

morning, after they had separated, Petitioner met with Lindsay and Chance and told them that Weekley had watered down the cough syrup and stolen a gold chain. He asked them to help him find a gun. They went to the apartment of Lindsay's brother, Maurice Gilliard, where Ricky Lowery was present. Lindsay gave Young a .32 caliber handgun from inside the apartment, the gun belonged to Victor Scruggs, who was not present. Weekley was shot multiple times with a .32 caliber handgun at 9:30 that morning about two blocks from Gilliard's apartment. Weekley died a few days later. Approximately one week after the shooting, Chance and Lindsay asked Young for the gun, Young told them that his father had melted it down because Young had used it on Weekley. In 1983, Chance, Lindsay, Gilliard and Lowery gave statements to the Philadelphia Police Department concerning this incident.

Petitioner filed post-verdict motions which were denied on July 8, 1986, Commonwealth v. Young, Nos. 2851, 2853, July Term, 1983 (C.C.C.P. July 8, 1986), and he was sentenced to life in prison. Petitioner's trial counsel was Barry Denker. He was represented by new counsel on appeal and raised numerous claims of ineffective assistance of trial counsel. Judgment was affirmed by the Superior Court on July 13, 1987, Commonwealth v. Young, 531 A.2d 529 (Pa. Super. Ct. 1987) (table), the Pennsylvania Supreme Court denied allocatur on March 1, 1988, Commonwealth v. Young, 539 A.2d 811 (Pa. 1988) (table). On September 15, 1989, Petitioner

filed a Post Conviction Relief Act ("PCRA") petition. The PCRA court appointed counsel to represent him, but his counsel sought to withdraw by filing a "no merit" letter. The PCRA court granted counsel's request to withdraw and dismissed the PCRA petition on January 29, 1992. Petitioner appealed the order dismissing his PCRA petition to the Superior Court. The Superior Court affirmed the dismissal of the PCRA petition on all but one claim and remanded the case for an evidentiary hearing on Petitioner's claim that an instruction should have been given stating that one accomplice's testimony could not be used to corroborate the testimony of another accomplice. Commonwealth v. Young, 620 A.2d 544 (Pa. Super. Ct. 1992) (table). After conducting the hearing, the PCRA court denied the remaining claim on March 13, 1998. Commonwealth v. Young, Nos. 2851, 2853, July Term 1983 (C.C.C.P. March 13, 1998). The Superior Court affirmed on August 4, 1999, Commonwealth v. Young, 745 A.2d 48 (Pa. Super. Ct. 1999) (table), and the Pennsylvania Supreme Court denied allocatur on January 6, 2000, Commonwealth v. Young, 749 A.2d 471 (Pa. 2000) (table).

Petitioner filed the instant Petition on July 12, 2001. He raises nine grounds for relief. Petitioner makes one claim of prosecutorial misconduct, arguing that the prosecutor committed misconduct by referring, in closing argument, to an "inner city code of silence." Petitioner also claims that his trial attorney provided ineffective assistance in eight ways: (1) he failed to

request an adverse witness jury instruction; (2) he failed to investigate and subpoena a potential defense witness; (3) he failed to cross-examine witnesses as to their bias or motivation for testifying; (4) he failed to object to a jury instruction on the reliability of accomplice testimony; (5) he failed to request a supplemental jury instruction on accomplice testimony; (6) he failed to object to a jury instruction on the purpose of a jury trial; (7) he failed to object to a jury instruction on reasonable doubt; and (8) he failed to object to a jury instruction on the element of malice in the crime of murder. There has been no objection to the Magistrate Judge's determination that all of these grounds were raised, though not necessarily in identical form, in Petitioner's state court post-verdict motion, appeal, PCRA petition and appeals of the denials of his PCRA petition and, consequently, that none of his claims are procedurally barred.

II. STANDARD OF REVIEW

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).

The instant 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 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 the 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). 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. 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 to Supreme Court precedent where the state court confronts a case with 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. 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. Id., 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 unreasonable, 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. PROSECUTORIAL MISCONDUCT

Petitioner claims that the Prosecutor committed misconduct by stating, during closing argument, that there was an inner city code of silence which the witnesses broke by going to the police two years after the murder and by asking the jury to further break that code. Following the prosecutor's statement, the

trial judge, Judge Latrone, gave the following curative instruction:

Ladies and gentlemen, I make one comment, as far as reference to inner city code of silence, public responsibility, et cetera, you are not on any crusade mission in this case to rectify any inner city violence, or problems, you are here and you are to avoid any subjective emotional appeal arriving from those comments, you are not here to break any code of silence, et cetera. . . . You are here to determine the guilt or innocence of the defendant in a fair and impartial manner based on the evidence, with respect to fairness on both sides. You are not crusading or anything, changing anything, breaking any code of silence or violence, you are here to give both sides, the prosecution and the defense, a fair trial based on the evidence presented within the four walls and confines of this courtroom.

(Commonwealth Response at 17, citing Commonwealth v. Young, Nos. 2851, 2853, July Term, 1983, 2/19/85 N.T. at 555-556.)

