reed, 489 U.S. 255, 260-61 (1989)).

Despite agreeing with the Report's conclusions that Claims Two, Six, and Seven are procedurally defaulted<sup>3</sup>, the Court

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<sup>3</sup>Petitioner raised Claims Two and Six in their present posture for the first time in his Third PCRA Motion. The state courts refused to address the merits of this claim because Claim Two was waived by Petitioner's failure to exhaust it on direct appeal and Claim Six was waived by his failure to raise it in an earlier PCRA motion. Commonwealth v. Ross, No. 1908 EDA 1999, at 4-5, 6-7 (Pa. Super. Ct. Aug. 8, 2000)(citing 42 Pa. Cons. Stat. § 9544(b)). Since waiver would bar any consideration of these claims by the state court, the claims are procedurally defaulted. See Coleman, 501 U.S. at 732.

Petitioner fails to establish cause and prejudice for his default of Claims Two and Six. Petitioner cites ineffectiveness of counsel as cause for default of Claim Two. To the extent that Petitioner cites ineffective assistance of post-conviction counsel, his argument fails. Ineffectiveness of post-conviction counsel cannot constitute cause to excuse procedural default in a federal habeas petition. Coleman, 501 U.S. at 757. To the extent that he argues ineffective assistance of appellate counsel, his argument again fails because he never exhausted the issue of ineffective assistance of counsel for failing to litigate Claim Two before the state court. See Edwards v. Carpenter, 529 U.S. 446, 451-52 (2000) ("[A] claim of ineffective assistance . . . generally must be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.").

As cause for his default of Claim Six, Petitioner contends that he did not learn of the destruction of the medical reports until the January 14, 1999 hearing on his Third PCRA Motion. On April 8, 1981, the Commonwealth, in response to Petitioner's motion to enjoin destruction of the medical records, stated its intention to retain the records. Petitioner argues that he relied on this representation until the hearing at which the Commonwealth admitted their destruction. Under the PCRA statute, Petitioner had 60 days after he learned of their destruction to file a claim for relief. See 42 Pa. Cons. Stat. Ann. § 9545(b)(2) (West 1999). Petitioner presents no cause for his failure to do so.

Claim Seven, alleging the existence of a relationship between the trial judge and Allender at the time of Petitioner's trial, was never raised in any prior PCRA motion or on his nunc pro tunc direct appeal. Petitioner asserts that he did not obtain information of the trial judge's relationship with Allender until August 26, 2000. Although this claim was never exhausted before

determines that in this case it is inappropriate to sua sponte raise the issue of procedural default. While the Court likely has the power to raise exhaustion and procedural default issues on its own initiative, it should do so only where the appropriate concerns of comity, federalism and justice are implicated and relief is "plainly warranted". See Smith v. Horn, 120 F.3d 400, 407-8 (3d Cir. 1997). Courts are not inclined to sua sponte raise the issue where the state completely fails to raise the defense, rather than just belatedly raising it. Id. at 408. Respondents have failed throughout the course of this habeas corpus case to assert the defenses of lack of exhaustion or procedural default with respect to any claim in the Petition. The Court, therefore, will address the merits of Claims Two, Six, and Seven.<sup>4</sup>

B. Claim One

Claim One alleges ineffective assistance of trial counsel for their failure to independently secure and review the victims' medical reports, and of his post-conviction and appellate counsel

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the state court, there is no available means for Petitioner to raise this issue before the state court for the reasons in the Report. See 42 Pa. Cons. Stat. Ann. § 9545(b) (West 2001). Petitioner presents no justification for his failure to seek state review of this claim and hence fails to satisfy the cause and prejudice requirements. Given the lack of supporting evidence or even information about the nature of the alleged relationship, the Court cannot conclude that Petitioner has shown a fundamental miscarriage of justice excusing his default.

<sup>4</sup>The Court will engage in plenary review with respect to these claims. See Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001).

for failure to argue at trial and on appeal/PCRA review that Talbot perjured herself at trial. These claims were exhausted in the Third PCRA Motion. See Ross, No. 1908 EDA 1999, at 3.

