



objections were filed August 13, 2003. For the reasons expressed below, we overrule petitioner's objections to United States Magistrate Judge Linda K. Caracappa's Report and Recommendation and approve and adopt that Report and Recommendation. Furthermore, we deny the petition for habeas corpus and decline to issue a certificate of appealability.

#### Procedural History

The within civil action was initiated by Mr. Greene's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. It is before the court on federal question jurisdiction. See 28 U.S.C. §§ 1331, 2254. Venue is appropriate because plaintiff was tried and convicted in Bucks County, Pennsylvania. See 28 U.S.C. §§ 118, 1391, 2241. The petition was filed on December 18, 2002.<sup>2</sup>

On January 6, 2003 the undersigned referred this matter to Magistrate Judge Caracappa for a Report and Recommendation. Magistrate Judge Caracappa's Report and Recommendation was filed July 31, 2003. On August 13, 2003 Petitioner's Objections to Report and Recommendation Filed by Magistrate Judge Caracappa was filed. The Respondent's Answer to Petitioner's Objections to Report and Recommendation Filed by Magistrate Judge Caracappa was filed August 27, 2003.

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<sup>2</sup> Mr. Green filed his Brief in Support of Habeas Corpus Petition together with his petition for writ of habeas corpus.

State Court Proceedings

On July 25, 1990 Thomas Greene was arrested and charged with murder of the first degree, robbery, conspiracy, and related offenses in regard to the murder of Michael Bannon. On October 4, 1990 the Commonwealth served notice that it intended to seek the death penalty. On the date set for trial, January 28, 1991, petitioner entered an open guilty plea to all charges before Judge William Hart Rufe III, of the Court of Common Pleas of Bucks County, Pennsylvania. On January 29, 1991 Judge Rufe sentenced Mr. Green to life imprisonment with a consecutive sentence of incarceration for not less than 150, nor more than 300, months.

Petitioner filed a motion for reconsideration of sentence on February 15, 1991. On March 8, 1991 following a hearing on the motion, Judge Rufe denied the motion. No direct appeal was filed.

On July 8, 1993 petitioner filed his first petition under Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9551. On April 19, 2000 court-appointed PCRA counsel Brian K. Wiley filed a supplemental motion for post conviction relief. A hearing on this petition was held April 24, 2000. Senior Judge Ward F. Clark denied the petition on July 13, 2000.

Petitioner then filed a pro se notice of appeal in the

state court. On February 1, 2001 the Superior Court of Pennsylvania remanded the appeal for the appointment of counsel and for briefing by that counsel. The PCRA court appointed Neil C. Erikson, Esquire as defense counsel on March 26, 2003. By Order and Opinion dated September 11, 2001, the Superior Court treated petitioner's appeal as a direct appeal nunc pro tunc and denied petitioner's appeal.

On May 7, 2002 the Supreme Court of Pennsylvania denied Mr. Greene's petition for allowance of appeal.

The following issues were raised by petitioner before the state courts on appeal on collateral review in his Motion for Post Conviction Collateral Relief filed July 8, 1993:

**(A) COUNSEL RENDERED INEFFECTIVE ASSISTANCE TO PETITIONER FOR THE FOLLOWING REASONS:**

1. Counsel was ineffective for not objecting to the defective **Guilty Plea Colloguy** [sic] administered by the **Court**, which failed to advise the Petitioner whithin [sic] the explaining of the possible ranges of sentencing that the possibility of the sentences imposed **would/could be imposed consecutive as opposed to concurrently upon the acceptance of the Guilty Plea. U.S. C.A. CONST. AMEND. #6, and Pa. R. C. P.; R. 319, 42 Pa. C.S.A..**
2. Counsel was ineffective for not objecting to the Court's defective **Guilty Plea Colloguy** [sic] where the court **omitted advising the Petitioner in the Colloguy** [sic], **that he may withdraw his plea before a verdict is rendered, and/or after sentencing... in violation of Petitioners Due Process. Pa. R.C. P.; R.319 Pa. 42 C.S.A.; Const. 6th, 14**