The trial court addressed Petitioner's argument in consideration of Petitioner's Motion for Post-Verdict Relief as follows:

Lastly, Young challenges the prosecutor's references to the "code of the inner city" or the "inner city code of silence" as part of his summation. [N.T. p.p. 519-521, 554-555]. These comments referred to the failures of Chance, Lindsay, Gilliard, and Lowery to disclose what they knew about this case only after almost two years had passed. This reluctance was based on the desires that "they did not want to get involved." At this point, this Court strongly feels that these remarks were not prejudicial but that they constituted acceptable and proper inferences and characterizations that flowed from the record

evidence. Generally, prompt curative instructions can eradicate the impact of a prejudicial event. Commonwealth v. Starks, 479 Pa. 51, 387 A.2d 829 (1978); Commonwealth v. Martinolich, 456 Pa. 136, 318 A.2d 680 (1974); Commonwealth v. Wiggins, 231 Pa. Super. 71, 328 A.2d 520 (1974). Out of an extreme sense of caution, this Court delivered sua sponte cautionary instructions at this juncture. [N.T. p.p. 55-556]. If there was any prejudice resulting from these comments, these cautionary instructions eliminated it. In fact, these cautionary instructions might not have been required, but they were delivered to absolutely insure the integrity of this trial. Lastly, by a retrospective analysis, even if it is assumed that the remarks were improper and prejudicial in nature, they were not so egregious in nature as to have impaired an objective jury determination in this case, even in the absence of these cautionary instructions. Because of the reasons stated, this final challenge to the prosecutor's summation comments was properly rejected.

Commonwealth v. Young, Nos. 2851, 2853, July Term, 1983, op. at 15-16 (C.C.C.P. July 8, 1986). The Superior Court addressed this issue on direct appeal as follows:

Appellant also alleges that the prosecuting attorney engaged in misconduct during his closing address to the jury which compels reversal. Appellant takes exception to the attorney's comments regarding the "inner city code of silence" which accounted for the lapse of time between the homicide and the implication of the appellant. The judge, after the Commonwealth's closing, delivered a cautionary instruction to the jury indicating that the jury was empaneled for the sole purpose of deciding appellant's guilt or innocence based upon the evidence and not to end, or combat against, a "code of silence" in the inner city. Appellant argues that the comments would tend to inflame the jury and

make them respond by convicting appellant in an attempt to break the "code". We disagree that the statements would have this effect. The Commonwealth's attorney made the questioned comment to explain why the Commonwealth's witnesses had not implicated the appellant, despite knowledge of his involvement in the homicide, for approximately two years. There was evidence of record which supported the statements made by the attorney and, as credibility was a key issue, the prosecutor was entitled to explain the period of silence. The prosecutor did not call upon the jury to use this case to help end the practice of non-involvement but only to explain the silence of two years. The prosecutor was within permissible bounds of advocacy.

Commonwealth v. Young, No. 2046, Philadelphia, 1986, op. at 6-7 (Pa. Super. Ct. July 13, 1987).

The issue before the Court in analyzing a claim of prosecutorial misconduct in closing argument is "whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181 (1986) (citing Donnelly v. DeChristoforo, 416 U.S. 637 (1974)). Although the trial and appellate courts did not discuss the basis for their analysis of Petitioner's claim of prosecutorial misconduct, it is clear that they properly weighed the possible prejudicial effect of the conduct in its context in the trial, in light of the evidence presented concerning the witnesses' two-year delay in talking to the police about the murder and the trial court's curative instruction. The state court decisions, therefore, are not

contrary to or an unreasonable application of clearly established federal law. Accordingly, Petitioner's objection is overruled with respect to his claim of prosecutorial misconduct.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner has brought eight claims of ineffective assistance of counsel. In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that criminal defendants have a Sixth Amendment right to "reasonably effective" legal assistance, id. at 687, and determined that a defendant claiming ineffective assistance of counsel must show the following:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. 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. In order to meet his burden of proving ineffectiveness, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 688. The Petitioner must "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id. at 690. In order 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 probability sufficient to undermine confidence in the outcome." Id. at 694.

The Pennsylvania Superior Court used the following standard of review in analyzing Petitioner's claims of ineffective assistance of counsel in his PCRA petition:

There are three elements to a valid claim of ineffective assistance. We inquire first whether the underlying claim is of arguable merit; that is, whether the disputed action or omission by counsel was of questionable legal soundness. If so, we ask whether counsel had any reasonable basis for the questionable action or omission which was designed to effectuate his client's interest. If he did, our inquiry ends. If not, the appellant will be granted relief if he also demonstrates that counsel's improper course of conduct worked to his prejudice, i.e., had an adverse effect upon the outcome of the proceedings.