Petitioner was represented in pretrial proceedings by Armando Salazar ("Salazar"). At a hearing on pretrial motions, Salazar stated to the trial court that the prosecutor had produced medical reports from Dr. Talbot ("Talbot"), the prosecutor's medical expert who examined the victims. N.T. 2/14/79 at 23. When Salazar complained that the reports were "written in medical language and penmanship," the court advised him that he could contact Talbot. Id. Petitioner argues that Salazar did not contact Talbot and should not have relied on Talbot's statements since she was a prosecution witness. Malcolm Gross ("Gross") was added as Petitioner's co-counsel just prior to trial. N.T. 3/26/79 at 2. During Talbot's direct examination, Gross told the trial court that he did not have a copy of the medical records Talbot was using during her examination. N.T. 3/28/79 at 248. Petitioner argues that Salazar was ineffective for failing to provide Gross with a copy of the medical records.

With respect to Talbot's testimony, Petitioner argues that appellate and post-conviction counsel failed to argue that Talbot perjured herself by not testifying that Schoffield was seven months pregnant at the time of the rape, and testifying falsely that Schoffield tested positive for sperm following the rape and that

she could not determine whether Allender engaged in intercourse.

The Superior Court rejected Petitioner's arguments. Ross, 1908 EDA 1999, at 4. With respect to the use of the medical records, the court determined that Petitioner failed to demonstrate prejudice arising from his counsel's reliance on the Commonwealth's medical records. Id. With respect to Talbot's alleged perjury, the court noted that she was never asked about the victim's pregnancy and had no obligation to volunteer the information, and that Talbot's testimony about the lack of evidence of intercourse for Allender was not shown to be probative or incorrect at trial. Id. The court held that because the alleged errors were meritless, appellate and post-conviction counsel were not ineffective for failing to raise them. Id.

The standard for determining ineffective assistance of counsel was clearly established in Strickland v. Washington, 466 U.S. 668, 687 (1984). See Williams v. Taylor, 529 U.S. 362, 391 (2000). Strickland requires proof that counsel's performance was deficient and the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. To establish ineffectiveness, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 688. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Id. at 687. To establish prejudice, the defendant "must show that there is

a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

The Court concludes that the state court decision comports with clearly established federal law. At the threshold, there is no evidence that Salazar failed to read or investigate the medical reports. Most importantly, Petitioner cannot show prejudice from either his reliance on the Commonwealth's medical reports or failure to provide Gross with a copy of the reports. Gross cross-examined Talbot extensively on her medical conclusions and produced testimony that supported Petitioner's defense. Gross established that Talbot could not determine whether intercourse had occurred with Allender or whether such intercourse was forced or consensual, that the sperm found in Allender could have been ejaculated up to five days prior to the examination,<sup>5</sup> and that some of Allender's injuries could have been inflicted up to two days prior to the examination. See N.T. 3/28/79 at 269, 272, 275. As the Report points out, Petitioner does not demonstrate that outside medical specialists would have testified to any facts or opinions that would have been beneficial to the defense or would have controverted any of Talbot's testimony.

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<sup>5</sup>Talbot found one dead sperm when examining Allender. N.T. 3/28/79 at 253, 260.

Furthermore, there is no evidence of any perjury by Talbot. Talbot was never asked on direct examination about Schoffield's pregnancy. Assuming the trial court would have permitted defense counsel broach the subject on cross-examination, Petitioner can prove no prejudice from any failure to ask about Schoffield's pregnancy since her pregnant status is irrelevant to whether she was sexually assaulted. Petitioner has not shown Talbot's testimony about the lack of evidence of intercourse to be false. As the state trial court noted, the lack of evidence of intercourse has no probative value since Petitioner admitted having intercourse with Allender. The existence of evidence of intercourse would not be relevant to the defense of consent that Petitioner raised with respect to Allender. Since these claims are without merit, the state court's rejection of his ineffective assistance of counsel claim was neither contrary to nor an unreasonable application of Strickland.

