

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

<b>ROBERT HUTSON,</b>	:	
<b>Petitioner</b>	:	
	:	
<b>v.</b>	:	<b>CIVIL ACTION</b>
	:	<b>NO. 00-6382</b>
<b>DONALD VAUGHN, et al.,</b>	:	
<b>Respondents</b>	:	

**MEMORANDUM OPINION AND ORDER**

**Rufe, J.**

**March 29, 2004**

Before the Court are Petitioner Robert Hutson’s Objections to Magistrate Judge Charles B. Smith’s December 11, 2002 Report and Recommendation (“R & R”) in the above-captioned case. The Magistrate Judge’s well-reasoned opinion addresses all of the relevant issues, setting forth the factual and procedural history and clearly identifying the basis for his recommendation to dismiss the Petition for a Writ of Habeas Corpus. Nevertheless, the Court, mindful of its responsibility to review the entire record in this matter, addresses each of Petitioner’s objections below. For the following reasons, the objections are overruled, the R & R is approved and adopted, and the petition is denied.

**I. FACTUAL BACKGROUND**

The facts adduced at trial are stated in the light most favorable to the verdict winner:

Shortly before one o’clock in the afternoon on May 19, 1983, Keith Moody was shot in the back and killed by a man riding a blue ten-speed bicycle. Carl Rainey was the only eyewitness to the shooting. Mr. Rainey testified that he was outside of a laundromat when he noticed Petitioner sitting on a blue ten-speed bicycle at an intersection. After a short time Petitioner rode down the street a short distance but stopped when Mr. Moody yelled out, “yo yo” to Petitioner as Mr. Moody

crossed the street.<sup>1</sup> After a short conversation, Mr. Moody walked away. When Mr. Moody was approximately 15 feet away from Petitioner, Petitioner pulled a gun and shot Mr. Moody once in the back. Mr. Moody died in the hospital a short time later.

When interviewed by the police on June 4, 1984, approximately 16 days later, Mr. Rainey described the gunman as follows: “Black guy, about 21 to 22, about the same size as Keith, slim build, mustache (slight), brown skinned, blue jeans, blue jacket with stripes on the front, white plastic frame glasses, dark blue 10 speed bike – new looking.”<sup>2</sup> On June 14, 1983, Mr. Rainey picked Petitioner’s photo from an array and stated, “This looks like the guy I saw do the shooting, but I can’t be positive.”<sup>3</sup> On July 14, 1983, Mr. Rainey picked Mark Wade, who stood next to Petitioner, from a live lineup. At the preliminary hearing, Mr. Rainey identified Petitioner as the same person he had picked out of the lineup and was corrected on the stand. At the trial, Mr. Rainey identified Petitioner as the gunman, while admitting that he had chosen the wrong man from the lineup.

Eloise Jones, Mr. Moody’s aunt with whom he lived at the time of his death, also testified for the prosecution. As she walked home from work for lunch around noon on May 19, 1983, she passed Petitioner sitting on a doorstep down the street from her home. She testified that he was wearing “[d]ungarees and vest jacket, blue with white stripes,”<sup>4</sup> and had a blue ten-speed bike

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<sup>1</sup> 3/8/84 N.T. at 87.

<sup>2</sup> Carl Rainey Investigation Interview Record 6/4/83, Supplementary Materials to Petitioner’s brief in support of petition for writ of habeas corpus [Doc. #11] (hereinafter, “Supplementary Materials”) at 43a.

<sup>3</sup> Investigation Report (Form 75-49), Supplementary Materials at 12a.

<sup>4</sup> 3/8/84 N.T. at 23.

next to him. She testified that while she was home, Mr. Moody “came in for about five minutes . . . went upstairs, changed jackets . . . and went out.”<sup>5</sup> Approximately twenty to twenty-five minutes later, she left her home to walk back to work, again passing Petitioner in the same place as he had been before.

Two days after the shooting, the police presented Ms. Jones with a photo array that did not contain Petitioner, and she picked out one photo saying it looked like the man she had seen but was not him.<sup>6</sup> On June 11, 1983, the police presented Ms. Jones with a second photo array of different men but also without Petitioner’s picture, and Ms. Jones picked out no one. Around this time, Ms. Jones told the police that she had received an anonymous tip that the gunman had shot himself in the leg while riding away from the scene. The detectives discovered that a man named Leno Quattlebaum went to St. Joseph’s Hospital on the day of the shooting with a gunshot wound to the leg. Thus, that same day, June 11, 1983, the police showed Ms. Jones a third array containing Mr. Quattlebaum’s picture, but not Petitioner’s picture. From this third array, Ms. Jones “picked out [Mr. Quattlebaum’s] photo as looking like the male she saw on the bike the day of the shooting, but added that she couldn’t be sure without seeing him in person or in a stand up.”<sup>7</sup> On June 14, 1983, the police presented Ms. Jones with another array from which she picked Petitioner’s picture. One month later, Ms. Jones viewed the same live line-up as Mr. Rainey and, like him, picked out Mr. Wade, who was standing next to Petitioner.

In addition to the testimony of Mr. Rainey and Ms. Jones, the prosecution entered

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<sup>5</sup> Id. at 18.

<sup>6</sup> Investigation Report (Form 75-49), Supplementary Materials at 9a.

<sup>7</sup> Id. at 10a-11a.

parts of a gun into evidence at the trial. On June 14, 1983, the police approached Petitioner as part of their investigation. When a crowd gathered, the police drove Petitioner a few blocks away so as to avoid a possible incident. During this encounter, Petitioner either threw or dropped a bag containing several pieces of a Browning handgun. At trial, an expert testified only that the bullet casing found at the scene of the shooting could have been fired from the Browning, but he could not say for certain.

## **II. PROCEDURAL HISTORY**

On March 17, 1984, a jury found Petitioner guilty of murder in the first degree. The Court sentenced Petitioner to life in prison.

Petitioner filed a timely appeal with the Superior Court, raising fourteen claims for relief.<sup>8</sup> On December 21, 1987, the Superior Court affirmed the judgment of sentence.<sup>9</sup> Petitioner

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<sup>8</sup> The fourteen claims were:

1. Ineffective assistance of trial counsel for failing to present character witnesses on his behalf;
2. Ineffective assistance of trial counsel for failing to conduct a timely pretrial investigation;
3. Ineffective assistance of trial counsel for failing to present prospective alibi witnesses and for failing to obtain, prior to trial, the written statement of Mr. Jerry Salters, an alleged alibi witness, taken by police who had interviewed him after petitioner identified him as an alibi witness;
4. Ineffective assistance of trial counsel for failing to object to statements made by the prosecutor during argument which constituted prosecutorial misconduct;
5. Ineffective assistance of trial counsel for failing to object to evidence which implied that he had been arrested and charged with prior criminal activity;
6. Ineffective assistance of trial counsel for failing to interview and call Darrell Williams as a witness;
7. Failure of the Commonwealth to disclose the alleged exculpatory statement of Jerry Salters;
8. Trial court error in denying petitioner's pre-trial motion to suppress physical evidence of

did not seek allocatur with the Pennsylvania Supreme Court.