**Amendments.**

3. Counsel was ineffective for inducing Petitioner's plea of **Guilty for the removal of the Death Sentence, omitting the entire Guilty Plea format. Pa. R.C.P.; R. 319.**
4. Counsel was ineffective for not advising Petitioner of the defective **Jury Waiver Colloguy [sic]** administered by the Court **omitting the fact within the colloguy [sic]** that Petitioner may at anytime withdraw his Waiver of jury prior to the commencement of trial, or before the verdict is rendered... violating Petitioner's Due Process and Constitutional Rights. Pa. R. C. P.; R. 1102 (b) 42 Pa. C.S.A., Const. 6th, 5th, and 14th Amendments.
5. Counsel was ineffective for not filing a **Motion to Withdraw the Guilty Plea before, and after sentencing. U.S.C.A. Const. Amend. 6th, Pa. R. C. P.; R. 319, 42 Pa. C.S.A..**

**(B) TRIAL COURT COMMITTED REVERSABLE CONSTITUTIONAL ERROR FOR THE FOLLOWING REASONS:**

1. Trial Court erred [sic] in its **Jury Waiver Colloguy [sic]** by not advising petitioner that anytime he may withdraw his jury waiver prior to the verdict being rendered, or upon the discretion of the Court...in violation of petitioner's Due Process Right's [sic] to a fair trial. Pa. R.C.P.; R. 1102 (b).
2. Trial Court erred in its **Guilty Plea Colloguy [sic]**, where it omitted the fact that Petitioner could withdraw this plea after sentencing under Pa.R. 321, in violation of petitioner's Due Process Rights and Constitutional Rights.
3. Court erred by not advising petitioner of the possible sentences that could be imposed **consecutive as opposed to concurrently, at**

the time that Petitioner entered his Plea of Guilty, which rendered the Plea invalid and defective. Pa. R. C. P.; R. 319, Pa. C.S.A.; 6th Amend. Const..

4. Trial Court erred with the acceptance of its Guilty Plea where nothing within the Colloguy [sic] stated that Petitioner was advised of the rights he was waiving as stated in the Guilty Plea Colloguy [sic], or the written colloguy [sic]. U.S.C. A. CONSTITUTION AMENDMENT 6, 14,.
5. Trial Court erred in its omittance [sic] after petitioner's Reconsideration/Modification Hearing of advising him of Appellate Rights to withdrawing his Guilty Plea within ten(10) days after sentencing; in violation of his Due Process and Constitutional Rights of his 6th, 14th, Amend., Pa. R. C. P. R. 321; Pa. R. A. P.; 1701.<sup>3</sup>

(Emphasis in original.)

#### Discussion

In Mr. Greene's petition, he asserts ten grounds in support of his request for the court to grant a writ of habeas corpus. They are as follows:

1. trial counsel failed to pursue a direct appeal from the judgment of sentence as requested by Greene;
2. trial counsel failed to withdraw his guilty plea as requested by the petitioner;

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<sup>3</sup> Answer to Petition for Habeas Corpus Relief and Memorandum of Law in Support Thereof, Exhibit C ("Motion for Post Conviction Collateral Relief" filed by petitioner). (All unconventional citations are quoted exactly as they appear in pro se petitioner's state court Motion for Post Conviction Relief).

3. PCRA counsel was ineffective for failing to raise his assertion that trial counsel was ineffective for failing to withdraw his plea and file a direct appeal;
4. trial counsel failed to advise him regarding the possible defense of voluntary intoxication and/or diminished capacity to the charge of murder in the first degree;
5. trial counsel failed to subpoena and interview other witnesses [Rusty Coles and Curtis Gratz] during the hearing for reconsideration of sentence;
6. trial counsel failed to compel the trial Judge to conduct a penetrating and comprehensive examination on the record assuring that Petitioner's guilty plea was knowing and intelligently entered;
7. trial counsel failed to petition the court for a copy of the colloquy to show that the Court failed to read Petitioner the required six questions pursuant to Pa.R.Crim. P. 319;
8. trial counsel failed to argue that Petitioner was actually innocent of first degree murder;
9. trial counsel failed to argue that petitioner was actually innocent of robbery;
10. trial counsel failed to argue that the cumulative errors of counsel ineffectiveness was the catalyst that induced Petitioner to plead guilty to charges he did not commit.<sup>4</sup>

Magistrate Judge Caracappa found that petitioner's Claims 6 through 10 are unexhausted in state court. Consequently, Magistrate Judge Caracappa concluded that 6 through 10 are procedurally defaulted and not subject to review.