C. Claim Two

Claim Two alleges that the prosecutor deliberately concealed Schoffield's pregnancy at the time of the rape and knowingly elicited false testimony from Schoffield and Allender that Petitioner engaged in intercourse with them. The state court did not address this claim, finding it waived under 42 Pa. Cons. Stat. § 9544(b). The Court determines that Petitioner's contentions are without merit.

Petitioner cites four instances in which he believes the prosecutor elicited false testimony or otherwise presented false evidence to the court. Petitioner argues that the prosecutor's offer of proof with respect to Talbot's testimony was false:

My offer of proof on the doctor will be [that] she'll testify to both the physical examination, as well as the testing, done of the victims, both victims. She examined both victims. . . .

In Roseann Schoffield, motile sperm; in Katherine Allender, no motile sperm. Just means he didn't ejaculate. That's consistent with her. High acid phosphatase level with Roseann Schoffield. The conclusion is consistent with intercourse within the past two to four hours. . . .

As to Katherine Allender there is no ejaculation, so there is no conclusion. But there is evidence by redness of the vulva.

N.T. 3/28/79 at 237-238. This offer of proof, however, is consistent with Talbot's subsequent testimony. See id. at 249-51, 253-54, 259-60.

Petitioner next argues that the prosecutor elicited false testimony from Talbot about the results of her medical examination, from Schoffield about the fact that intercourse with Petitioner occurred, and from Allender that she was unsure if Petitioner ejaculated. Essentially, Petitioner denies that Schoffield tested positive for sperm and contends that ejaculation occurred with Allender but presents no support for his bald assertions.

Third, Petitioner argues that the prosecutor concealed exculpatory information that Schoffield was seven months pregnant at the time of the rape. In Brady, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." Brady v. Maryland, 373 U.S. 83, 87 (1963). Brady requires disclosure by the government of evidence that is both exculpatory and material. Id.; Hollman v. Wilson, 158 F.3d 177, 180 (3d Cir. 1998). Exculpatory evidence includes material that goes to the heart of the defendant's guilt or innocence as well as that which might well alter the jury's judgment of the credibility of a crucial prosecution witness. Giglio v. United States, 405 U.S. 150, 154 (1972); United States v. Starusko, 729 F.2d 256, 260 (3d Cir. 1984). If the exculpatory evidence is material where it creates a reasonable doubt as to the defendant's culpability. Starusko, 729 F.2d at 260 (citing United State v. Agurs, 427 U.S. 97, 112 (1976)). Information about Schoffield's alleged pregnancy is not exculpatory because it is unrelated to the defendant's guilt or innocence in the rape charges, or material because it does not create reasonable doubt about the defendant's culpability.

D. Claim Three

Claim Three alleges that the trial court's comments to the jury during the jury charge created a mandatory presumption of

Petitioner's guilt. Petitioner objects to the following italicized statements:

Now it is the position of the Defendant that he's entitled to a verdict in his favor. In this regard, the Defendant took the stand and testified that he did not hit or rape either woman in either of these cases. I think it fair to say that if you accept the Defendant's testimony and if you find it credible, that he is clearly entitled to a verdict of not guilty in both cases.

The Defendant argues more, however. Defendant contends that even if you are not fully prepared to accept his story that the Defendant is still entitled to a verdict in his favor on the basis that the Commonwealth has failed to prove the allegations of either case beyond a reasonable doubt.

In this regard, the Defendant does not attack the integrity of Roseann Schoffield, conceding that she was, in fact, raped and robbed. And in my opinion, I would say to you - and here I am giving you my opinion, which you are free to reject - that in my opinion if you find Roseann Schoffield's testimony credible that clearly she was raped and robbed within the meaning of the statutes. The Defendant does not attack the integrity of Roseann in this regard. Rather the Defendant contends that because of the horror of what happened to her that Miss Schoffield could very well be mistaken in her identification. The Defendant argues that Roseann's description and identification from photographs and otherwise is insufficient proof. . . .

With respect to Katherine Allender - and again in this case the Defendant is attacking the credibility of the witness. But I would say that in the opinion of this Court - again, you are fully free to disregard that - if you were to accept Katherine Allender's testimony as credible, in the opinion of the Court the

offense of rape has been made out. However, the Defendant in this case attacks the credibility of Katherine Allender and argues that whatever happened on that night in question, that it happened with the consent of the witness and that, therefore, there is no rape. . . .

