

Superior Court on October 24, 1989, raising four issues.¹ On June 26, 1990, the Pennsylvania Superior Court affirmed the findings of the trial court in an unpublished opinion. On February 5, 1991, the Pennsylvania Supreme Court denied allocatur.

On January 12, 1993, Petitioner filed a motion ("First PCRA Motion") pursuant to the Pennsylvania Post-Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541. While his First PCRA Motion was pending, Petitioner filed petition for Writ of Habeas Corpus with this Court on February 24, 1993. Due to this habeas proceeding, the PCRA court dismissed Petitioner's First PCRA Motion without prejudice on March 18, 1993. On July 15, 1993, this Court dismissed the habeas petition for failure to exhaust state remedies.

Petitioner filed a new PCRA Motion ("Second PCRA Motion") on August 3, 1993, which was amended to include three claims of prosecutorial misconduct and six claims of ineffective assistance of counsel.² The PCRA Court appointed Paul Hetznecker, Esquire, to

¹These issues included: (1) whether trial counsel was ineffective for choosing not to present alibi witnesses; (2) whether the trial court erred in not granting the pre-trial motion to suppress evidence of the photographic identification; (3) whether the trial court erred in refusing to grant a mistrial when a witness referred to the Petitioner's nickname "Blood"; and (4) whether the trial court erred under Commonwealth v. Kloiber, 106 A.2d 820 (Pa. 1954), for failing to give a cautionary warning in the jury instructions about weak identification evidence.

²These claims included: (1) did the prosecutor commit misconduct by implying to the jury that Petitioner did not have character evidence available and that the Petitioner may have a

represent Petitioner and held a lengthy evidentiary hearing. On August 6, 1997, Petitioner was denied relief.

Petitioner timely appealed to the Superior Court, raising two new issues: (1) whether the trial court denied Petitioner an impartial evidentiary hearing on his post-conviction claims; and (2) whether the case should be remanded for an evidentiary hearing for further exculpatory evidence. Petitioner also raised eight issues similar to those raised in his Second PCRA Motion.³ The

prior criminal record; (2) did the prosecutor commit misconduct by eliciting hearsay testimony to prove Petitioner's motive for the killing; (3) did the prosecutor fail to disclose a witness' statement to trial counsel that constituted misconduct, thereby denying Petitioner a fair trial; (4) did trial counsel fail to present character testimony; (5) did trial counsel fail to present alibi witnesses during the trial; (6) did trial counsel fail to withdraw the alibi defense after learning that there were problems with that defense; (7) did trial counsel fail to object to hearsay evidence or file a motion in limine to exclude it; (8) did trial counsel fail to present the testimony of a defense investigator to rebut the testimony of the eyewitnesses; and (9) did appellate counsel fail to challenge trial counsel's ineffectiveness for the issues set forth above.

³These claims alleged that: (1) the prosecutor committed misconduct by implying to the jury that Petitioner did not have character evidence and by suggesting that the jury consider the possibility that he had committed crimes in other jurisdictions; (2) the prosecutor committed misconduct by eliciting alleged hearsay testimony; (3) the prosecutor committed misconduct by failing to disclose a witness statement prior to trial; (4) appellant counsel was ineffective for not alleging on appeal that trial counsel was ineffective for not presenting character evidence at trial; (5) trial counsel was ineffective for telling the jury that he would present alibi witnesses, but then failing to produce any such testimony at trial; (6) appellate counsel was ineffective for failing to allege trial counsel's ineffectiveness for failing to withdraw the alibi defense prior to trial, knowing the defense was problematic; (7) appellate counsel rendered ineffective assistance of counsel for choosing not to assert trial counsel's

appeal was denied on July 13, 1998. On December 30, 1998, the Pennsylvania Supreme Court denied allocatur.

On December 20, 1999, Petitioner filed the instant Petition pursuant to 28 U.S.C. § 2254. Shortly thereafter, Samuel C. Stretton entered his appearance on Petitioner's behalf and on June 14, 2000, filed an amended pleading, and on December 19, 2000, filed a supplemental pleading (along with the original Petition for Writ of Habeas Corpus, collectively known as the "Petition"). 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 Charles B. Smith ("Magistrate Judge") for a report and recommendation. On July 17, 2001, the Magistrate Judge filed a report and recommendation ("Report") recommending that the Petition be denied in all respects. Petitioner filed timely objections to the Report in its entirety. In accordance with 28 U.S.C. § 636(b), the Court will conduct a de novo determination of the issues raised.⁴

ineffectiveness concerning the introduction of hearsay evidence; and (8) trial counsel was ineffective for not calling the defense investigator in rebuttal, and appellate counsel was ineffective for not litigating this issue on direct appeal.