On June 2, 1992, Petitioner filed a petition under Pennsylvania's Post Conviction Relief Act ("PCRA") raising additional claims of trial counsel's ineffectiveness. After a January 31, 1996 hearing, the PCRA Court denied post-conviction relief on March 23, 1998. In Petitioner's timely appeal to the Pennsylvania Superior Court, Petitioner claimed that trial counsel was ineffective for: (1) failing to interview and call Darrell Williams as a witness; (2) failing to object to the court's jury instruction regarding identification testimony; and (3) failing to object to the court's refusal to answer a jury question. The Superior Court disagreed and affirmed the PCRA Court's ruling on June 28, 1999.<sup>10</sup> The Pennsylvania Supreme Court denied allocatur on December

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the two pieces of the semi-automatic pistol which petitioner discarded upon his arrest;

9. Trial court error in permitting the prosecutor to question two Commonwealth witnesses regarding the composite sketch of a suspect where the court had ruled pre-trial that evidence concerning the same was inadmissible;
10. Trial court error in permitting a witness to testify that he observed a black male ride past his house on a ten-speed bicycle carrying a black semiautomatic handgun;
11. Prosecutorial misconduct by arguing to the jury that the petitioner acted as "the judge, jury, and executioner" in committing the crime for which he was convicted;
12. Prosecutorial misconduct for commenting upon matters outside the record by reminding the jurors that the arresting police officer recognized petitioner from a composite sketch when that sketch had been ruled inadmissible;
13. Prosecutorial misconduct in misstating the evidence during his summation;
14. After-discovered evidence that convicted murderer, Daniel Marsh, was willing to testify that he observed someone other than appellant, who fit appellant's general description, at the scene of the crime in 1983.

R & R at 3-5.

<sup>9</sup> Commonwealth v. Hutson, 538 A.2d 939 (Pa. Super. Ct. 1987).

<sup>10</sup> Commonwealth v. Hutson, 742 A.2d 205 (Pa. Super. Ct. 1999).

16, 1999.<sup>11</sup>

On December 15, 2000, Petitioner brought the present Petition for Writ of Habeas Corpus asserting approximately thirty different claims.<sup>12</sup> On September 5, 2002, after extensive

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<sup>11</sup> Commonwealth v. Hutson, 749 A.2d 467 (Pa. 1999).

<sup>12</sup> The approximately thirty claims are as follows:

- I. Ineffective assistance of trial counsel:
  - A. Resulting from abandonment by retained counsel and substitution of inexperienced and unprepared counsel;
  - B. For failing to conduct any pretrial investigation or an adequate during-the-trial investigation, and resulting failure to use available, critically important testimony, including the following actions:
    1. Failure to conduct timely investigation into petitioner's alibi witnesses;
    2. Failure to use the testimony of Jerry Salters;
    3. Failure to use the testimony of Cynthia Carolina;
    4. Failure to demand appropriate discovery and Brady materials from the Commonwealth:
      - a. The police investigative report referring to Ms. Jones' identification of Leno Quattlebaum as the supposed shooter;
      - b. The Commonwealth's statement from Carl Rainey where he admitted that he did not pay very much attention while observing the person who eventually shot Moody; and where he stated that he heard that Moody was killed in retaliation by the loser in a previous fight;
      - c. Police interview of Moody's sister, Darlene Hickman, regarding a link between the killing and Carl Williamson's injuries during a previous fight with Moody;
      - d. Carl Williamson's own statement;
      - e. The statement of Robin White indicating that Moody was a thief and a gang member;
      - f. The statement of Amos Anistead to the effect that the killer held the gun in his left hand (whereas petitioner was right-handed); and
      - g. The Commonwealth's ballistics and medical examiner's report;
    5. Failure to cross-examine Ms. Jones and the investigating detectives concerning Ms. Jones' previous tentative identification of Leno Quattlebaum as the man she observed with a bicycle;
    6. Failure to investigate the strong possibilities raised by the police investigation report that Mr. Moody was killed by persons other than petitioner;
    7. Failure to interview witness Darrell Williams, who was found driving Moody to the hospital shortly after the shooting;
    8. Failure to put on testimony (a) to demonstrate the easily verified fact that petitioner is right-handed, whereas the shooter was seen to ride away holding his gun in the left hand; and (b) to show that petitioner's

briefing from both parties, Magistrate Judge Smith issued a Memorandum and Order concluding that all but three of Petitioner's claims had been procedurally defaulted. He found, however, that

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- hand contains a prominent burn scar which was not observed by Ms. Jones;
9. Failure to obtain expert advice or put on expert testimony concerning the Commonwealth's ballistics evidence and the autopsy report;
  10. Failure to investigate the authenticity of the alleged composite drawing;
- C. For failing to permit petitioner to testify on his own behalf and failing to properly consult with petitioner concerning this decision;
  - D. For failing to call available character witnesses, including:
    1. Norma Dowling;
    2. Victor Clavis;
    3. Yvelle Wright;
    4. Walter Hankins;
    5. Cynthia Carolina;
  - E. For failing to use available cross-examination material, including the following:
    1. Carl Rainey's initial testimony at the preliminary hearing, to the effect that petitioner was the person he had identified at the lineup, when in fact he identified someone else;
    2. Ms. Jones's testimony at the suppression hearing and to police which differed from her trial testimony in material respects;
    3. Various testimonies and reports by investigating detectives concerning the circumstances of petitioner's brief arrest and release on June 14, 1983, the manner in which the gun parts were allegedly recovered, and the timing of the various encounters with witnesses and photographic lineups;
    4. The obvious burn scar on petitioner's hand which should have been readily apparent to Ms. Jones;
    5. The various impeachment materials described above;
  - F. For failing to object to the improper jury charge regarding identification testimony;
  - G. For promising the jury an alibi defense and then failing to call an alibi witness;
  - H. For failing to object to evidence disclosing prior criminal activity by petitioner;
  - I. For failing to have a jury question answered where the answer would have been favorable to petitioner;
  - J. For abandoning petitioner while the jury was still deliberating;
  - K. For failing to put on the testimony of Daniel Marsh;
- II. Violation of Due Process by the trial court's refusal to entertain petitioner's motion for new trial based on the after-discovered evidence of Daniel Marsh, after the court made an unreasonable finding that the evidence was available during trial;
  - III. Unconstitutional failure of the prosecution to disclose to petitioner evidence favorable to petitioner;
  - IV. Constitutionally insufficient identification evidence and constitutionally irrelevant physical evidence;
  - V. Use of evidence obtained pursuant to unlawful arrest;
  - VI. Use of fabricated evidence;
  - VII. Ineffectiveness of post-verdict and direct appeal counsel.

R & R at 6-9.

“Petitioner had made a colorable showing of actual innocence which, if proven, would excuse the procedural default,”<sup>13</sup> and scheduled an evidentiary hearing to allow Petitioner to “present any appropriate testimony and/or evidence pertinent to a showing of actual innocence.”<sup>14</sup> This Court denied both parties’ objections to the September 5, 2002 Order.

The evidentiary hearing was held on November 5 and 21, 2002. On December 11, 2002, Magistrate Judge Smith filed his R & R and recommended that the petition be denied.<sup>15</sup>

### **III. DISCUSSION**

This Court reviews de novo those portions of the Magistrate Judge’s Report and Recommendation to which Petitioner has objected.<sup>16</sup> Petitioner’s objections fall into four categories: (1) that the Magistrate Judge erred in finding the evidence insufficient to show actual innocence; (2) that the Magistrate Judge improperly restricted the evidence Petitioner could produce at the evidentiary hearing; (3) that the Magistrate Judge erroneously decided Petitioner’s defaulted claims; and (4) that the Magistrate Judge erroneously dismissed Petitioner’s cause and prejudice argument. Petitioner does not object to the Magistrate Judge’s finding that the vast majority of Petitioner’s claims are procedurally defaulted, so the Court does not discuss those issues here. The Court addresses each of Petitioner’s objections below.

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<sup>13</sup> R & R at 9.

<sup>14</sup> September 5, 2002 Memorandum and Order at 47.

<sup>15</sup> Petitioner filed Objections to the R & R on February 28, 2003, and the Commonwealth filed a Response to Petitioner’s Objections on March 25, 2003. On December 8, 2003, Petitioner filed a supplemental submission in support of his objections to the R & R. On December 31, 2003, the Commonwealth filed a Motion to Strike this supplemental submission. The Court today grants the Motion to Strike by separate order and does not consider Petitioner’s supplemental submission to support this ruling, as it is untimely and filed without leave of the Court.