Commonwealth v. Davis, 541 A.2d 315, 318 (Pa. 1988) (citations omitted).² The Supreme Court of Pennsylvania has determined that this is the same as the standard set forth in Strickland. Commonwealth v. Pierce, 527 A.2d 973, 975-76 (Pa. 1987). The

²The Superior Court did not explain the standard of review it used in analyzing Petitioner's ineffective assistance of counsel claims on direct appeal. However, it appears that the Superior Court used the Davis standard on direct appeal because it examined whether the underlying claims had merit and, having determined that they did not, found that trial counsel was not ineffective. Commonwealth v. Young, No. 2046, Philadelphia, 1986, op. at 2-5 (Pa. Super. Ct. July 13, 1987).

United States Court of Appeals for the Third Circuit has examined this standard and has determined that the application of this standard does not contradict the Supreme Court's holding in Strickland and, therefore, is not contrary to established Supreme Court precedent. Werts v. Vaughn, 228 F.3d 178, 204 (3d Cir. 2000). The next step, therefore, is to determine whether the Superior Court unreasonably applied this standard to Petitioner's claims of ineffectiveness of counsel. The Court will consider each ineffectiveness claim in turn.

A. Victor Scruggs

Petitioner makes two claims with respect to Victor Scruggs. He first claims that his trial counsel was ineffective for failing to request an adverse witness jury instruction because the Commonwealth failed to produce Victor Scruggs, the owner of the gun, as a witness at trial. His second claim is that his trial counsel was ineffective for failing to subpoena Victor Scruggs to testify at trial. The Superior Court addressed both of these arguments in its consideration of Petitioner's appeal of the denial of his PCRA petition.

1. Failure to request adverse witness jury instruction

The Superior Court addressed Petitioner's claim that his counsel was ineffective for failing to request an adverse witness jury instruction as follows:

Appellant claims that his trial counsel should have requested an adverse witness charge when

the Commonwealth failed to call Victor Scruggs as a witness. Appellant argues that the four "accomplices" testified that Victor Scruggs owned the gun and that the Commonwealth failed to called [sic] Scruggs as a witness. Appellant argues that Scruggs was not available to him as a witness and, therefore, his trial counsel should have requested an adverse witness charge.

Essentially, an adverse witness charge permits the jury to infer that the failure of a party to call a particular witness means that that witness would have provided testimony unfavorable to the party who did not call him. To be eligible for such an instruction, the witness must be: (1) available to only one of the parties; (2) must appear to have special information material to the issue involved; and (3) the testimony would not be merely cumulative. Commonwealth v. Jones, 455 Pa. 488, 317 A.2d 233 (1974). An adverse witness charge will not be given where the witness is equally available to both parties. Commonwealth v. Morris, 320 Pa. Super. 139, 466 A.2d 1356 (1983). Appellant must, therefore, first establish that Scruggs was only available to the Commonwealth. Both Appellant and the Commonwealth agree that Scruggs was a prisoner at Graterford Correctional Facility at the time of Appellant's trial, and that Scruggs refused to give a statement or to testify for either side. Consequently, Scruggs was available to both the Commonwealth and Appellant even though the parties agree that Scruggs had refused to provide a statement or to testify because both the Commonwealth and defense possess subpoena powers. We therefore find that Scruggs was equally available to both parties. Because we find that an adverse witness instruction was not necessary, we find Appellant's claim on this issue is without merit.

Commonwealth v. Young, No. 877 Philadelphia 1992, op. at 5-6 (Pa. Super. Ct. Oct. 1, 1992) (footnotes omitted). Petitioner does not

claim that the Superior Court's factual finding that Scruggs was equally available to both Petitioner and the Commonwealth is incorrect. As Petitioner has not submitted clear and convincing evidence that these factual findings are incorrect, the Court must accept them as correct. 28 U.S.C.A. § 2254(e)(1). Consequently, if Petitioner's trial counsel had requested the adverse jury charge, the request would have been denied because Scruggs was equally available to both the Commonwealth and Petitioner. Therefore, trial counsel's failure to request an adverse witness charge was not "outside the wide range of professionally competent assistance" and did not prejudice Petitioner. Strickland, 466 U.S. at 690-91. Accordingly, the Superior Court's determination that trial counsel's failure to request an adverse witness charge was not ineffective assistance of counsel was not an unreasonable application of clearly established federal law. Petitioner's objection is overruled with respect to this claim.

2. Failure to subpoena Victor Scruggs

The Superior Court next addressed Petitioner's claim that his counsel was ineffective in failing to subpoena Scruggs to testify on his behalf at trial:

Next, Appellant argues in the alternative that if Scruggs were available to Appellant, then his trial counsel should have subpoenaed him to testify. It is well-established that before trial counsel will be deemed ineffective for failing to call a particular witness, Appellant must establish that: "1) the witness existed; 2) the witness was

available; 3) counsel was informed of the existence of the witness or counsel should otherwise have known of him; 4) the witness was prepared to cooperate and testify for appellant at trial; and 5) the absence of the testimony prejudiced appellant so as to deny him a fair trial." Commonwealth v. Petras, 368 Pa. Super. 372, ___, 534 A.2d 483, 485 (1987). We find Appellant's claim with regard to this issue is without merit because he concedes that Scruggs was uncooperative and would not willingly testify. See Appellant's letter, dated 12/30/91 to Judge McCrudden in opposition to counsel's request to withdraw, at p. 2.