⁴Where 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).

II. DISCUSSION

The Petition asserts nearly twenty issues, which the Magistrate Judge summarized in the following eight categories:

(1) the trial court erred in not granting a mistrial when the Commonwealth witness said Petitioner's nickname "Blood" was given to him because of his stories "about bodies and other stuff," which purportedly referred to Petitioner killing other people;

(2) Trial counsel and counsel on direct appeal were ineffective for failure to present a defense which included alibi witnesses, and the defense investigator who would allegedly refute the prosecution's eyewitness' statement that he was offered compensation if he refused to testify;

(3) The trial court erred in not charging the jury that the identification should be received with care and caution;

(4) (a) Trial counsel and counsel on direct appeal were ineffective for not presenting or preserving the issue as to character witnesses' testimony concerning Petitioner's reputation in the community; (b) the assistant District Attorney erred in implying Petitioner did not have character witnesses available and by implying Petitioner had a prior criminal record; (c) trial counsel and counsel on direct appeal were ineffective for not objecting to or preserving the issue in 4(b);

(5)(a) The prosecution erred in eliciting purportedly impermissible hearsay testimony from witnesses as to what the decedent said about Petitioner and the decedent's comments on motives for the crime; (b) trial counsel and counsel on direct appeal were ineffective for not objecting and preserving the issue in 5(a);

(6)(a) The prosecution failed to properly disclose a witness statement to trial counsel prior to trial, thereby denying Petitioner a fair trial; (b) trial counsel and appellate counsel were ineffective for not objecting or preserving the issue in 6(a);

(7) Trial counsel was ineffective for not calling two police witnesses who could have refuted the testimony of

Mr. Presley; direct appellate counsel and PCRA counsel erred and were ineffective for not properly preserving this issue;

(8) The assistant district attorney erred on commenting on Petitioner's failure to testify and present a defense and further erred in misleading the jury on Mr. Presley's prior record; trial counsel, appellate counsel, and PCRA counsel were ineffective for not objecting or preserving these issues.

The Magistrate Judge recommended denying the Petition in its entirety. He concluded that some claims were procedurally defaulted, and that the remaining claims should be denied on the merits.

Petitioner objects to the entire Report. First, Petitioner objects to the finding of procedural default, maintaining that the Magistrate Judge erred in finding that: (1) some claims were defaulted because they were not raised on the state level; (2) Petitioner had not properly raised the claim of "actual innocence;" and (3) Petitioner had not made a showing of "cause and prejudice" to excuse the procedural default. Petitioner further argues that the Magistrate Judge erred in concluding that: (1) there was no alleged error in the trial court's failure to grant a mistrial in light of references at trial to Petitioner's nickname "Blood"; (2) counsel was not ineffective for failing to call alibi and other witnesses; (3) the trial court did not err by failing to give the jury special cautionary instructions; and (4) counsel was not ineffective for failing to object to the prosecutor's use of

hearsay testimony. For the following reasons, the Court overrules Petitioner's objections.

A. Procedural Default

Ordinarily, before a federal district court may entertain a petition for writ of habeas corpus, the petitioner must exhaust his or her remedies in state court. See Carter v. Vaughn, 62 F.3d 591, 594 (3d Cir. 1995). In order to exhaust the available state court remedies on a claim, 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. See 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, 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. See McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999). A petitioner who has raised an issue on direct appeal need not raise it again in state post-conviction proceedings. See 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. See 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. See Lines v. Larkins,

208 F.3d 153, 159 (3d Cir. 2000). “[I]f [a] petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred . . . there is procedural default for the purpose of federal habeas” Coleman v. Thompson, 501 U.S. 722, 735 n.1, reh’g denied, 501 U.S. 1277 (1991); McCandless, 172 F.3d at 260. Procedural default bars federal review of those claims precluded by state law. Coleman, 501 U.S. at 729.

Petitioner’s claims numbers 4(c), 7 and 8 were never raised before and are therefore unexhausted. See O’Sullivan v. Boerckel, 526 U.S. at 847-48; Henderson v. Frank, 155 F.3d at 164. Petitioner cannot return to the state courts to file a successive PCRA petition on his unexhausted claims, however, because the one-year statute of limitations for such motions has passed. See 42 Pa. Cons. Stat. § 9545(b)(1) (West 1998)⁵. Petitioner’s judgment became

⁵The Section provides, in pertinent part:

Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and petitioner proves that:

(i) the failure to raise such a claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of Pennsylvania

final on March 30, 1999, ninety days after the Pennsylvania Supreme court denied allocatur. Petitioner had a year from that date to raise any additional claims in a PCRA petition. Consequently, any attempt to file for relief in the state courts would be beyond the one-year statute of limitations. Moreover, Petitioner has not alleged, nor would the state court likely find, that any of the three exceptions set forth in the statute apply.