<sup>16</sup> 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

**A. Actual Innocence**

Petitioner makes the following arguments relating to the Magistrate Judge's consideration of the actual innocence claim: (1) that the R & R failed to consider the prosecution's recent disclosures relating to the actual time of the shooting; and (2) that the R & R inaccurately characterized evidence presented at the evidentiary hearing. As explained below, neither of these objections has merit.

**1. The Standard of Review for a Claim of a Fundamental Miscarriage of Justice**

In the September Order, Magistrate Judge Smith ruled that the vast majority of Petitioner's habeas claims are procedurally defaulted. Magistrate Judge Smith also found, however, that the fundamental miscarriage of justice exception to procedural default may apply and conducted an evidentiary hearing to explore that possibility. Nevertheless, after the evidentiary hearing, he found that the proffered "new evidence" failed to qualify for the exception.

The standard for overcoming a procedural default is very stringent:

Under the fundamental miscarriage of justice exception, a petitioner must demonstrate that a constitutional violation probably resulted in the conviction of an innocent defendant. Murray v. Carrier, 477 U.S. 478, 496 (1986). A petitioner meets the miscarriage of justice exception if he "establish[es] that under the probative evidence he has a colorable claim of factual innocence." Sawyer v. Whitley, 505 U.S. 333, 339, reh'g denied 505 U.S. 1244 (1992) (quoting Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986)). However, a fundamental miscarriage of justice occurs only "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 321 (1995) (quoting Murray, 477 U.S. at 496).<sup>17</sup>

To satisfy this high standard, Petitioner must present "new reliable evidence – whether it be

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<sup>17</sup> R & R at 16-17 (internal parallel citations omitted).

exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial” to “show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.”<sup>18</sup>

## **2. New Evidence Relating to the Time of the Shooting**

Petitioner argues that the R & R fails to consider the police radio transmission print-out, which shows that the victim was already being driven to the hospital at 12:47 p.m. According to Petitioner, based on Darrell Williams’ testimony that he was stopped by the police en route to the hospital approximately ten minutes after finding Moody wounded, this transcript proves that the shooting occurred around 12:37 p.m. Therefore, this transcript completely refutes all of Ms. Jones’ testimony because she claimed to have passed the man with the ten-speed bicycle as she returned to work shortly before 1:00 p.m., and her sighting would have been impossible if the shooting had occurred at 12:37 p.m. In addition, Petitioner claims that he first received the radio transmission transcript at the evidentiary hearing and that the prosecution’s alleged suppression of this evidence violated the Supreme Court’s holding in Brady v. Maryland, 373 U.S. 83 (1963).

Although it is true that the R & R does not address the significance of the radio transcript, the transcript itself does not lend much support to Petitioner’s claim of actual innocence. Petitioner’s reliance on the transcript to prove that the shooting occurred ten minutes earlier than the prosecution argued at trial does little for his case of actual innocence. First, as Respondent points out, the time of the shooting was never a critical element of the prosecution’s case.<sup>19</sup> Second, Ms. Jones never testified to any specific times; she only gave approximations for the times she left

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<sup>18</sup> Schlup v. Delo, 513 U.S. 298, 324, 327 (1995).

<sup>19</sup> Response to Petitioner’s Objections at 9.

work and then returned. Moreover, as Petitioner himself points out, “[i]n Ms. Jones’ initial statement to the police, she claimed to have left school on her lunch hour at 11:30 a.m., stayed an hour at her mother’s house, and returned to school, passing by the man on the bike, at 12:30.”<sup>20</sup> These times comport with Petitioner’s assertion that the shooting occurred at 12:37 p.m. Third, to the extent that the transcript contradicts Ms. Jones’ testimony about the times she saw the suspicious man sitting on the doorstep, such a contradiction, while it may impeach some of Ms. Jones’ testimony, does not prove Petitioner’s actual innocence. Ms. Jones did not witness the shooting, so at most, this evidence could lead to the conclusion that Ms. Jones did not pass Petitioner as she walked to and from her home; it does not refute Mr. Rainey’s testimony that he saw Petitioner shoot the victim. Thus, the transcript does not prove Petitioner’s actual innocence.

Petitioner’s Brady claim fails as well. Petitioner alleges that the prosecution had not provided him with the radio transcript before the evidentiary hearing. In response to Petitioner’s unsupported allegation, Respondent produces a letter sent on October 14, 1983 from the prosecution to Petitioner’s counsel.<sup>21</sup> This letter lists the documents the prosecution disclosed to Petitioner in response to his discovery request and specifically lists the radio transcript. Accordingly, Petitioner’s Brady claim fails as well.

### **3. The Magistrate Judge’s Account of the Evidence Presented at the Evidentiary Hearing**

Petitioner argues that Magistrate Judge Smith’s account of the evidence presented at the evidentiary hearing was inaccurate and should be rejected. Having reviewed the transcript of the

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<sup>20</sup> Objections at 18 n.17 (citing N.T. 2/27/84 at 22).

<sup>21</sup> Oct. 14, 1983 Letter from Arnold Gordon to Daniel Alva, Attached as Exhibit A to Respondents’ Response to Petitioner’s Objections.

evidentiary hearing, this Court fully agrees with and adopts Magistrate Judge Smith's assessment of the testimony and evidence presented at the evidentiary hearing. Even assuming the R & R does contain inaccuracies as alleged by Petitioner, these inaccuracies do not support Petitioner's claim of actual innocence, which is the only issue before the Court.

In the R & R, Magistrate Judge Smith divided the evidence presented at the evidentiary hearing into two categories: (a) "witnesses who provided an alibi, i.e., they placed petitioner elsewhere at the time of the murder ('alibi evidence')"; and (b) evidence "to establish that it was someone else who committed the murder ('other perpetrator evidence')." <sup>22</sup> Although Magistrate Judge Smith discussed each category separately, he considered both categories concurrently. The Court does the same below.

**a. Alibi Evidence**

Petitioner specifically objects to Magistrate Judge Smith's account of the testimony and statements of three witnesses who support his alibi claim: (i) the testimony of Yanna Ballard; (ii) the testimony of Cynthia Carolina; and (iii) the statement of Jerry Salters.

**(i) Yanna Ballard's Testimony**

Petitioner finds error in Magistrate Judge Smith's characterization of the testimony of Yanna Ballard, Petitioner's daughter. In the R & R, the Magistrate Judge states that Ms. Ballard, who was nine years-old at the time of the shooting, remembered the May 19, 1983 date because it was her sister Monica's birthday. She testified that Petitioner came into her classroom on the morning of the shooting, but stated that he did not come by her classroom later in the day. Petitioner argues that because Ms. Ballard's evidentiary hearing testimony conflicts with her prior affidavit in

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<sup>22</sup> R & R at 17.

which she stated that Petitioner came to see her at school on the day of the shooting without giving a specific time,<sup>23</sup> her testimony demonstrates only that Petitioner visited her on that day. Although this Court fails to see any conflict between Ms. Ballard's testimony and prior affidavit, even accepting Petitioner's interpretation of her testimony, i.e., that Petitioner visited her at school on the day of the shooting, such evidence does not support Petitioner's claim of actual innocence. Accordingly, Magistrate Judge Smith appropriately assessed Ms. Ballard's testimony.

**(ii) Cynthia Carolina's Testimony**

Ms. Carolina worked with Petitioner at a snack stand outside of Walton Elementary School, where Ms. Ballard attended school, on May 19, 1983. She testified "that she saw petitioner leave the truck at approximately 12:00 p.m. and go across the street to the Walton Elementary School to see his daughter for her birthday. At around 1:00 or 1:15 p.m., he returned to the stand."<sup>24</sup> Magistrate Judge Smith found that Ms. Carolina's testimony was contradicted by Ms. Ballard, who testified that her sister Monica, whose birthday it was, attended a different school. Magistrate Judge Smith also remarked, "our observation of Ms. Carolina's demeanor on the stand and her seemingly rehearsed recitation of the events of the day did not lend support to her credibility."<sup>25</sup> Furthermore, Magistrate Judge Smith found Ms. Carolina's testimony unhelpful: "even giving her testimony full credence, it was still possible for petitioner to have left his stand at 12:00 p.m., committed the shooting at 12:40 p.m. and returned to the stand at approximately 1:00 or 1:15 p.m."<sup>26</sup>

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<sup>23</sup> Supplementary Materials at 32a.