Commonwealth v. Young, No. 877 Philadelphia 1992, op. at 6-7 (Pa. Super. Ct. Oct. 1, 1992). As Petitioner does not argue that the Superior Court's factual findings that Scruggs was uncooperative and would not willingly testify were incorrect, the Court must accept these findings as correct. 28 U.S.C.A. § 2254(e)(1). Since Petitioner has not established that Scruggs would have testified in his favor at trial if he had been subpoenaed, trial counsel's failure to subpoena him was not "outside the wide range of professionally competent assistance" and did not prejudice Petitioner. Strickland, 466 U.S. at 690-91. Moreover, Petitioner's bare assertion that Scruggs might have testified in his favor is insufficient to support a claim of ineffective assistance of counsel. Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir. 1991) ("Zettlemoyer cannot meet his burden to show that counsel made errors so serious that his representation fell below an objective standard of reasonableness based on vague and

conclusory allegations that some unspecified and speculative testimony might have established his defense. Rather, he must set forth facts to support his contention."). Consequently, the Superior Court's determination that trial counsel's failure to subpoena Scruggs was not ineffective assistance of counsel was not an unreasonable application of clearly established federal law. Petitioner's objection is overruled with respect to this claim.

B. Failure to Cross-Examine Witnesses Regarding Motive

Petitioner claims that his trial counsel was ineffective for failing to cross-examine his "accomplices" regarding their motivation for testifying, i.e., whether they were given deals by the Commonwealth. The Superior Court addressed this argument in its consideration of Petitioner's appeal of the denial of his PCRA petition:

Appellant claims that his trial counsel should have cross-examined certain witnesses with regard to any "deals" that may have existed between those witnesses and the Commonwealth. We agree that a witness's motivation for testifying is a proper subject for cross-examination. Commonwealth v. Baston, 242 Pa. Super. 98 363 A.2d 1178 (1976). Appellant has failed, however, to allege facts of record sufficient to establish a claim with regard to this issue. Appellant has merely stated that his trial counsel failed to pursue a line of questioning regarding bias, but has failed to state that any deals were, in fact, made and, therefore, that his counsel failed to bring this evidence out at trial. We will not consider claims of ineffectiveness in the abstract, Commonwealth v. Grier, ___ Pa. Super. ___, ___ n.5, 599 A.2d 993, 995, n.5,

and, therefore, find that Appellant's claim on this issue is without merit.

Commonwealth v. Young, No. 877 Philadelphia 1992, op. at 4-5 (Pa. Super. Ct. Oct. 1, 1992). Petitioner does not allege that these witnesses had made any deals with the prosecution in exchange for their testimony, or that they had any other motives for testifying against him. Moreover, he has submitted no evidence whatsoever concerning any deals made by his accomplices to this murder in exchange for their testimony. Petitioner's unsupported allegations are insufficient to warrant a finding that his trial counsel was ineffective in failing to cross-examine his alleged accomplices regarding their motivation for testifying. Zettlemyer, 923 F.2d at 298. Therefore, the Superior Court's determination that Petitioner's ineffective assistance of counsel claim was without merit was not an unreasonable application of clearly established federal law. Petitioner's objection is overruled with respect to this claim.

C. Other Jury Instructions

The remainder of the Petition concerns claims that trial counsel was ineffective for failing to object to certain jury instructions or for failing to request a particular jury instruction. "Although jury instructions in state trials are normally matters of state law, such instructions are reviewable on habeas where they violate specific constitutional standards imposed on the states by the due process clause of the Fourteenth

Amendment." Wheeler v. Chesney, No.Civ.A. 98-5131, 2000 WL 124560, at *7 (E.D. Pa. Jan. 27, 2000) (citing Hallowell v. Keve, 555 F.2d 103, 106 (3d Cir. 1977)). Petitioner does not specify the constitutional rights which he claims were violated by the jury instructions at issue in the Petition. The test, therefore, "is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Id. (citing Cupp v. Naughton, 414 U.S. 141, 147 (1973)). "In assessing the effect of a challenged jury instruction, 'a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" Boyde v. California, 494 U.S. 370, 378 (1990) (citing Boyd v. United States, 271 U.S. 104, 107 (1926)).

1. Accomplice testimony

Petitioner makes two claims that his trial counsel was ineffective with regard to jury instructions regarding accomplice testimony. He claims that his trial counsel was ineffective for failure to object to the instruction given by the trial judge because that instruction implied that the testimony of an accomplice is dependable. Petitioner also claims that his attorney was ineffective for failing to request a jury instruction that one accomplice's testimony cannot be used to corroborate another

accomplice's testimony (a Pressel charge).³ Petitioner raised these issues in his PCRA petition. The Superior Court addressed these arguments in its consideration of Petitioner's appeal of the denial of his PCRA petition.