Under PCRA, procedural default can also occur through waiver. A claim is waived if "the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state post-conviction proceeding." 42 U.S.C.A. § 9544(b) (West 1998); see also Commonwealth v. Rollins, 738 A.2d 435, 440-41 (Pa. 1999) (issues of prosecutorial misconduct which were not raised on direct appeal were waived).

In this case Petitioner's claims numbers 4(a), 4(b), 5(a), and 6(a) are waived.⁶ Petitioner raised these prosecutorial misconduct issues for the first time in his Second PCRA Motion. As the

after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa. Cons. Stat. § 9545(b)(1) (West 1998).

⁶The Magistrate Judge concluded that claim number 4(a) had never been raised, and was therefore unexhausted. Petitioner objected, arguing that this claim had been raised at his PCRA Hearing. In this instance, whether the claim is unexhausted or waived, it is procedurally defaulted and federal habeas review is precluded.

Pennsylvania Superior Court found, since Petitioner "failed to raise any issue of [the prosecutorial misconduct claims at issue] during trial, on direct appeal, or in any collateral proceedings, they are waived under the PCRA." Commonwealth v. Swainson, 1843 slip op. at 2 n.3 (Pa. Super. Ct. July 13, 1998)(citing 42 Pa. Cons. Stat. § 9544(b)).

The Court may excuse procedural default and consider a claim on the merits, however, if the petitioner can "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750; see also McCandless, 172 F.2d at 260. The Magistrate Judge concluded that Petitioner failed to demonstrate cause and actual prejudice or a fundamental miscarriage of justice because of actual innocence. Petitioner objects, arguing that he has indeed established both bases for excusing procedural default.

In this case, Petitioner has failed to establish cause for the procedural default.⁷ A demonstration of cause sufficient to survive dismissal "must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." Caswell v. Ryan, 953 F.2d 853, 862 (3d Cir.), cert. denied, 504

⁷Because the Court determines that Petitioner has failed to establish cause, it need not address the issue of whether Petitioner established prejudice.

U.S. 944 (1992) (citation omitted). Petitioner asserts that the procedural infirmities of his claims were caused by counsels' failure to object to or properly preserve the underlying issues. Error by counsel may constitute cause for procedural default if the error is also constitutionally ineffective under the standard set forth by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). See Carrier, 477 U.S. at 488. However, procedurally defaulted claims cannot be asserted as "cause" for not having complied with state procedural rules. Edwards v. Carpenter, 529 U.S. 446, 452-52, 456 (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."). Moreover, ineffectiveness of post-conviction counsel normally cannot constitute cause to excuse procedural default in a federal habeas petition. Coleman, 501 U.S. at 757. Because Petitioner's ineffective assistance of counsel claims 4(a), 4(c), 6(b) and 7 have been procedurally defaulted, they cannot be considered as establishing cause. Petitioner also fails to set forth any other evidence independent of his procedurally defaulted ineffectiveness claims to show cause and his claim for ineffective assistance of appellate counsel does not constitute cause.

The Magistrate Judge also concluded that Petitioner has not even alleged, let alone proven, actual innocence, and therefore did not establish a fundamental miscarriage of justice. Under

fundamental miscarriage of justice, a petitioner must "establish that under the probative evidence he has a colorable claim of actual innocence." Murray v. Carrier, 477 U.S. at 495. The habeas petitioner must 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 Carrier, 477 U.S. at 496). To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence. Id. Petitioner must "support his allegation of constitutional error with new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts or critical physical evidence - that was not presented at trial." Id. at 324. The Magistrate Judge concluded that Petitioner has not offered any new evidence that Petitioner did not commit the crime. Petitioner objects and claims that his testimony at the PCRA Hearing is filled with evidence that he did not commit the crime. Petitioner argues that he testified at the PCRA Hearing that he had alibi witnesses who would demonstrate that he did not commit the crime, that he had character witnesses, and that two police officers, Officer Kay and Officer Peay, one of who testified at the PCRA Hearing, would have directly contradicted what the prosecutions' witnesses said, but they were never called

at trial.⁸ Petitioner, however, contradicts himself with this objection: Petitioner argues that he testified at the PCRA Hearing

⁸ The post-trial opinion of the trial court describes the circumstances of the crime as follows:

On January 17, 1988, at approximately 3:40 a.m., the defendant, Andrew Swainson, shot and killed Stanley Opher with a sawed-off shotgun. Mr. Opher was running from the premises of 5413 Samson Street pursued by the defendant who shot him on the porch steps. Mr. Swainson then noticed Paul Presley on the porch and yelled into the house whereby another male appeared on the porch carrying a boltaction shotgun. After a brief skirmish with Presley, both men ran from the house in opposite directions.