<sup>24</sup> R & R at 19; see also 11/5/02 N.T. at 24-29.

<sup>25</sup> R & R at 21.

<sup>26</sup> Id.

Petitioner raises several objections to the characterization of Ms. Carolina's testimony in the R & R. First, Petitioner argues that Ms. Carolina only guessed that Petitioner went to the Walton school to see his daughter for her birthday and that this error should have no impact on her credibility. However, even if Ms. Carolina was innocently mistaken about Petitioner's reason for going to the Walton school, her testimony is still contradicted by Ms. Ballard because Ms. Ballard testified that Petitioner did not visit her that afternoon.

Second, Petitioner takes issue with Magistrate Judge Smith's statement that Ms. Carolina's testimony appeared "rehearsed." This Court, however, must defer to the credibility determination of Magistrate Judge Smith because "our judicial system affords deference to the finder of fact who hears the live testimony of witnesses because of the opportunity to judge the credibility of those witnesses."<sup>27</sup>

Third, Petitioner argues that Ms. Carolina was understandably mistaken as to the exact time Petitioner entered the school and that the Magistrate Judge should have accepted the testimony Ms. Carolina gave in 1984 as dispositive of the exact timing of his visit. This argument is unpersuasive because Ms. Carolina's prior testimony did not contain definite times either. She merely stated that Petitioner left the stand approximately seven or eight minutes before noon and returned "forty-five minutes or an hour later."<sup>28</sup> Thus, using Ms. Carolina's prior testimony as a guide, Petitioner still could have committed the murder at 12:37 p.m. (the time Petitioner claims the

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<sup>27</sup> Hill v. Beyer, 62 F.2d 474, 482 (3d Cir. 1995) ("A district court may not reject a finding of fact by a magistrate judge without an evidentiary hearing, where the finding is based on the credibility of a witness testifying before the magistrate judge and the finding is dispositive of an application for post-conviction relief involving the constitutional rights of a criminal defendant.").

<sup>28</sup> 12/17/84 N.T. at 62.

murder took place) and returned to the snack stand afterwards. Accordingly, even giving Petitioner every benefit of the doubt, Ms. Carolina's testimony does not support his actual innocence claim.

**(iii) Jerry Salters' Statement**

Jerry Salters, now deceased, was the principal of Walton Elementary School at the time of the shooting. To support his alibi claim, Petitioner offered a statement Mr. Salters made to the police on March 6, 1984. This statement contained the following exchange:

- Q. Is there any reason that Robert Hutson was at the school on May 19, 1983?  
A. He comes here often, he went to school here, it was not strange to see him.  
Q. How long did Robert Hutson stay that night?  
A. He came in the day time, yes it was about 11:30 approx.  
Q. When you say 11:30 do you mean a.m. or p.m.?  
A. a.m.  
\* \* \*  
Q. How long did he stay that day on 5/19/83?  
A. I saw him about 11:30 a.m. and he left the school yard about 1:00 p.m.<sup>29</sup>

When considering Mr. Salters' statement, Magistrate Judge Smith noted: (1) that the statement was not under oath; (2) that Mr. Salters did not independently state that he saw Petitioner on May 19, 1983; and (3) "that trial counsel, who was originally planning on calling Mr. Salters as a witness, consciously elected not to call him, suggesting perhaps that Mr. Salters did not truly trust his memory that he saw petitioner on May 19, 1983."<sup>30</sup> Petitioner contends that Magistrate Judge Smith "unreasonably dismisses" the statement as "doubtful hearsay."<sup>31</sup> The R & R, however, never mentions hearsay. Rather, it merely questions the reliability of the statement in light of the circumstances in which it was taken and of trial counsel's decision not to call him as a witness at

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<sup>29</sup> Supplementary Materials at 48a-50a.

<sup>30</sup> R & R at 21-22.

<sup>31</sup> Objections at 37-41.

trial.

Even giving Mr. Salters' statement full credence, the statement does little to support Petitioner's claim of actual innocence. Mr. Salters said that he saw Petitioner around 11:30 a.m. and that Petitioner left the schoolyard around 1:00 p.m. This would have given Petitioner plenty of time to commit the murder in the interim. Petitioner argues that it would have been impossible for him to have "ridden in from 9 blocks away, hidden his gun and bike, changed his clothes and sneaked unobserved into the schoolyard – all in less than 10 minutes following the shooting."<sup>32</sup> However, this argument is inconsistent with Petitioner's earlier argument that the radio transcript proves that the shooting occurred at approximately 12:37 p.m. Moreover, Mr. Salters' statement is inconsistent with both Ms. Carolina's testimony at the evidentiary hearing and her prior affidavit. In a tortured construction of the evidence, Petitioner would have the Court view the combined recollections of Mr. Salters and Ms. Carolina as proving that Petitioner was occupied when the killing occurred. This is simply not a reasonable interpretation of the evidence. Mr. Salters' statement, even combined with the other evidence presented at the evidentiary hearing, does not prove that Petitioner was actually innocent.

In sum, giving full credence to all of the alibi evidence presented at the evidentiary hearing, none of it is sufficient to establish Petitioner's actual innocence. Even reviewed most favorably to Petitioner, the alibi evidence consists of individuals who saw Petitioner at various times before and after the murder; Petitioner did not present testimony of anyone who was certain he or she was with Petitioner between 12:37 and 12:47, when the murder occurred. As Magistrate Judge Smith concluded: "Certainly, this Court cannot say that, if faced with this evidence, no reasonable

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<sup>32</sup> Id. at 39.

juror, not even one, would have voted to convict him. Indeed, in light of the various contradictions, together with the demeanor of the various witnesses, we would not think it impossible for a full jury to re-convict him of the crimes at issue.”<sup>33</sup>

#### **b. Other Perpetrator Evidence**

Petitioner objects to Magistrate Judge Smith’s interpretation of the testimony of Daniel Marsh and Darrell Williams. Magistrate Judge Smith found that the testimony of these witnesses did not meet the stringent actual innocence standard because, *inter alia*, they were inconsistent. In his objections, Petitioner attempts to reconcile these two witnesses’ accounts to show that Magistrate Judge Smith erroneously discounted their testimony. Petitioner’s objections lack merit.

Daniel Marsh testified that, on the morning of May 19, 1983, he was walking to the barbershop and saw two men along the way – Keith Moody and a tall dark-skinned man with a ten-speed bicycle. He knew Mr. Moody but did not recognize the other man. Mr. Marsh testified that he went into “Mr. Leon’s” barbershop on 23rd and Clearfield Streets at 12:00 p.m. or 12:15 p.m., got a haircut which took approximately twenty minutes, and saw the same two men during his walk home between 12:30 p.m. and 12:40 p.m. While the man with the ten-speed bicycle stood across the street, Mr. Marsh stopped to talk to Mr. Moody and then returned home. Mr. Marsh met Petitioner in Holmesburg Prison years later and, upon learning of the circumstances of Mr. Moody’s murder, realized that Petitioner was not the man on the ten-speed bike and thus was not the shooter.