The trial judge gave the following jury instruction concerning accomplice testimony:

Special rules that I shall give you are meant to help you distinguish between truthful and false accomplice testimony. An accomplice . . . may be defined as a person who knowingly and intentionally cooperates in aiding the person in a commission of a crime. Here is the factual predicate, one or all of these people took part in procuring the firearm used to shoot the deceased. That's the assistance and cooperation, encompassing accompliceship. Special rules, you should view the testimony of an accomplice with disfavor first because it comes from corrupt and polluted source, only accept it with care and caution. Third [sic], you should consider whether the testimony of an accomplice is supported in whole or in part by other evidence. The accomplice testimony is more dependable if supported by independent evidence. However, if there is note [sic], independent supporting evidence you may still find the defendant guilty solely on the basis of accomplice's testimony, if after using the rules that I have just told you about, you are satisfied

³In Commonwealth v. Pressel, 168 A.2d 779, 780 (Pa. Super. Ct. 1961), the Pennsylvania Superior Court stated: "In his general charge the trial judge had properly charged on the subject of scrutinizing an accomplice's testimony with care but had failed to say that the testimony of one accomplice may not be used to corroborate the testimony of another accomplice. The refusal to charge on the subject of corroboration after having been specifically requested to do so was, in our judgment, reversible error and, unfortunately, makes necessary the granting of a new trial.").

beyond a reasonable doubt, that the accomplice testified truthfully and that the defendant is guilty. Simply stated, the principles are first, the testimony of a witness who's an accomplice, should be looked upon with disfavor because it comes from a corrupt and polluted source; second, you should examine accomplice's testimony closely and accept it only with caution and care; third, you should consider whether an accomplice - whether the accomplice's testimony in that vein that the defendant committed the crime that is supported in whole or part by evidence other than that testimony or it is supported by independent evidence, that's more dependable you may find the defendant guilty based on the testimony of one or more accomplices alone even though it is not supported, each of the accomplices testimony singly is not supported by any other independent evidence. So to summarize, even though you decide that one or all four of the witnesses are accomplices, individually and collectively their testimony individually and collectively could be sufficient evidence on which to find the defendant guilty, if after following the foregoing principles, you are convinced beyond a reasonable [doubt] that one or more of the accomplices testified truthfully that the defendant committed the crime.

Commonwealth v. Young, No. 877 Philadelphia 1992, op. at 7-8 (Pa. Super. Oct. 1, 1992) (citing N.T. 2/20/85 at 615-17.). The Superior Court found that this instruction is similar to the Pennsylvania Suggested Standard Jury Instruction on this issue and determined that Petitioner's claim of ineffective assistance of counsel on this issue was without merit. Id., op. at 8-9.

The jury instruction in question strongly emphasized that accomplice testimony should be treated with caution, is more believable if supported by independent evidence, but may be relied

upon even without independent supporting evidence. It did not misstate the law with regard to the credibility of accomplice testimony. The Third Circuit recently noted that the Supreme Court has held that "uncorroborated accomplice testimony may constitutionally provide the exclusive basis for a criminal conviction." United States v. Perez, 280 F.3d 318, 2002 WL 171241, at *22 (3d Cir. Feb. 4, 2002). Since this jury instruction did not violate any constitutional standard, its use at Petitioner's trial could not have violated his right to due process. Consequently, his trial counsel's failure to object to this instruction was not unreasonable and the Superior Court's determination that this claim of ineffective assistance of counsel was without merit was not an unreasonable application of clearly established federal law. Petitioner's objection is overruled with respect to this claim.

In examining Petitioner's argument that his trial counsel was ineffective for not requesting a Pressel charge, the Superior Court recognized that it would be reversible error for the trial court to fail to instruct the jury on this issue if requested, and remanded to the PCRA court to hold a hearing "to determine the facts surrounding trial counsel's action in not requesting a supplementary instruction on the use of accomplice testimony to corroborate testimony of another accomplice." Commonwealth v. Young, No. 877 Philadelphia 1992, op. at 9-10 (Pa. Super. Ct. Oct. 1, 1992). On remand, the PCRA court considered "whether Mr. Denker

was ineffective for not requesting a Pressel charge, and whether the Defendant was prejudiced by the absence of the charge so that a new trial is required." Commonwealth v. Young, Nos. 2851, 2853 July Term, 1983, op. at 7 (C.C.C.P. Mar. 13, 1998) (citing Commonwealth v. Cook, 676 A.2d 639 (Pa. 1996)). Denker did not testify, but submitted an affidavit, prepared by PCRA counsel, stating that he had forgotten to request a Pressel charge. The Commonwealth would not stipulate to the admissibility of the affidavit because trial counsel was not subjected to cross-examination concerning its contents. Denker died on March 1, 1996. The PCRA court analyzed the issue as follows:

we are called upon to determine Mr. Denker's trial strategy, based upon the affidavit signed by Mr. Denker, the existing record and Petitioner's testimony.