On January 22, 1988, the defendant and another unidentified male were arrested for allegedly driving a stolen car. They were taken to the Police Administration Building The defendant was then informed that he was going to be questioned concerning the shooting death of Stanely [sic] Opher. . . . He then gave [a]n exculpatory statement in the shooting death of Stanley Opher. The defendant was then informed that he was not going to be arrested [Defendant agreed to be fingerprinted and photographed to be kept in a file during the homicide investigation]. On February 12, 1988, [P]aul Presley was shown a photo spread and he identified the photo of defendant, Andrew Swainson, as the man who shot Stanley Opher. . . .

Trial Opinion, Sabo, J. at 1-3. According to trial counsel's testimony at the PCRA Hearing about the officers' police reports, Officer Kay, who was within a short distance of 5413 Samson Street where the homicide occurred, saw two individuals (not Petitioner) crossing from the side of 5413 to the other side of the street and running down the street. The Officer stopped both individuals. (One of these individuals, Paul Presley, the prosecutor's eyewitness, was subsequently charged with aggravated assault in the shooting of the decedent in this case). Officer Kay also had indicated that Presley's hand was bleeding and that Presley told the Officer that he had been shot with a shotgun and that the bleeding resulted from a shotgun pellet. (At the PCRA Hearing, trial counsel asserted strategic reasons for not calling these officers during trial.)

that he wanted the officers' testimony presented and that he did not learn of the officers' testimony until after trial. In fact, Petitioner was aware of the officers' potential testimony before trial, but his counsel did not call these witnesses - Petitioner consented to not calling these witnesses. (N.T. 1/14/97 (PCRA Hearing), at 94-101). Therefore, this is not new evidence available after trial demonstrating Petitioner's actual innocence. Moreover, this evidence, even if new, when considered with the evidence offered by the Commonwealth falls short of establishing that it is more likely than not that no reasonable juror would have convicted him. Because Petitioner has not shown cause and prejudice or a miscarriage of justice, the Court will not consider the merits of the procedurally defaulted claims.

B. The Remaining Claims On the Merits

Section 2254 of Title 28 of the United States Code 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 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. 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 State court shall not be granted with

respect to any claim that was adjudicated on the merits in State court proceedings unless that 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." U.S.C.A. § 2254(d)(1) (West 2001). This phrase refers to the "holdings, as opposed to the dicta" of the United States Supreme Court's decisions as of the time of the relevant state court decision. Williams v. Taylor, 529 U.S. 362, 412 (2000).

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. See 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. See 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. See 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. See 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. See 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. See Williams, 529 U.S. at 407. A state court determination also may be set aside under this standard if the court fails to extend a 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. See 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. See Williams, 529 U.S. at 409; Werts, 228 F.3d at 197. A federal court cannot grant habeas relief 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. See 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. See 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. See 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 also Weaver v. Bowersox, 241 F.3d 1024, 1030 (8th Cir. 2001); Watson v. Artuz, 99 Civ. 1364 (SAS), 1999 U.S. Dist. LEXIS 18383, 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, 1107-08 (9th Cir. 2000); see also Watson, 1999 U.S. Dist. LEXIS 18383, at *3. Mere disagreement with the state court's determination, or even erroneous fact-finding, is insufficient to grant relief if the court acted reasonably. Weaver, 241 F.3d at 1030.

The Court will consider each of Petitioner's remaining claims in turn.

1. Jury Charge

Petitioner argues that the Magistrate Judge erred in concluding that the trial court did not have to present a Kloiber standard of cautionary jury instruction with respect to identification evidence. In Commonwealth v. Kloiber, the Pennsylvania Supreme Court set forth the standard for instructing a jury with respect to identification evidence. The Court stated:

Where the opportunity for positive identification is good and the witness is positive in his identification and his identification is not weakened by prior failure to identify, but remains, even after cross examination, positive and unqualified, the testimony as to identification need not be received with caution - indeed

the cases say that 'his positive testimony as to identity may be treated as the statement of fact.'

106 A.2d 820, 826 (Pa. 1954) (citation omitted). The court provided for a cautionary warning, however, in jury instructions where:

the witness is not in a position to clearly observe the assailant, or he is not positive as to identity, or his positive statements as to identity are weakened by qualification or by failure to identify defendant on one or more prior occasions, the accuracy of the identification is so doubtful that the court should warn the jury that the testimony as to identity should be received with caution.