Darrell Williams testified that Mr. Moody slept at Mr. Williams’ house the night of May 18, 1983. At approximately 12:20 p.m. on May 19, 1983, Mr. Williams left to go to the

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<sup>33</sup> R & R at 22.

barbershop on the corner of 23rd Street but returned to his house because the barbershop was closed. Mr. Williams testified that he saw a man on a bicycle, who was not Petitioner, in the street on his way to and from the barbershop. Mr. Moody left Mr. Williams' home shortly after Mr. Williams returned from the barbershop. Several minutes later, Mr. Williams found Mr. Moody bleeding on some steps in the middle of his block and saw the man on the bicycle riding away.

Mr. Williams spoke to the police after Mr. Moody was taken to the hospital but did not mention seeing the man on the ten-speed before the shooting. He only claimed to have seen a man on a bicycle ride away after the shooting: "I saw a bike turning the corner of Clearfield St., turning left going towards 24th St. . . . I was too far away to see the color of the bike. I couldn't see who was riding the bike or describe him, other than the person on the bike had a newspaper in his left hand."<sup>34</sup> Mr. Williams testified that he did not tell the police everything in his initial statement because "[y]ou don't cooperate with the police where I come from."<sup>35</sup> He testified that he first encountered Petitioner in Holmesburg Prison, when he heard that the man who killed Mr. Moody was also in the prison. When he saw Petitioner, however, he realized that Petitioner was not the shooter.

Magistrate Judge Smith pointed out numerous inconsistencies in these accounts:

The two men, on the morning of May 19, 1983, at approximately the same time, allegedly both went to a barbershop on the corner of 23rd Street. One encountered an open barbershop, in which he got a haircut that day, the other encountered a closed barbershop. There was no testimony as to whether there are two barbershops in the exact same vicinity, giving the Court some doubt

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<sup>34</sup> Darrell Williams Investigation Interview Record 5/19/83, Supplementary Materials at 57a.

<sup>35</sup> 11/21/02 N.T. at 13; see also 1/31/96 N.T. at 163 ("Because when we was coming up, man, on the street, you know what I mean, you just don't cooperate with the police. That's the law, that's street law, I didn't make it up, I just grew up in it.").

as to the veracity of their testimony.

Mr. Marsh also indicated that he talked to Mr. Moody around 12:30 or 12:40 p.m., but did not see the shooting occur. Nor did he even know that a shooting occurred until the following day. According to Mr. Williams testimony, however, he left his home to go to the barbershop at around 12:20, found it closed and then returned home to find Mr. Moody still there. At no point did Mr. Williams or Mr. Marsh testify that they crossed each other's paths. Moreover, the combined trial and evidentiary hearing testimony reveal that the shooting occurred sometime between 12:37 and 12:40 p.m. As such, for both witnesses' stories to be true, Mr. Williams would have had to have raced at lightning speed to the barbershop, found it to be closed and then raced back to his house and had a conversation with Mr. Moody, all under ten minutes. Mr. Moody would then have had to rush back to his own home to change his jacket, appear in the vicinity of the barbershop, arriving no later than 12:30, encounter Mr. Marsh, who was already in the same area getting a haircut, and have a conversation with him. Mr. Marsh would then have had to be completely absent from the area by no later than approximately 12:40 when Mr. Moody was shot, so as not to even hear gunshots. Amazingly, Mr. Marsh and Mr. Williams, despite clearly noticing a man on a bike, would have had to completely miss each other's presence in the same locale.<sup>36</sup>

Petitioner claims this characterization is erroneous because it "postulate[s] a degree of definiteness to these witnesses' estimates of time. . . ." <sup>37</sup> Petitioner argues that all of the times were estimates and should not be treated "as something more precise than they actually were."<sup>38</sup> Petitioner also points to Darrell Williams' affidavit from 1987 in which he states that he was unable to get a haircut because the chair was full, not because the barbershop was closed.<sup>39</sup> Petitioner claims that this affidavit could be reconciled with Mr. Marsh's story in such a way that both testimonies would be consistent.

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<sup>36</sup> R & R at 25-26.

<sup>37</sup> Objections at 44.

<sup>38</sup> Id.

<sup>39</sup> Supplementary Materials at 54a.

Although Petitioner is able to formulate a sequence of events that would make the stories of both Mr. Marsh and Mr. Williams consistent, this sequence still does not meet the actual innocence standard. Even assuming the facts to be as Petitioner claims – that both Mr. Marsh and Mr. Williams saw a man, who was not Petitioner, on a bicycle in the vicinity of the shooting shortly before (and in Mr. Williams case, shortly after) the shooting – this testimony does not prove that Petitioner is actually innocent. A reasonable juror could still choose to believe the testimony of Mr. Rainey and Ms. Jones and find Petitioner guilty beyond a reasonable doubt.

Instead of presenting evidence of his actual innocence, Petitioner has turned this case into a credibility contest between Mr. Rainey and Ms. Jones on one side, and the witnesses who testified at the evidentiary hearing on the other.<sup>40</sup> Petitioner has simply muddied the waters as to the accuracy of the testimony of Ms. Jones and Mr. Rainey; he has not presented any evidence of his actual innocence. Accordingly, Petitioner has failed to show actual innocence and cannot overcome the procedural default of the majority of his habeas claims.

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<sup>40</sup> In another case involving a habeas petitioner's claim of actual innocence, the Honorable John R. Padova offered the following observation, which is equally applicable to this case:

Counsel devotes a large portion of the submitted objections to parsing the evidence presented at trial and highlighting the alleged internal inconsistencies of the witness testimony in an effort to show that Tran's testimony is more credible than that of Le or the eyewitnesses. (See Pet'r Objections at 7-16.) However, the case, even when thus viewed, essentially comes down to a narrow credibility contest between Tran, Le and the eyewitnesses. Despite the alleged inconsistencies in the testimony of the various witnesses, a jury would be perfectly within its rights to credit the testimony of one witness or co-defendant and disbelieve the other. Without some additional evidence tending to more conclusively show Tran's actual innocence, the Court cannot conclude that a fair probability exists that a trier of fact would have entertained a reasonable doubt as to Tran's guilt. Therefore Tran has not met his burden of establishing a fundamental miscarriage of justice.

Tran v. Gillis, No. Civ.A.98-532, 1999 U.S. Dist. LEXIS 16108, at \*21 (E.D. Pa. Oct. 19, 1999).

**B. The Magistrate Judge’s Restriction of the Evidence Petitioner Could Present at the Evidentiary Hearing**

Petitioner next argues that Magistrate Judge Smith improperly prevented Petitioner from presenting at the evidentiary hearing the testimony of Solomon M. Fulero, Curtis Carr, Lois Gibson and several witnesses who would have testified that other people had motives to kill the victim. Petitioner raised a similar objection to Magistrate Judge Smith’s September Order, and this Court overruled that objection. The Court finds no reason to alter that ruling here.

The excluded testimony of Dr. Fulero and Ms. Gibson constitutes neither new evidence nor probative evidence of Petitioner’s actual innocence. At most, the testimony of these witnesses is relevant to the sufficiency of the prosecution’s evidence, not the actual innocence of Petitioner.<sup>41</sup> Dr. Fulero and Ms. Gibson would have offered opinion testimony based on the evidence presented to the jury at trial.<sup>42</sup> As such, this testimony is not “new evidence”; it is merely a “different spin” on the evidence already presented to the jury.<sup>43</sup> Accordingly, Magistrate Judge Smith properly excluded this testimony from the evidentiary hearing.

Magistrate Judge Smith also properly prevented Curtis Carr from testifying about the June 14, 1983 incident during which Petitioner dropped the pieces of the Browning handgun.

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<sup>41</sup> Bousley v. United States, 523 U.S. 614, 623 (1998) (“[A]ctual innocence’ means factual innocence, not mere legal insufficiency.”).

<sup>42</sup> Dr. Fulero is a psychologist who would have testified to the unreliability of eyewitness testimony. Ms. Gibson is a forensic artist who would have offered her opinion as to whether the composite sketch of Petitioner (which was not even entered into evidence at trial) was based on a witness’ description or merely derived from a photograph.