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<sup>4</sup> Report and Recommendation of Magistrate Judge Caracappa, pages 5-6 (summarizing Petition for Writ of Habeas Corpus by a Person in State Custody).

Magistrate Judge Caracappa further concluded that Claims 1 through 5 are exhausted and ripe for our consideration.

Federal law requires the exhaustion of claims in state court before they can be considered in a federal habeas corpus action. In Evans v. Court of Common Pleas, 959 F.2d 1227, 1230 (3d Cir. 1992), the United States Court of Appeals for the Third Circuit concluded that it was "well-established" that "absent a valid excuse, a prisoner must first present all federal claims to the state court." . The exhaustion requirement recognizes the dual sovereignty inherent in our federal system of government. Accordingly, the exhaustion requirement appropriately gives state courts the first opportunity to correct any errors which may have been committed by a state trial court. 959 F.2d at 1230.

In order for a claim to be exhausted, petitioner "must demonstrate that he has presented the legal theory and supporting facts asserted in the federal habeas petition in such a manner that the claims raised in the state courts are 'substantially equivalent' to those asserted in federal court." Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996).

#### Claims 6 through 10

In Claims 6, 7 and 10, petitioner asserts that trial counsel was ineffective for not objecting to the trial court's allegedly defective guilty plea colloquy and for inducing the

guilty plea. These Claims were not presented to the state courts. A comparison of the lists above reveals that Claims 7 and 10 were not raised during petitioner's state appeals. A careful examination reveals that Claim 6 also was not raised.

In Claim 6, petitioner accuses trial counsel of being ineffective for failing to compel the trial judge to ensure that petitioner's guilty plea was knowing and voluntary. Petitioner did not raise the issue of a knowing and voluntary guilty plea before the state court. Petitioner did assert that the trial counsel was ineffective for failing to ensure that the trial court informed petitioner of his right to withdraw his guilty plea, but counsel's alleged failure to inform petitioner that he could withdraw his plea is factually and legally distinguishable from an allegation that petitioner's guilty plea was not the product of a knowing and intelligent decision.

Petitioner raises two distinct arguments, one challenging the guilty plea colloquy procedurally and one challenging it substantively. In the state court, petitioner asserted that the colloquy was defective because petitioner was not informed of his right to withdraw his plea. This is a procedural error.

The argument presented herein challenges the voluntariness of the plea. This is a substantive challenge. Because the state court was never given the opportunity to

determine whether petitioner's guilty plea was the result of a knowing and voluntary decision, this Claim is procedurally defaulted.<sup>5</sup>

Claims 8 and 9 are also procedurally defaulted. It appears that petitioner asserts that his PCRA contention that trial counsel was ineffective for failing to inform petitioner of the defenses of voluntary intoxication and diminished capacity (see Claim 4) is, in fact, a claim of actual innocence. In other words, petitioner is apparently contending that he is innocent of murder in the first degree and robbery because he was incapable of forming the requisite intent to commit either crime by virtue of his voluntary intoxication.

But petitioner errs in his analysis. The analysis for ineffective assistance of counsel differs from that of actual innocence. Ineffective assistance of counsel mandates a Sixth Amendment analysis. The Sixth Amendment to the United States Constitution is applicable to the states through the Due Process

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<sup>5</sup> In his first objection, petitioner argues that he did raise the issues presented in Claims 6, 7, and 10 to the PCRA court. For the reasons expressed above, objection one is overruled.

Because petitioner's second, third, and fourth objections restates Claim 6 and because Claim 6 is procedurally defaulted, petitioner's second, third, and fourth objections are overruled.

Petitioner's sixth objection addresses trial counsel's alleged failure to ensure that the guilty plea colloquy was not defective. For the reasons expressed above, this Claim is defaulted. Accordingly, we overrule the sixth objection.

Mr. Greene's seventh objection appears to assert that the Superior Court erred by granting petitioner's motion for an appeal nunc pro tunc and conducting its review of the case without the full record. There is no evidence that this Claim was presented to the Pennsylvania courts. As such, we find this objection to be procedurally defaulted. Accordingly, we overrule petitioner's seventh objection.