In this case, Judge Latrone determined that, as a matter of law, George Lindsay, Mitchell Chance, Maurice Gilliard and Ricky Lowery were accomplices. By their own admissions, all four were instrumental in assisting Young in obtaining the murder weapon, a .32 caliber revolver. Lindsay and Chance gave testimony implicating Young in the murder.

However, the Defendant testified in his own behalf at trial and contradicted the testimony of Lindsay, Chance, Gilliard and Lowery. He admitted that he was friends with Chance, and stated that Chance had been in apartment [sic] very briefly, only once. However, he testified that Lindsay, Chance and Weekley were never in his apartment, alone or together. He denied ever having "syrup" in his apartment; he denied being in Gilliard's apartment with Lindsay and Chance for the

purpose of getting a handgun; he denied giving his father a gun to melt down or doing so himself. Furthermore, Young categorically denied shooting Weekly.

He alleged that in 1993 he had refused Chance's request that he lend Chance \$2,000. That allegation was advanced as the reason why Chance falsely accused him of the murder. (N.T. 423-66, 2/15/85).

We agree with Petitioner's assessment that Mr. Denker's trial strategy was to convince the jury that the four witnesses were not telling the truth by exposing contradictions between the trial testimony of each one and prior statements he made, and by revealing inconsistencies between the trial testimony of Chance and Lindsay. (N.T. 5-9, 10/20/97).

During his closing argument to the jury, the prosecutor, Thomas Bello, Esquire, characterized the Commonwealth witnesses as accomplices to murder. (N.T. 529, 536, 542-43, 2/19/85). He did not argue, either directly or by inference, that the testimony of one accomplice could be used to corroborate the testimony of another accomplice. Instead, he made it a point to indicate to the jury the areas of the accomplices' testimony which were corroborated by independent evidence. (N.T. 524, 525-26, 527, 530, 532-33, 541, 543).

During a conference with Judge Latrone after the closing arguments, Mr. Denker urged the Court to grant a mistrial because the prosecutor had characterized Chance and Gilliard as accessories to murder. (N.T. 561-64, 2/19/85).

Judge Latrone overruled the objection and in his charge to the jury he gave a lengthy instruction on accomplice testimony, referring to Lindsay, Chance, Gilliard and Lowery. He characterized accomplice testimony as "from corrupt and polluted source." He instructed the jury that they could find the Defendant

guilty based on the testimony of the accomplices, individually and collectively, if they found that one or more of the accomplices testified truthfully, but that the accomplice testimony would be more dependable if it was supported by other independent evidence. (N.T. 614-17, 2/20/85).

In written Post-Verdict Motions, in a Memorandum of Law in Support of Post-Verdict Motions and during oral argument, Mr. Denker contended that the district attorney had committed prosecutorial misconduct and denied his client a fair trial by arguing to the jury that the Commonwealth witnesses were accessories to murder. (See Q.S. file; N.T. 4-5, 7/8/86).

Given Mr. Denker's position that the Commonwealth witnesses should not have been characterized as accomplices at all, and the fact that in closing the prosecutor emphasized independent evidence and not argue [sic], either directly or by inference, that the testimony of one accomplice should be used to corroborate the testimony of another accomplice, we conclude that Mr. Denker was not ineffective in not requesting that Judge Latrone give a supplemental instruction in that issue.

Furthermore, in reviewing both the closing argument of the prosecutor and Judge Latrone's instructions to the jury, we find that both repeatedly urged the jury to consider independent evidence that supported the testimony of Lindsay, Chance, Gilliard and Lowery.

We conclude, as a matter of law, that the Defendant was not prejudiced by the failure of trial counsel to request a Pressel charge, because the verdict would have been the same if such an instruction had been given.

Commonwealth v. Young, Nos. 2851, 2853 July Term, 1983, op. at 8-11 (C.C.C.P. Mar. 13, 1998). Petitioner appealed this ruling. The

Superior Court found "that the trial court has thoroughly addressed and properly disposed of the issue raised." Commonwealth v. Young, No. 1091, Philadelphia, 1998, mem. at 2 (Pa. Super. Ct. Aug. 4, 1999).

Petitioner has not challenged the PCRA court's findings of fact with regard to trial counsel's strategy, the prosecutor's closing argument, or the trial court's jury charge. Consequently, the Court must accept these findings of fact as correct. 28 U.S.C.A. § 2254(e)(1). Since trial counsel's strategy was to deny that Petitioner participated in the murder, and to reject the idea that the witnesses against him were accomplices, his failure to request an accomplice jury charge appears consistent with his trial strategy. Moreover, the Prosecutor did not suggest that the testimony of one accomplice could be used to corroborate the testimony of another accomplice, and the instruction given by the trial court stressed the importance of corroboration by independent evidence. It does not appear, therefore, that trial counsel's failure to request this charge was "outside the wide range of professionally competent assistance" or that Petitioner suffered any prejudice because trial counsel did not request a Pressel charge. Strickland, 466 U.S. at 687, 690. Accordingly, the Superior Court's determination that Petitioner's ineffective assistance of counsel claim was without merit was not an

unreasonable application of clearly established federal law. Petitioner's objection is overruled with respect to this claim.