<sup>43</sup> Schlup, 513 U.S. at 324 (A claim of actual innocence “requires petitioner to support his allegations 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.”); Bannister v. Delo, 100 F.3d 610, 618 (8th Cir. 1996) (“[P]utting a different spin on evidence that was presented to the jury does not satisfy the requirements set forth in Schlup.”)

Petitioner argues: “Had Mr. Carr testified and been believed, then no probable cause to arrest could have existed, and the entire house of cards based on petitioner’s supposed resistance to arrest and his supposed discarding of suspicious gun parts would have been removed from the case – dramatically adding to petitioner’s claim of actual innocence.”<sup>44</sup> This argument is premised on a flawed understanding of how Petitioner must prove actual innocence. That the prosecution may have had a weaker case because they could not use the gun parts relates only to the sufficiency of the evidence, not Petitioner’s actual innocence.<sup>45</sup> The alleged improper admission of the gun parts is entirely irrelevant to the question before this court: Is Petitioner actually innocent of the murder of Keith Moody? Accordingly, Magistrate Judge Smith properly prohibited Curtis Carr from testifying about the June 14, 1983 encounter.

Petitioner also argues that Magistrate Judge Smith improperly excluded the testimony of a number of witnesses concerning other individuals’ motives to kill the victim. To support his argument, Petitioner relies on Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991), noting that the Supreme Court cited it in Schlup as one of the few examples of a successful actual innocence claim. Petitioner’s reliance on Henderson is misplaced. First, in Henderson, the court found that the petitioner

was convicted on a circumstantial case with only a piece of paper to place him at the murder scene. His alleged motive was the robbery of \$41, yet the coroner testified there was no evidence of a struggle that would require the robber to kill [the victim]. In contrast, [the victim’s husband] had several motives to kill his wife, had recently threatened her, owned the type of gun used in the murder, was with the victim during her last hour, made uncanny statements that indicated his involvement, and conducted himself in a bizarre

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<sup>44</sup> Objections at 30.

<sup>45</sup> See Bousley, 523 U.S. at 623.

and surprising manner.<sup>46</sup>

Conversely, in the case before the Court an eyewitness testified that he watched Petitioner commit the murder. Further, the proposed testimony relating to other individuals' motives to kill the victim is vague and speculative, and there is no evidence that any of these individuals had the opportunity or ability to kill the victim.<sup>47</sup>

Secondly, and perhaps more significantly, Henderson was decided before Schlup,<sup>48</sup> and the Court applied a different standard to determine the petitioner's actual innocence: "the actual innocence exception applies if the defendant on retrial probably would be acquitted."<sup>49</sup> To meet this standard, a petitioner could simply present evidence questioning the sufficiency of the prosecution's evidence. This is a much more lenient standard than the Schlup standard. Accordingly, Henderson is easily distinguishable from the case before the Court, and Magistrate Judge Smith properly excluded the testimony of these witnesses from the evidentiary hearing.

In sum, the Court agrees with Magistrate Judge Smith that the excluded evidence

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<sup>46</sup> Henderson, 926 F.2d at 713-14.

<sup>47</sup> Petitioner cites to the following as evidence of the motives of others to kill the victim: (1) the affidavit of Anthony Johnson states that members of a rival gang accused gang member, Frederick Jones, of the murder of Keith Moody; (2) the affidavit of Frederick Jones simply states that the police questioned him about the shooting and then released him; (3) the statement of Damon Dixon to the police in which he was asked if he knew why someone would shoot Moody and responded, "lots of reasons," but was not asked for specifics; and (4) the Honorable Bethel Caesar's Opinion in the case of Commonwealth v. Wyche, Crim. Nos. 890-893 (April 24, 1984), which discusses Keith Moody's in court identification of the defendant. Even combined, this evidence falls far short of the evidence of another person's motive that the petitioner presented in Henderson.

<sup>48</sup> In Schlup, the Supreme Court cited to Henderson as an example of case where a Court of Appeals had found that a petitioner had satisfied any definition of actual innocence, not as an example of a case where a petitioner had satisfied the actual innocence definition set forth in Schlup. See Schlup, 513 U.S. at 322 n.36 ("Indeed, neither party called our attention to any decision from a Court of Appeals in which a petitioner had satisfied any definition of actual innocence. Though some such decisions exist, see, e. g., Henderson v. Sargent, 926 F.2d 706, 713-714 (CA8).") (emphasis added).

<sup>49</sup> Henderson, 926 F.2d at 713.

“only raise[s] the possibility that someone other than petitioner may have committed the crime. As such, considering all of this evidence together . . . this Court could not find that it is more likely than not that no reasonable juror, not even one, would have voted to convict petitioner.”<sup>50</sup> Accordingly, Magistrate Judge Smith properly restricted the testimony at the evidentiary hearing to witnesses whose testimony related to Petitioner’s actual innocence as opposed to the sufficiency of the evidence used to convict Petitioner.

**C. The Undefaulted Claims**

In Petitioner’s remaining defaulted claims, he contends that his trial counsel was ineffective for: (1) failing to interview Darrell Williams and call him as a witness at trial; (2) failing to object to the court’s jury instruction regarding identification testimony; and (3) failing to object to the court’s refusal to answer a jury question. Petitioner asserts that Magistrate Judge Smith erroneously decided each of these claims. The Court addresses Petitioner’s specific objections below.

**1. The Standard of Review of the State Court Ruling**

Petitioner objects to Magistrate Judge Smith’s application of the standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) to Petitioner’s ineffective assistance claims. Under the AEDPA standard, a petitioner must prove that the adjudication of his claim in state court:

- (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

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<sup>50</sup> September 5, 2002 Memorandum and Order at 45-46, n.11.

determination of the facts in light of the evidence presented in the State court proceeding.<sup>51</sup>

In addition, the AEDPA standard imparts a presumption of correctness to the state court's determination of factual issues.<sup>52</sup> This presumption can only be rebutted by clear and convincing evidence.<sup>53</sup>

Petitioner relies on Everett v. Beard, 290 F.3d 500, 508 (3d Cir. 2002), for the proposition that the AEDPA standard “does not apply unless it is clear from the face of the state court decision that the merits of the petitioner’s constitutional claims were examined in light of federal law as established by the Supreme Court of the United States.” Thus, contends Petitioner, the AEDPA standard does not apply here because “the Superior Court failed to acknowledge the applicability of federal ineffectiveness jurisprudence at all.”<sup>54</sup>

Petitioner’s reliance on Everett is misplaced. Although Petitioner is correct that the Superior Court opinion does not cite to any federal cases, a more recent Supreme Court decision makes it clear that a state court need not cite to federal authority for the AEDPA standard to apply:

[T]he Ninth Circuit observed that the state court “failed to cite . . . any federal law, much less the controlling Supreme Court precedents.” Packer, 291 F.3d at 578. If this meant to suggest that such citation was required, it was in error. A state-court decision is “contrary to” our clearly established precedents if it “applies a rule that contradicts the governing law set forth in our cases” or if it “confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.” Williams v. Taylor, 529 U.S. 362, 405-406, 146 L. Ed.

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<sup>51</sup> 28 U.S.C. § 2254(d).

<sup>52</sup> Id. at § 2254(e)(1).

<sup>53</sup> Id.

<sup>54</sup> Objections at 45.