Id. at 826, 827.

At trial, Petitioner's counsel asked for a Kloiber charge, which was denied. The Magistrate correctly concluded that the issue was a state law issue, and therefore was not cognizable on habeas review. A Kloiber instruction is a matter of state law, as such it is not a valid basis for federal habeas review. See McCloskey v. Ryan, Civ. A.No.90-1478, 1991 U.S. Dist. LEXIS 11952, at *30 (E.D. Pa. Aug. 23, 1991) (citing Engle v. Isaac, 456 U.S. 107 (1982)). See also Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)(citations omitted)("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."). "The fact that [a jury] instruction was allegedly incorrect under state law is not a basis for habeas relief." Id. at 71-72.

In his objection, Petitioner argues that jury instruction error is within the province of federal habeas review, citing Buehl v. Vaughn, 166 F.3d 163 (3d Cir. 1999). Buehl v. Vaughn, however, is inapplicable. That case concerned whether counsel was constitutionally ineffective for failing to raise more explicit cautioning jury instructions, and not whether jury instructions themselves are the province of habeas review. See id. The objection is overruled.

2. Mistrial for allowing testimony regarding Petitioner's nickname

Petitioner objects to the Magistrate Judge's finding that the trial court correctly denied a motion for mistrial when a Commonwealth witness, Ms. Morsell, testified over objection that Petitioner's nickname "Blood" was given to him because "[h]e used to tell [the victim] and them stories about other bodies and stuff he is supposed to have - -." (N.T. 3/16/89, at 123). Defense counsel moved for mistrial. The motion was denied. Petitioner offers no new arguments or federal case law to contradict the Magistrate Judge's correct conclusion that the inclusion of the nickname and reference to it did not rise to a due process violation.

Petitioner argues that this comment was devastating, especially because defense counsel had already stated in his opening that Petitioner worked in a drug operation and that the decedent said that Petitioner was trigger happy. Petitioner argues

that although defense counsel later impeached Ms. Morsell's testimony⁹, the damage was already done. He further argues that this statement, coupled with a reference to "bodies"¹⁰ by the

⁹Defense counsel's impeachment of this witness included:

Defense counsel: Did [Petitioner] ever say anything to you about bodies or anything like that?

Ms. Morsell: No.

Defense Counsel: In fact, Dread [an associate of Petitioner] said something to you about bodies, didn't he?

Ms. Morsell: Once in awhile.

Defense counsel: Isn't Dread the one who was bragging about some bodies? Isn't that right? You have to answer yes or no.

Ms. Morsell: Yes.

Defense Counsel: Isn't that correct?

Ms. Morsell: Yes.

Defense Counsel: Now, you told that to the police, isn't that correct?

Ms. Morsell: Yes.

Defense Counsel: But when you were talking to the police and mentioning [Petitioner] you never, ever, to either of the detectives, said anything about [Petitioner] being connected with any bodies or the name Blood having to do with anything about bodies, did you?

Prosecution: Objection, Your Honor.

Ms. Morsell: No.

(N.T., 3/16/89, 135).

¹⁰The prosecutor stated: "There was testimony that [the victim] told Jackie Morsell that in fact Blood bragged about how many

prosecutor in her closing argument unduly prejudiced him by implying that he had previously murdered other people.

It is not the court's role on habeas review to decide whether a state trial judge's decision to admit evidence pursuant to state evidentiary rules was proper. See Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983). Violation of a state evidence rule does not constitute grounds for habeas corpus relief absent a due process violation. Engel v. Isaac, 456 U.S. 107, 119 (1982). "[A] federal court cannot disturb on due process grounds a state court's decision to admit prior bad acts evidence unless admission of the evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair." Johnston v. Love, 940 F. Supp. 738 (E.D. Pa. 1996) (quoting Walters v. Maas, 45 F.3d 1355, 1357 (9th Cir. 1995)). The improper admission of evidence of prior bad acts does not rise to the level of constitutional error if the trial judge later instructs the jury to disregard the evidence. See Scrivner v. Tansy, 68 F.3d 1234, 1239-40 (10th Cir. 1995); Warden v. Wyrick, 770 F.2d 112, 116 (8th Cir. 1985); McAfee v. Proconier, 761 F.2d 1124, 1127 (5th Cir. 1985). When the trial court has failed to instruct the jury to disregard the evidence, the federal habeas court must consider the record as a whole to determine whether the admission of the prior bad acts evidence resulted in fundamental

bodies he had." (N.T. 3/20/89, at 68).

unfairness. Smallwood v. Gibson, 191 F.3d 1257, 1277 (10th Cir. 1999).