The Commonwealth further argues that the alibi witnesses presented by the Defendant do not necessarily have to be lying, that only Sol Maria and Janice are really true alibi witness[es], and that all of them could easily be mistaken as to the night in question because of the passage of time.

N.T. 3/29/79 at 561-63.

The state court rejected Petitioner's argument under Pennsylvania law because the trial court stated that he was only giving his opinion and the jury was free to reach its own conclusions.<sup>6</sup> Ross, No. 1908 EDA 1999, at 5. This factual determination is reasonable and amply supported by the record. The trial judge did not express an opinion as to the ultimate credibility of the witnesses or the Petitioner. He merely said that if the jury found the witnesses credible, then he thought their testimony would satisfy the legal elements. The trial judge treated all witnesses, including the Petitioner, equally since he

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<sup>6</sup>Although the state court based its conclusions solely on state law, Petitioner argued that the instructions represented structural constitutional error, citing United States Supreme Court caselaw. Accordingly, this claim was properly exhausted because Petitioner presented the legal substance of Claim Three in a manner that placed the state court on notice that a federal claim was being asserted. See McCandless v. Vaughn, 173 F.3d 255, 261 (3d Cir. 1999).

gave a similar instruction with respect to Petitioner's testimony: "I think it fair to say that if you accept the Defendant's testimony and if you find it credible, that he is clearly entitled to a verdict of not guilty in both cases." N.T. 3/29/79 at 561. The trial court repeatedly charged the jury that it has the ultimate discretion to determine credibility and the facts of the case. See id. at 546, 549, 561-63, 564. Accordingly, the state court's factual determination is not unreasonable in light of the available record.

Neither party identifies the United States Supreme Court precedent that should be applied to this claim. Pursuant to § 2254(d), the Court may not test Petitioner's claim against the Pennsylvania cases that both sides cite in support of their arguments. The Court can find no Supreme Court precedent that clearly addresses the issue of the expression of a personal opinion by the trial judge in jury instructions.

In Carella v. California, 491 U.S. 263 (1989), the United State Supreme Court held that jury instructions that relieve the state of the burden of proving the defendant's guilty beyond a reasonable doubt violate the Fourteenth Amendment's due process clause.<sup>7</sup> Id. at 265. The court held that "courts should ask whether

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<sup>7</sup>This case had not been issued at the time Petitioner's conviction became final. Petitioner's conviction became final on April 25, 1998, when the Pennsylvania Supreme Court denied allocatur on his nunc pro tunc appeal. However, Carella likely represents an old rule under Teague because its holding was

the presumption in question is mandatory, that is, whether the specific instruction, both alone and in the context of the overall charge, could have been understood by reasonable jurors to require them to find the presumed fact if the State proves certain predicate facts." Id. The state court's decision with respect to the jury instructions in Petitioner's case was not contrary to Carella because the court found that the trial judge's comments did not create a mandatory presumption based on the instruction and its context in the overall charge. Nor was the court's decision an unreasonable application of Carella for the reasons stated above with respect to the reasonability of the court's factual determination.

The Report considers Quercia v. United States, 289 U.S. 466 (1933), but declared it inapplicable to Petitioner's case. Report at 36 n.22. The Court agrees that Quercia is not applicable in this case. Quercia stated that during the course of jury instructions, the trial court may "assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important, and he may express his opinion upon the facts, provided

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dictated by a long line of prior cases. See Francis v. Franklin, 471 U.S. 307, 313 (1985); Sandstrom v. Montana, 442 U.S. 510, 524 (1979); United States v. United States Gypsum Co., 438 U.S. 422, 446 (1978). Thus, it was clearly established for the purposes of § 2254(d)(1). See Williams v. Taylor, 529 U.S. 362, 412 (2000).