2. The purpose of a jury trial

Petitioner claims that his trial counsel was ineffective for failing to object to a jury instruction which stated that the purpose of a criminal trial is the discovery of the truth. Petitioner raised this issue on direct appeal. The trial court instructed the jury that: "All of us are here for one solemn similar steadfast purpose. And that is to discover the truth, having discovered it to apply the law of the land as it has been established in our Courts and to administer justice accordingly." Commonwealth v. Young, No. 2046, Philadelphia, 1986, op. at 4 (Pa. Super. Ct. July 13, 1987). The Superior Court addressed Petitioner's argument as follows:

The essence of appellant's contention is that this comment misdirected the jury's attention from the true inquiry of whether the Commonwealth had met its burden of proof. However, a review of the charge indicates that the statement in question was made early in the charge as a sort of introduction. The apparent thrust of the comment was to impress upon the jury their role as finder of fact. Later in the charge the judge impressed upon the jury the fact that the Commonwealth had a duty to prove, beyond a reasonable doubt, appellant's guilt. The following instruction was given:

In other words, Members of the Jury, the law does not require the defendant to prove that he's innocent or not guilty, of the crimes for which criminal

informations have been returned. On the contrary, the law places upon the Commonwealth, the burden of proving the defendant's guilt, beyond a reasonable doubt. It is not the defendant's burden to prove that he is not guilty or prove his innocence or that he's not guilty. Defendant is a person accused of a crime and is not required to present evidence or prove anything in his own behalf. He bears no burden of proof, in terms of having the burden to introduce evidence, no risk of persuading you of the fact that he's not guilty by the reason of introduction of evidence. Once again, please note that a defendant in any criminal proceeding is under no burden or obligation to prove anything, bears no risk of persuading you of the fact that he's not guilty.

Once again, we find no error in the charge given and no reason for trial counsel to object.

Id., op. at 4-5. Viewing the disputed instruction in the context of the entire jury charge, as the Superior Court did, it does not appear that this instruction "so infected the entire trial that the resulting conviction violates due process." Wheeler v. Chesney, No.Civ.A. 98-5131, 2000 WL 124560, at *7 (internal citation omitted). Since the disputed instruction did not violate any constitutional standard, there was no reason for trial counsel to object. Consequently, the Superior Court's determination that Petitioner's ineffective assistance of counsel claim was without merit was not an unreasonable application of clearly established

federal law. Petitioner's objection is overruled with respect to this claim.

3. Reasonable Doubt

Petitioner claims that his trial counsel was ineffective for failing to object to the jury instruction on reasonable doubt because the trial court misdefined reasonable doubt as substantial doubt in the following sentence: "[a] reasonable doubt is not merely any imagined or passing fancy that may come into the mind of a juror; it must come out of the mind that is substantial and well founded on reason and common sense." (Pet. at 12, citing N.T. 2/20/85 at 589.) The entire jury instruction given by the trial court on reasonable doubt was:

What is reasonable doubt? Note initially, that although the Commonwealth has the burden of proving that the defendant is guilty, this does not mean that the Commonwealth must prove its case beyond all doubt or to a mathematical certainty, nor must it demonstrate the complete impossibility of innocence. Reasonable doubt is such a doubt as would cause a reasonably prudent, careful and sensible person to pause, hesitate and restrain himself or herself, before acting upon a matter of highest importance in his or her affairs. Reasonable doubt is such a doubt that would cause a person to hesitate in arriving at a conclusion of importance to that person.

Therefore, should you, after considering all the evidence, have in your mind such a doubt as would cause you to hesitate in arriving at a conclusion and matters of importance to yourself, or yourselves, then it is your duty to give the defendant the benefit of that reasonable doubt and find him not

guilty. For a doubt to be reasonable it must be one that fairly strikes a conscientious mind and clouds the judgment. It's not such a doubt as one might dig up or ferret out or conjure up or sum up, out of nowhere for the purposes of avoiding or escaping the questions of consequences of an unpleasant verdict. It is a doubt which is reasonable, honest, real doubt, fairly arising from the evidence that has been presented or out of the lack or absence of evidence presented with respect to some element of the crime. A reasonable doubt is not merely any imagined or passing fancy that may come into the mind of a juror; it must come out of the mind that is substantial and well founded on reason and common sense, remembered such as being taken notice of by a juror in deciding the case on the issues of the same nature of a doubt which would cause a reasonable man or woman in the conduct of his or her own affairs and matters of importance to himself and herself, stop, hesitate, seriously consider as to whether he or she should do a certain thing before acting, finally acting.