On post-trial motions, the trial court determined that it did not err in failing to grant a mistrial because "defense counsel had the opportunity to cross-examine the witness on her knowledge of what defendant's nickname 'Blood' really meant and did question her extensively," and he presented another explanation for the witness' testimony and left her credibility for the jury to decide. Trial Opinion, Sabo, J. at 5-6. The trial court also faulted defense counsel for failing to request a curative jury instruction with respect to Ms. Morsell's testimony about Petitioner's nickname. Id. at 5. The Pennsylvania Superior Court affirmed, noting that "the remark was merely a passing reference and the Commonwealth ceased questioning after the objection," and that "defense counsel failed to ask for a curative instruction, which would have dispelled any improper inference."¹¹ Commonwealth v. Swainson, 02733 slip op. at 6 (Pa. Super. Ct. June 26, 1990).

¹¹The court makes a de novo determination because the state court did not address a due process violation in its determination of Petitioner's claim. See Hameen v. Delaware, 212 F.3d 226, 248 (3d Cir. 2000) ("Under the AEDPA the limitation on the granting of an application for a writ of habeas corpus is only with respect to any claim that was adjudicated on the merits in State court proceedings. Hence we exercise pre-AEDPA independent judgment on . . . [this] . . . claim.") (citations omitted). Under de novo review, the result is the same. Considering the record as a whole, the evidence does not rise to a due process violation.

The trial judge did not specifically instruct the jury to disregard the prior bad acts evidence in connection with Petitioner's alleged nickname. He did, however, instruct the jury: "At the very outset I want to say to you that the speeches of Counsel are not part of the evidence and you should not consider them as such," (N.T. 3/20/89, at 94), which addresses the prosecutor's reference to bad acts in her closing argument. Because the judge did not specifically instruct the jury about the prior bad act evidence, the Court must consider the record as a whole to determine whether the evidence rendered the trial unfair so as to violate Petitioner's constitutional due process rights.

The facts that defense counsel had an opportunity to and did impeach Ms. Morsell, that the trial judge instructed the jury regarding witness credibility and that counsel's speeches cannot be considered evidence, combined with the record as a whole, do not amount to fundamental unfairness. Accordingly, Petitioner's objection is overruled.

2. Ineffective Assistance of Counsel Claims

In Strickland v. Washington, 466 U.S. 668, reh'g denied, 467 U.S. 1267 (1984), the United States Supreme Court set forth a two-prong test for determining ineffective assistance of counsel. A defendant first must show that counsel's performance was so deficient that it fell below an objective standard of reasonableness under prevailing professional norms. Strickland, 466

U.S. 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. "In evaluating counsel's performance, [the Court is] 'highly deferential' and 'indulge[s] a strong presumption' that, under the circumstances, counsel's challenged actions 'might be considered sound . . . strategy.'" Buehl v. Vaughn, 166 F.3d 163, 169 (3d Cir. 1999) (quoting Strickland, 466 U.S. at 689). "Because counsel is afforded a wide range within which to make decisions without fear of judicial second-guessing, [] it is 'only the rare claim of ineffectiveness of counsel that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance.'" Id. (citing United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989)).

If a defendant shows that counsel's performance was deficient, he then must show that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. 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.

a. Failure to object and preserve the issue of prosecutorial misconduct in eliciting hearsay testimony

In his Petition, Petitioner asserts that trial counsel and counsel on direct appeal were ineffective for not properly objecting to and preserving the issue of prosecutorial misconduct in eliciting hearsay testimony. The testimony, given by Ms. Morsell, the girlfriend of the decedent, included numerous statements made by the decedent, most of which were made days before the decedent's death. Petitioner argued that this testimony,¹² which he alleges is only supported by hearsay statements, provided a motive argument for the prosecution.

Petitioner's claim is based on the state court's application of state hearsay law, and therefore is not subject to habeas review. See Estelle v. McGuire, 502 U.S. 62, 67, 68 (1991). On collateral review, the Pennsylvania Superior Court held that "appellant [Petitioner] fails to demonstrate how the admission of either witness's testimony created any prejudice. This claim fails on that basis alone [per] Commonwealth v. Paoletto, 665 A.2d 439, 454 (Pa. 1995)." Commonwealth v. Swainson, No. 1843 slip op. at 9

¹²This testimony includes Ms. Morsell recounting that the decedent had stated that Petitioner was "pistol happy" (N.T. 3/16/89, at 122), that Petitioner received his nickname "Blood" because of his stories about "bodies and other stuff" (N.T. 3/16/89, at 123, 124, 134), that Petitioner played a major role in the drug operation, and that the decedent was unpaid, unhappy, and was going to quit the operation. (N.T. 3/16/89, at 93-96, 103, 112).