he makes it clear to the jury that all matters of fact are submitted to their determination." Quercia, 289 U.S. at 469. The court then held that the trial judge had exceeded the scope of his discretion by characterizing the manner of the defendant's testimony and stating his belief that the defendant's mannerisms indicated deceit. Id. at 472. The Quercia court, however, did not reference any specific constitutional provision supporting its holding, but rather invoked its supervisory power. Id. at 469. Because federal courts lack general supervisory power over state court judges, Quercia cannot be used to satisfy the § 2254(d)(1) contrary to prong. See Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974) (stating habeas review does not encompass supervisory power, but only those errors that constitute a "failure to observe that fundamental fairness essential to the very concept of justice"). The Quercia standard also cannot be used as the test for objectively reasonable judicial behavior under the Fourteenth Amendment because it did not clearly establish the principle of permissible judicial behavior under the Fourteenth Amendment or in a way that is applicable to state courts. See Quercia, 289 U.S. at 469; Cupp v. Naughten, 414 U.S. 141, 146 (1973); Vasquez v. Di Paolo, No.Civ.96-12261-PBS, 1998 WL 428012, at \*10 (D. Mass. July 23, 1998); see also Williams, 529 U.S. at 412 (stating that 'clearly established federal law' refers to the "holdings, as opposed to the dicta" of the Supreme Court's decisions as of the

time of the relevant state-court decision).

E. Claim Four

Petitioner asserts that his direct appeal was obstructed by government officials. Petitioner believes that the Court of Common Pleas obstructed his appeal by dismissing his supplemental memorandum filed on August 14, 1980, and his motion for a new trial without ruling on the merits of his Brady claim. Petitioner raised the Brady claim for the first time in his supplemental memorandum filed in connection with his motion for a new trial. The court dismissed his supplemental memorandum as untimely filed and refused to address any of the new claims raised therein on procedural grounds.

The state court rejected Petitioner's arguments, finding no support for Petitioner's allegations that the court obstructed his appeal:

Next, Appellant alleges that his equal protection rights were violated because his appeal rights were improperly obstructed. Like the ineffective assistance claims, this allegation involves defense counsel's knowledge of Dr. Talbot's testimony. Appellant claims that a **Brady** violation occurred and asserts that he should have been granted relief as a result. The trial court found no basis for this allegation. We note that Appellant was appointed counsel to assist him at each stage of the case, and all of Appellant's issues were ruled on by the appropriate appellate courts. The correctness of any of these rulings could have been challenged on appeal. Appellant's general allegation of an obstruction of his rights has no merit.

Ross, 1908 EDA 1999, at 6.

The Court has not found any United States Supreme Court precedent that deals with the issue of judicial obstruction of claims. As a general principle, a state's appeal procedures must comport with the United States Constitution. Evitts, 469 U.S. at 393. Due process requires that a right to appeal be a right to an "adequate and effective appeal" which is "more than a meaningless ritual." Id. at 393, 394 (quoting Griffin v. Illinois, 351 U.S. 12, 18 (1956) and Douglas v. California, 372 U.S. 353, 358 (1963)). Due process further protects not only the right "to obtain a favorable decision," but also the right "to obtain a decision at all ... on the merits of the case." Id. at 395 n. 6. Evitts primarily addressed the question of "whether the Due Process Clause of the Fourteenth Amendment guarantees the criminal defendant the effective assistance of counsel on such an appeal." Id. at 388-89. The statements cited by the Report were dicta, not the general holding of Evitts and as such cannot constitute the clearly established law against which the state court determination is tested. See Williams, 529 U.S. at 412. Because there is no clearly established federal law against which to test the state court's determination, habeas relief could not be granted pursuant to § 2254(d)(1).

Thus, the only avenue available for relief is pursuant to § 2254(d)(2). The Court determines that the state court determination

was reasonable in light of the record because there is no evidence of any intentional obstruction of Petitioner's appeal. Petitioner untimely raised his Brady claim in a memorandum filed forty days late. Furthermore, state rules required all claims for relief be brought in the original motion. The supplemental memorandum was limited to rebuttal argument. Accordingly, Petitioner is not entitled to relief on Claim Four.