2d 389, 120 S. Ct. 1495 (2000). Avoiding these pitfalls does not require citation of our cases -- indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.<sup>55</sup>

In its opinion affirming the PCRA Court's ruling, the Superior Court applied the following three-pronged standard to Petitioner's ineffective assistance of counsel claims:

Under Pennsylvania law, trial counsel is presumed to have been effective. Commonwealth v. Fowler, 703 A.2d 1027, 1028 (Pa. 1997). To rebut the presumptions of effectiveness, a petitioner must demonstrate: (1) that the underlying claim is of arguable merit; (2) counsel's performance was unreasonable; and (3) that counsel's ineffectiveness prejudiced defendant. Commonwealth v. Edmiston, 634 A.2d 1078, 1092 (Pa. 1993). To show prejudice resulting from ineffectiveness, a petitioner must show that there is a reasonable probability that but for the act or omission in question, the outcome of the proceeding would have been different. Commonwealth v. Douglas, 645 A.2d 226, 230 (Pa. 1994).<sup>56</sup>

In contrast, the federal standard for ineffective assistance of counsel is the two-pronged test set out in Strickland v. Washington, 466 U.S. 668, 687 (1984):

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant 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.

The Pennsylvania Supreme Court has held that these two ineffective assistance standards are

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<sup>55</sup> Early v. Packer, 537 U.S. 3, 8 (2002); see also Lewis v. Johnson, No. 01-1036, 2004 U.S. App. LEXIS 4572, at \*32 n.11 (3d Cir. Mar. 10, 2004) ("We note that the mere fact that the Commonwealth courts failed to mention Strickland is not dispositive of the question of whether the courts' decisions adjudicating Lewis's claim were contrary to clearly established federal law.").

<sup>56</sup> Superior Court Opinion dated June 28, 1999, Supplementary Materials at 80a (internal parallel citations omitted).

identical,<sup>57</sup> and the Third Circuit has agreed.<sup>58</sup> Therefore, despite the Superior Court’s failure to mention Strickland or other federal law while considering Petitioner’s ineffectiveness claims, the AEDPA standard of review applies to these claims. Accordingly, the Court overrules this objection and reviews Petitioner’s claims using this standard.

## **2. Ineffective Assistance of Counsel for Failing to Interview Darrell Williams and Call Him as a Witness**

Instead of articulating objections to Magistrate Judge Smith’s R & R, Petitioner simply restates, almost word for word, the arguments he made in his traverse to Magistrate Judge Smith [Doc. #45]. Specifically, Petitioner contends that: (a) “the Superior Court’s conclusion that counsel had no reason to be aware of Mr. Williams’ potential to give exculpatory testimony is an unreasonable finding of fact”;<sup>59</sup> and (b) the Superior Court’s conclusion that “Mr. Williams’ testimony would have been readily impeachable, and its introduction could have tainted appellant’s entire defense of misidentification”<sup>60</sup> was an unreasonable finding of fact and application of Strickland.<sup>61</sup> Magistrate Judge Smith, having reviewed these arguments before issuing his R & R,

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<sup>57</sup> Commonwealth v. Bomar, 826 A.2d 831, 855 (Pa. 2003) (“[I]t is well-settled that the test for counsel ineffectiveness is the same under both [the Federal and Pennsylvania Constitutions]: It is the performance and prejudice test as set forth in Strickland v. Washington.”); Commonwealth v. Pierce, 527 A.2d 973, 977 (Pa. 1987) (holding that the Pennsylvania standard and Strickland “constitute an identical rule of law in this Commonwealth”).

<sup>58</sup> Rompilla v. Horn, 355 F.3d 233, 248 (3d Cir. 2004) (“[I]t is abundantly clear that the state supreme court adjudicated Rompilla’s Sixth Amendment claim on the merits. Although the state supreme court referred to its own three-pronged ineffective assistance test rather than the two-pronged Strickland test, the Pennsylvania Supreme Court has explicitly held that the state standard is ‘the same’ as Strickland’s and that Pennsylvania law does not provide ‘any greater or lesser protection’ than the Sixth Amendment.”) (citing Pierce, 527 A.2d at 976-77); see also Werts v. Vaughn, 228 F.3d 178 (3d Cir. 2000) (holding that by applying Pennsylvania ineffectiveness law, “the state appellate courts did not apply a rule of law that contradicts the Supreme Court’s holding in Strickland”).

<sup>59</sup> Objections at 47.

<sup>60</sup> Supplementary Materials at 84a.

<sup>61</sup> Objections at 48.

concluded:

[D]eferring to the state court's findings of fact regarding Williams' statements to police and testimony at the PCRA hearing, we note that although counsel knew of Williams's existence, he had no way of knowing that Mr. Williams would subsequently reveal that he had clearly seen the man on the bike both before and after the shooting. In fact, Mr. Williams did not give any indication that he had seen anything other than what he said in his initial statement to police until almost four years later. As counsel cannot be ineffective for failing to call a witness he reasonably did not think would be exculpatory, trial counsel's actions did not fall below the bar of objectively reasonable professionalism. Moreover, having had the benefit of hearing Mr. Williams' testimony and reading his contradictory statements, this Court cannot disagree that he would have likely been impeachable and, perhaps, a hindrance to the defense.<sup>62</sup>

The Court finds that Magistrate Judge Smith properly addressed Petitioner's arguments and agrees that habeas relief is inappropriate for this claim.

**3. Ineffective Assistance of Counsel for Failing to Object to the Court's Jury Instruction Regarding Identification Testimony**

Again, Petitioner does not raise any specific objections to Magistrate Judge Smith's R & R relating to this issue. Instead, Petitioner simply reiterates, word for word, the arguments he made in his original brief and traverse. Specifically, Petitioner argues that the trial court's jury instruction regarding identification testimony was "considerably weaker" than the instruction required by Commonwealth v. Kloiber, 106 A.2d 820 (Pa. 1954), and that trial counsel's failure to object constituted ineffective assistance.<sup>63</sup>

In Kloiber, the Pennsylvania Supreme articulated the following jury charge:

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

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<sup>62</sup> R & R at 34-35.

<sup>63</sup> Id. at 49.

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 must be received with caution.<sup>64</sup>

In contrast, the trial court in this case charged as follows:

Another thing that you should remember, carry in your minds very clearly, even though a crime may have been committed, the defendant may not be found guilty of any crimes unless the Commonwealth has proven beyond a reasonable doubt that the defendant, in fact, is the person who committed the crime.

In your deliberations, you should consider, therefore, whether there was testimony concerning the identification by at least two of the witnesses, namely Mr. Rainey and Miss Jones, with respect to such identification.

You should carry with you in your minds very clearly only your recollection counts. The District Attorney has mentioned, Defense Counsel, I may at this point review certain aspects of this matter. Under no circumstances are the comments of the three of us in any way control your recollection of the facts. You and you alone determine the facts.

But you should know it is the function of the jury to determine from among the facts whether an identification of the defendant was made by any witnesses as well as Rainey and Jones.

You should remember that a mistake can be made in identifying a person even by a witness attempting to be truthful. In this case, you should consider whether there was testimony that during Carl Rainey's photographic identification made on June 14, 1983, the identification of such a defendant or this defendant may have been limited by Mr. Rainey's testimony, if such you find, that his identification would have been better if he could have seen or if he could have seen the defendant in person.

You should also consider whether there was testimony that Eloise Jones was shown photographic displays on four occasions.

Further, you should consider whether there was testimony to show that she did not identify the defendant at the first two photographic displays.

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<sup>64</sup> Kloiber, 106 A.2d at 826-27.

You should further consider whether there was testimony that during the third photographic display, Miss Jones may have identified one of the persons or one of the pictures in the photographic display as a lookalike of the defendant, but not the defendant.

During the first three photographic spreads, you should consider whether there was testimony with respect to this matter that the defendant's photograph was not among those displayed.

You should further consider whether there was testimony that on the fourth photographic display Miss Jones may have identified the defendant's photograph. You saw them. The defendant's photograph was among pictures supposedly shown to Miss Jones in the fourth display, and to Mr. Rainey on the same date; namely, June 14, 1983.

You should also consider whether there was testimony that at the lineup that took place on July 14, 1983, both Carl Rainey and Eloise Jones failed to identify the defendant as the one who may have committed the crime.

You should also take into consideration whether there was testimony indicating that at the lineup, no one was further away than possibly 20 feet, 24, 25 feet. You should consider that.