Finally, a reasonable doubt is something different and much more serious than a possible doubt in the course of our day to day living, in the course of our acquisition of the worldly knowledge we have acquired. We all know a possible doubt exists in all things, it's almost impossible to possess any human knowledge, understanding or come to any conclusion beyond a possible doubt. The Commonwealth is not required to prove its case beyond all doubt, it is not a doubt arising from the evidence, not a reasonable doubt, but a possible doubt, therefore, not such a doubt being a possible doubt as would justify a conscientious juror from hesitating to render a verdict, where the mind is fairly satisfied, except for the existence of such a possible doubt.

(Commonwealth Response at 22-23, citing Commonwealth v. Young, Nos. 2851, 2853, July Term, 1983, 2/20/85 N.T. at 588-591.) The Superior Court found that this instruction was proper and that "trial counsel had no obligation to object to it." Commonwealth v. Young, No. 2046, Philadelphia, 1986, op. at 3 (Pa. Super. Ct. July 13, 1987).

The United States Supreme Court examined the issue of whether use of the word "substantial" impermissibly alters the definition of the term "reasonable doubt" in Victor v. Nebraska, 511 U.S. 1 (1994). The Supreme Court considered the issue as follows:

Victor's primary argument is that equating a reasonable doubt with a "substantial doubt" overstated the degree of doubt necessary for acquittal. We agree that this construction is somewhat problematic. On the one hand, "substantial" means "not seeming or imaginary"; on the other, it means "that specified to a large degree." Webster's Third New International Dictionary, at 2280. The former is unexceptional, as it informs the jury only that a reasonable doubt is something more than a speculative one; but the latter could imply a doubt greater than required for acquittal under Winship. Any ambiguity, however, is removed by reading the phrase in the context of the sentence in which it appears: "A reasonable doubt is an actual and substantial doubt ... as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture." Victor App. 11 (emphasis added).

* * *

In any event, the instruction provided an alternative definition of reasonable doubt: a

doubt that would cause a reasonable person to hesitate to act. This is a formulation we have repeatedly approved, Holland v. United States, 348 U.S., at 140, 75 S. Ct., at 137; cf. Hopt v. Utah, 120 U.S., at 439-441, 7 S. Ct., at 618-620, and to the extent the word "substantial" denotes the quantum of doubt necessary for acquittal, the hesitate to act standard gives a common sense benchmark for just how substantial such a doubt must be. We therefore do not think it reasonably likely that the jury would have interpreted this instruction to indicate that the doubt must be anything other than a reasonable one.

Id. at 19-21 (emphasis in original). The instruction in this case is very similar to the instruction in Victor. The trial court used the word "substantial" to distinguish reasonable doubt from "any imagined or passing fancy that may come into the mind of a juror." (Commonwealth Response at 23, citing Commonwealth v. Young, Nos. 2851, 2853, July Term, 1983, 2/20/85 N.T. at 588-591.) In addition, the instruction also provides the alternative definition of reasonable doubt which the Supreme Court has approved, "a doubt that would cause a reasonable person to hesitate to act." Victor, 511 U.S. at 21. Considering the reasonable doubt instruction in context, the use of the word "substantial" did not change the definition of reasonable doubt and, consequently, did not violate Petitioner's right to due process. Therefore, trial counsel was not unreasonable in not objecting to this jury instruction. The Superior Court's determination that trial counsel was not ineffective, therefore, was not an unreasonable application of

clearly established federal law. Petitioner's objection is overruled with respect to this claim.

4. Malice

Petitioner claims that his trial counsel was ineffective for not objecting to a jury instruction which indicated that the jury needed to find malice in order to find the Petitioner guilty of first degree murder. The Superior Court addressed this issue on direct appeal as follows:

Appellant's fourth contention of ineffectiveness is baffling at best. Appellant contends trial counsel was ineffective for failing to object to a jury charge which indicated that a finding of malice was necessary to return a verdict of guilty for first degree murder. Appellant notes that malice is no longer an element of this crime. We cannot see how appellant was prejudiced by the charge in question. If the trial court required the jury to find malice for a first degree murder, it imposed a stricter burden upon the Commonwealth and increased appellant's chance of acquittal. It appears to us that trial counsel would have been ineffective had he objected to a charge which was more favorable to his client than law required. Certainly, trial counsel was not ineffective for failing to object to this charge.

Commonwealth v. Young, 2046, Philadelphia, 1986, op. at 6 (Pa. Super. Ct. July 13, 1987). Trial counsel did not act unreasonably, or prejudice Petitioner, by not objecting to a charge which raised the Commonwealth's burden of proof at trial. Therefore, the Superior Court's determination that trial counsel was not ineffective was not an unreasonable application of clearly

established federal law. Petitioner's objection is overruled with respect to this claim.

V. CONCLUSION

The Pennsylvania state courts considered, and rejected, each of the nine grounds contained in the instant Petition for writ of habeas corpus. Petitioner has failed to establish that the state court rulings on any of these grounds were contrary to clearly established Supreme Court precedent or were unreasonable applications of clearly established federal law. Consequently, the Court overrules each of Petitioner's objections to the Magistrate's Report and Recommendation, adopts the Report and Recommendation in its entirety, and denies the instant Petition for Writ of Habeas Corpus. An appropriate Order follows.