F. Claim Five

In Claim Five, Petitioner seeks a new trial based on allegedly new evidence that Schoffield was pregnant at the time of her rape and that Allender had tested positive for sperm. The state court rejected this claim because Schoffield's pregnancy was not newly-discovered. Ross, 1908 EDA 1999, at 6. The court determined that Petitioner's appellate counsel knew of Schoffield's pregnancy at the time he filed post-trial motions. Id. The court further concluded that Petitioner failed to demonstrate how the availability of the evidence at trial would have changed the trial's outcome. Id.

Claims of actual innocence based on newly discovered evidence do not state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. Herrera v. Collins, 506 U.S. 390, 400 (1993) (citing Townsend v. Sain, 372 U.S. 293, 317 (1963)). This rule is grounded in the principle that federal habeas courts sit to

ensure that individuals are not imprisoned in violation of the Constitution, and not to correct errors of fact or relitigate state trials. Id. (citations omitted). The independent constitutional violation that Petitioner alleges is stated in Claim Two, alleging prosecutorial misconduct in concealing evidence of Schoffield's pregnancy and eliciting allegedly false testimony of the presence of sperm in Allender. The Court, however, has already concluded that Claim Two is without merit. Accordingly, Petitioner is not entitled to habeas relief on Claim Five.

G. Claim Six

Claim Six alleges that the Commonwealth destroyed the victims' medical records in bad faith. The Commonwealth states that Petitioner's argument is misplaced, and is directed not at medical reports, but semen samples. It is not clear from Petitioner's submissions whether he is referring solely to the records or physical medical evidence. The record does not contain the transcripts of the PCRA hearing at which Petitioner claims the Commonwealth admitted to destroying the evidence. The state courts did not address this claim, finding it waived under state procedural rules.

When potentially exculpatory evidence is destroyed a due process violation will be found only upon a showing of bad faith. Arizona v. Youngblood, 488 U.S. 51, 58 (1988). The record contains no evidence that any evidence was destroyed. Assuming that both

medical records and physical evidence were destroyed, Petitioner presents no supporting evidence of bad faith. To the extent that Petitioner is arguing bad faith destruction of the medical records based on the Commonwealth's representation in 1981 that it intended to preserve the records, bad faith based on their subsequent destruction cannot be inferred because the Commonwealth knew that Petitioner's counsel had copies of the medical reports. Furthermore, since his counsel had copies of the medical records, destruction of the originals by the Commonwealth would not result in any prejudice to Petitioner. For these reasons, the Court rejects Claim Six.

#### H. Claim Seven

Claim Seven asserts that the trial judge had a close relationship with Allender at the time of Petitioner's trial. Petitioner fails to specify the nature of the alleged relationship or submit a supporting affidavit. The Commonwealth denies the existence of any relationship.

The Due Process Clause mandates a trial before a judge with no actual bias against the defendant or interest in the outcome of his particular case. Bracy v. Gramley, 520 U.S. 899, 904-5 (1997) (citing Withrow v. Larkin, 421 U.S. 35, 46 (1975), Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821-22 (1986), and Tumey v. Ohio, 273 U.S. 510, 523 (1927)). Generally, a habeas petitioner seeking reversal of his conviction on due process grounds because of the

trial judge's alleged bias must demonstrate that the judge was actually biased or prejudiced against the petitioner. See Dyas v. Lockhart, 705 F.2d 993, 996 (1983) (citing Corbett v. Bordenkirder, 615 F.2d 722, 723-24 (6th Cir. 1980) and Brinlee v. Crisp, 608 F.2d 839, 852-53 (10th Cir. 1979)). Not only does Petitioner provide no evidence of the relationship, i.e. the source of the alleged bias, Petitioner points to no evidence of actual bias and no such evidence is reflected in the record. Accordingly, the Court rejects Claim Seven.

### **III. CONCLUSION**

In summary, the Court adopts the Report in part to the extent that it is consistent with this Memorandum, overrules Petitioner's Objections and denies the Petition. Because Petitioner fails to demonstrate a substantial showing of the denial of a constitutional right with respect to any of the claims alleged, the Court declines to issue a certificate of appealability. An appropriate Order follows.