You should consider whether there was testimony that during the preliminary hearing that took place on August 4, 1983, Carl Rainey identified the defendant as the one who may have committed the crime.

You should further consider whether there was testimony that during the trial, Carl Rainey and Eloise Jones may have identified the defendant as the one who committed the crime in this courtroom.

As a result of all of these things that I have just reviewed, and please note again, whatever comments I may have made have nothing to do with controlling your thoughts. If anything, that I may have said different from what you recollect, only your recollection counts, but in any event, as a result of these events, you should understand that the accuracy of the identification made by Mr. Rainey and Miss Jones requires that you consider their testimony as to the identification of the defendant with a certain amount of caution in deciding whether the defendant was the person who may have committed the crime.

In determining whether or not to accept as accurate the identification testimony of Carl Rainey and Eloise Jones, using caution as I have just

mentioned, you must take into consideration the following matters:

One, whether the testimony of the so-called identification witnesses, Miss Jones and Mr. Rainey is generally believable.

Second, whether the witnesses had the opportunity to observe, and whether that opportunity was sufficient in time and in place to allow each of them to make an accurate identification.

Three, you should determine how the identification or identifications were made.

Fourth, you should further consider all the circumstances indicating whether or not the identification or identifications was or were accurate, as the case might be.

Finally, you should consider whether the identification testimony is supported by other evidence presented in the case, and you must conclude that it is so supported before you can accept the identification as being accurate, and above all, you should remember that it is, once again, the obligation of the Commonwealth to prove this aspect of the case beyond a reasonable doubt.<sup>65</sup>

Petitioner contends that this instruction was “greatly watered down and weakened by his confusing attempt to review all the evidence concerning all the witnesses’ attempts at identification,” and that trial counsel could have no possible reason for not objecting.<sup>66</sup> Petitioner’s argument lacks merit. As Magistrate Judge Smith concluded:

The trial judge took pains to point out the various instances of misidentification by the key Commonwealth witnesses. Counsel, thus, had no grounds for objecting to the jury charge and interrupting what was, on the whole, a fairly positive instruction for the defense, especially in light of the trial court’s broad discretion to frame the form and language of the instructions. Because counsel cannot be deemed ineffective for failing to raise meritless claims, Chimenti v. Frank, Civ. A. No. 98-6151, 2001 WL 21496, \*7 (E.D. Pa. Jan. 9, 2001), we dismiss this claim.

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<sup>65</sup> N.T. 3/15/84 at 82-87 (emphasis added by Petitioner).

<sup>66</sup> Objections at 49.

Magistrate Judge Smith is correct. The Court denies habeas relief as to this claim.

**4. Ineffective Assistance of Counsel for Failing to Object to the Trial Court's Refusal to Answer a Jury Question**

Petitioner contends that trial counsel was ineffective for failing to object to the trial court's refusal to answer the following question submitted to the judge on the third day of deliberations: "[w]e, the members of the jury, would like to hear the part of testimony on who called who, Moody called Hutson, or Hutson called Moody?"<sup>67</sup> Once again, Petitioner makes no reference to the R & R in his objections, arguing simply that because the answer to the question would have been favorable to Petitioner, counsel's decision not to object constituted ineffective assistance and was prejudicial. Therefore, according to Petitioner, the Superior Court's rejection of this claim was an unreasonable application of federal law.

Magistrate Judge Smith thoroughly and accurately addressed Petitioner's arguments in the R & R. As he points out, it is within a trial judge's discretion whether to grant a jury request for a reading of testimony at trial.<sup>68</sup> Further, because the decision was within the trial judge's discretion, so long as the judge did not abuse that discretion, "an attorney cannot be ineffective for failing to object to it."<sup>69</sup> In this case, the Superior Court found that the trial court acted within its discretion, and the Court agrees with that determination. "Accordingly, counsel had no basis upon which to object to the trial court's ruling. Because counsel cannot be ineffective for failing to make

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<sup>67</sup> N.T. 3/15/84 at 4.

<sup>68</sup> R & R at 43-44 (citing Commonwealth v. Peterman, 244 A.2d 723, 726 (Pa. 1968)).

<sup>69</sup> Id. at 44 (citing Commonwealth v. McBall, 463 A.2d 472, 475 (Pa. 1977)).

fruitless objections,”<sup>70</sup> the Court denies habeas relief on this claim.<sup>71</sup>

**D. The Magistrate Judge Erroneously Rejected Petitioner’s Cause and Prejudice Argument**

Once again, in his objections Petitioner merely repeats, virtually verbatim, the arguments he made in his brief and traverse in support of his petition. Magistrate Judge Smith thoroughly and accurately addressed these arguments in his September 5, 2002 Memorandum and Order and found them lacking. Petitioner filed objections to the September 5, 2002 Order on September 19, 2002, and this Court overruled those objections by Order dated September 27, 2002. As a result, Magistrate Judge Smith did not address cause and prejudice in the R & R. Regardless, the Court reviewed again Petitioner’s arguments and still finds them lacking. Therefore, the Court adopts and incorporates the discussion and conclusions set forth in the September 5, 2002 Order.<sup>72</sup> Accordingly, Petitioner cannot overcome procedural default pursuant to the cause and prejudice exception.

**IV. CONCLUSION**

For the foregoing reasons, the Court overrules Petitioner’s Objections, approves and adopts the Magistrate Judge’s Report and Recommendation, and dismisses the Petition for a Writ of Habeas Corpus. An appropriate Order follows.

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<sup>70</sup> Id. at 44-45.

<sup>71</sup> In the R & R, Magistrate Judge Smith further concludes that even if counsel’s failure to object constituted ineffective assistance, Petitioner has not proven prejudice. The Court agrees but finds it unnecessary to address this issue because Petitioner raises no new arguments in his Objections.

<sup>72</sup> Sept. 5, 2002 Memorandum and Order at 32-35.

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

<b>ROBERT HUTSON,</b>	:	
<b>Petitioner</b>	:	
	:	
v.	:	<b>CIVIL ACTION</b>
	:	<b>NO. 00-6382</b>
<b>DONALD VAUGHN, et al.,</b>	:	
<b>Respondents</b>	:	

**ORDER**

**AND NOW**, this \_\_\_th day of March, 2004, upon careful consideration of the pleadings and record, and after review of Petitioner’s Brief in support of his petition for writ of habeas corpus [Doc. #11], Respondents’ Response thereto [Doc. #23], Petitioner’s Traverse [Doc. #45], Magistrate Judge Charles B. Smith’s September 5, 2002 Memorandum and Order [Doc. #47] and both parties’ Objections thereto [Docs. #54-55], the transcripts from the evidentiary hearings on November 5, 2002 [Doc. #78] and November 21, 2002 [Doc. #77], Magistrate Judge Charles B. Smith’s December 11, 2002 Report & Recommendation [Doc. #72], Petitioner’s Objections thereto [Doc. #79], and Respondents’ Response thereto [Doc. #82], and for the reasons set forth in the attached Memorandum Opinion, it is hereby **ORDERED** and **DECREED** as follows:

- (1) Petitioner Robert Hutson’s Objections to the Report and Recommendation [Doc. # 82] are **OVERRULED**;
- (2) Magistrate Judge Charles B. Smith’s Memorandum and Order dated September 5, 2002 [Doc. #47] and Report and Recommendation dated December 11, 2002 [Doc. # 72] are **APPROVED** and **ADOPTED**;
- (3) The Petition for a Writ of Habeas Corpus is **DENIED**;
- (4) Because the Petition does not make a substantial showing of the denial of a constitutional right, the Court declines to issue a Certificate of Appealability; and

(5) The Clerk shall **CLOSE** this case for statistical purposes.

It is so **ORDERED**.

**BY THE COURT:**

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**CYNTHIA M. RUFÉ, J.**