(Pa. Super. Ct. July 13, 1998). The Pennsylvania Superior Court dismissed the claim solely under the state law principle that Petitioner failed to demonstrate how the admission of witness testimony could have possibly created prejudice. See, e.g., Paolletello, 665 A.2d 439.

Furthermore, federal law does not contradict this finding.¹³ The Sixth Amendment does not categorically forbid the admission of hearsay evidence against a defendant. See, e.g., Dutton v. Evans, 400 U.S. 74 (1970) (scope of the Confrontation Clause is not coextensive with the rule against admission of hearsay evidence). In Ohio v. Roberts, the United States Supreme Court set forth the applicable constitutional standards for determining whether a Sixth Amendment violation relating to hearsay evidence has occurred for habeas purposes:

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.

448 U.S. 56, 66 (1980). Here, the alleged hearsay testimony was originally stated by the decedent, who was obviously unavailable. Moreover, almost all of the hearsay evidence falls under the state

¹³The Court makes a de novo determination of the Sixth Amendment issue because the state courts did not address it under federal law. See Hameen v. Delaware, 212 F.3d 226, 248 (3d Cir. 2000).

of mind hearsay exception governed by Federal Rule of Evidence Rule 803(3). Accordingly, allowance of this testimony did not violate the Sixth Amendment. Counsel cannot be ineffective for failing to pursue meritless claims "since the result of the proceeding would not have been changed had these claims been pursued." Martinez v. Chesney, Civ.A.No. 97-6280, 1999 WL 722818, *4 (E.D. Pa. Sept. 15, 1999). Because trial counsel's objection to and appellate counsel's preservation of the issue of prosecutorial misconduct for eliciting this hearsay testimony would have been fruitless, counsel cannot be deemed ineffective for failing to raise these issues.

Moreover, trial counsel in fact did object throughout the alleged hearsay testimony at issue. Petitioner argues that trial counsel did not object, but offers no examples of such alleged hearsay statements to which trial counsel did not object. Trial counsel did fail, however, to timely object to the question as to how Petitioner received the nickname "Blood." This delay in objecting allowed Ms. Morsell to respond about the "bodies and other stuff." The trial judge denied trial counsel's motion for mistrial on the basis that trial counsel objected too late, but stated that trial counsel could cross-exam the witness about this statement. Trial counsel later cross-examined and impeached Ms. Morsell. Because trial counsel impeached Ms. Morsell, no prejudicial effect has been shown. Furthermore, because counsel did in fact object to the alleged hearsay statements, Petitioner cannot

claim his counsel was ineffective for failing to do something which in fact he did do. Petitioner's objection is overruled.

b. Failure to present a defense which included alibi witnesses and the defense investigator

In his Petition, Petitioner argues that trial counsel and counsel on direct appeal were ineffective for not including in Petitioner's defense the testimony of two alibi witnesses¹⁴ and the defense investigator.¹⁵ The Magistrate Judge correctly concluded that the state court determination that counsel was not constitutionally ineffective were not contrary to and did not involve an unreasonable application of clearly established United States Supreme Court precedent. In his objection, Petitioner alleges that counsel's conduct was particularly ineffective because trial counsel stated in his opening statement that he would present an alibi defense that the defendant was not present at the time of the crime. (N.T. 3/16/89, at 26). Instead, the defense rested immediately after the prosecution finished. Petitioner further argues that counsel was ineffective for failing to call the defense

¹⁴Petitioner argues that he would have called his girlfriend, Ms. Oldgen, who would have verified his whereabouts and testified that he was not at the house in question, and Tamaria Biskett, who would have verified the same. Petitioner fails, however, to offer any details whatsoever about the testimony these alibi witnesses would offer.

¹⁵Petitioner cites to trial counsel's statement at the PCRA Hearing that, as far as counsel knew, the defense investigator did not attempt to bribe the prosecution's eyewitness. (N.T. 1/14/97 (PCRA Hearing), at 29).

investigator who would have refuted eyewitness Mr. Presley's statement that he was offered compensation if he refused to testify.¹⁶ Trial counsel's strategy, however, was based on the idea that the Commonwealth failed to prove its case beyond a reasonable doubt. Petitioner argued that counsel for direct appeal was ineffective for not raising and properly preserving the issue with respect to the defense investigator on direct appeal.

Before the defense rested, the trial court permitted a detailed colloquy with Petitioner, in which Petitioner stated that: (1) his attorney had discussed with him whether he should rest his case without putting on a defense; (2) he was advised that the defense investigator and two witnesses were present to testify as alibi witnesses; (3) he knew that at that point in time defense could argue to the jury as to the sufficiency of the evidence; (4) he and his attorney discussed that they would not use the alibi witnesses; (5) he knew that counsel had been advised by the assistant district attorney that one of the alibi witnesses who had been subject to questioning prior to trial had some weaknesses in her testimony; (6) as a result of counsel and Petitioner's discussions, they would rest their case and would test the sufficiency of the evidence to prove guilt beyond a reasonable

¹⁶Mr. Presley testified that he met with the defense investigator and was promised he would be compensated in return for a statement that Petitioner did not commit the crime. (N.T. 3/17/89, at 30-32).

doubt; (7) Petitioner decided that he wanted to rest without putting on a defense; (8) no one forced Petitioner to do so; (9) he did so of his own free will; and (10) he was satisfied with counsel's representation up until that point.¹⁷ (N.T. 3/17/89, at 212-215). The trial judge then posed questions to ensure Petitioner's comprehension of the matter. At the end of the colloquy, the trial judge concluded, "I think we have put on the record sufficiently that this is his own free will, his own choice, he understands everything." (N.T. 3/17/89, at 216).

Trial counsel's ineffectiveness for not presenting alibi witnesses was first raised on direct appeal separate from the claim relating to the defense investigator. The Superior Court dismissed the claim:

Counsel's failure to interview and present all prospective witnesses is not per se ineffectiveness. Commonwealth v. Flanagan, 544 A.2d 1030 (Pa. 1988). In the instant case, appellant [Petitioner] has failed to identify the alibi witness nor has he set forth the material evidence the witness would have provided. Appellant's claim lacks arguable merit because we are unable to conclude that this evidence would have been helpful.

Commonwealth v. Swainson, No. 02733, slip op. at 2 (Pa. Super. Ct. June 26, 1990). The claim was separately raised on collateral

¹⁷Petitioner notes that at his PCRA Hearing, he indicated that at the time of trial, his English was not good and there were words he did not understand. The record reveals that Petitioner testified that what he did not understand was some of the legal terminology used and that he never asked for interpretations. The record also reveals that the legal bases were discussed with Petitioner and he consented to them all.

review and dismissed by the Superior Court as previously litigated and, alternatively, as deficient on the merits. Commonwealth v. Swainson, No. 1843, slip op. at 7-8 (Pa. Super. Ct. July 13, 1998).

Petitioner first raised the issue of ineffective assistance of counsel for failure to call the defense investigator on collateral review. This claim was dismissed essentially along the same line of reasoning as the alibi witness claim. As supporting evidence that the decision not to call the defense investigator was made ultimately and knowingly by Petitioner, the Superior Court on collateral review cited trial counsel's testimony from the PCRA Hearing. Commonwealth v. Swainson, No. 1843, slip op. at 10 (Pa. Super. Ct. July 13, 1998)(citing N.T. 1/14/97 (PCRA Hearing), at 86-87). Petitioner's derivative ineffectiveness claims for failing to preserve the issues were also rejected on collateral review since the underlying claims of trial counsel ineffectiveness were groundless. See id.

These rulings by the state courts are neither contrary to nor an unreasonable application of federal law. The trial court repeatedly noted that Petitioner had thoroughly discussed the consequences of his decision with his counsel and understood the effects. Trial counsel's strategy was based upon a calculated decision to pursue a rational defense strategy that was ultimately approved by Petitioner. Criticism of a strategy is not in itself sufficient to support a charge of inadequate representation. See

United States v. Narducci, Civ.A.No. 97-2813, 1998 WL 122235, at *2 (E.D. Pa. Mar. 9, 1998)) (citation omitted). This is particularly so "[w]here a defendant, fully informed of the reasonable options before him, agrees to follow a particular strategy at trial." United States v. Lively, 817 F. Supp. 453, 462 (D. Del. 1993) (quoting United States v. Weaver, 882 F.2d 1128, 1140 (7th Cir.), cert. denied, 493 U.S. 968 (1989)). Accordingly, Petitioner's objection regarding ineffective assistance of counsel is overruled.

III. CONCLUSION

Following a de novo review of the Petition and Report, the Court overrules all of Petitioner's objections, adopts the Magistrate Judge's Report to the extent that it is consistent with this Memorandum, and denies the Petition. An appropriate Order follows.

3. The Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 is **DENIED**;
4. As Petitioner has failed to make a substantial showing of the denial of a constitutional right, there is no basis for the issuance of a certificate of appealability under 28 U.S.C. § 2253(c)(2); and
5. The Clerk shall **CLOSE** this case statistically.

BY THE COURT:

John R. Padova, J.