Clause of Fourteenth Amendment. See Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

An actual innocence argument must be based upon the Fourteenth Amendment's Due Process clause. See In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Under an actual innocence argument, petitioner must show by a preponderance of the evidence that no reasonable jury would have convicted him. Schlup v. Delo, 513 U.S. 298, 327, 115 S.Ct. 851, 867, 130 L.Ed.2d 808, 836. Because the two analyses differ, petitioner has not presented his actual innocence arguments to the Pennsylvania state courts. Accordingly, petitioner's Claims of actual innocence are procedurally defaulted.<sup>6</sup>

Moreover, plaintiff has adduced no evidence to support his assertion that he is actually innocent of the offenses with which he has been convicted. Rather, it appears that petitioner relies upon a legal argument concerning his innocence.

Petitioner's claim of actual innocence is based upon his contention that because he was inebriated at the time of the offenses, he was incapable of forming the specific intent to commit murder of the first degree or robbery.<sup>7</sup> Thus, petitioner

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<sup>6</sup> In his ninth objection, petitioner contends that Claims 8 and 9 are not defaulted. For the reasons expressed above, petitioner's ninth objection is overruled.

<sup>7</sup> Petitioner admitted that he committed the crimes of which he is convicted both during his guilty plea colloquy and during his motion for reconsideration hearing before the Pennsylvania trial court. At his PCRA hearing, petitioner claimed that he lied during these proceedings upon the  
(Footnote 7 continued)

does not dispute that he committed murder, but merely disputes what kind of murder he committed.<sup>8</sup>

According to defendants' Answer to Petition for Habeas Corpus Relief and Memorandum of Law in Support Thereof, the facts (which petitioner does not dispute) are as follows:

On Thursday 19, 1990, the deceased, Michael Bannon, age 32, arrived at the Bristol House Tavern in Bristol Brough, Bucks County, Pennsylvania, between 11:00 and 11:30 p.m. He was at the bar and quietly conversed with the bartender for approximately forty-five minutes. During the early morning hours of Friday, July 20, 1990, Petitioner arrived at the bar with a friend, Jason McCausland. Petitioner sat down at the bar near the victim. As he did so, the victim, who had money on the bar, moved the money over in front of him. Petitioner, annoyed that Bannon had moved the money, told the victim that he did not have to move his money.

Petitioner, co-conspirator Jeffery Lafferty and another individual eventually left the bar together with the victim. The victim was acting under the impression that the men were going fishing. Bannon walked with Petitioner and his friends to the Delaware River in Bristol Borough. Upon their arrival, Petitioner and Jeffery Lafferty attacked the victim. The victim was beaten and stabbed by Petitioner and thrown in to the river with the assistance of Lafferty.

Minutes after leaving the area of the attack, Petitioner returned for his beer and found the

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(Footnote 7 continued)

advice of counsel. Whether petitioner lied to the trial court or the PCRA court, we do not credit his bald assertions of innocence herein.

<sup>8</sup> Pennsylvania has a three tier system for defining murder. The Commonwealth defines murder in the first degree as followings: "A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing." 18 Pa.C.S.A. § 2502(a). "A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony." 18 Pa.C.S.A. § 2502(b). "All other kinds of murder shall be murder of the third degree." 18 Pa.C.S.A. § 2502(c).

victim staggering, soaking wet, on Radcliffe Street after apparently climbing out of the river. Petitioner approached the victim and attacked him again, slicing his throat.

Shortly after 3:00 a.m. on Friday, July 20, 1990, the body of Michael Bannon was found lying face down on Radcliffe Street by the Bristol Borough Police. The victim's clothes were wet and his jeans pockets were turned inside out. The body had visible stab wounds to the neck, chest and both sides of the abdomen. A trail of blood ran from the area where the body was located across the street and down to the river bulkhead. Three of the areas of heavy concentrations of blood were found near the river and were comparable in the amount to the blood found near the body.

The autopsy performed on the body of Michael Bannon revealed thirty (30) external injuries. The injuries included scrapes to the face and fifteen stab wounds to the body including the neck, chest, and both sides of the abdomen, finger, pelvis and thigh. The victim died as a result of stab wounds to the neck aorta, lungs and liver.<sup>9</sup>

We will disturb a state court ruling only when the state court decision: "(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. § 2254(d); see Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 369 (2000).

Petitioner has offered no explanation of how his

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<sup>9</sup> Answer to Petition for Habeas Corpus Relief and Memorandum of Law in Support Thereof, pages 1-2.

conviction for murder of the first degree is "contrary to, or an unreasonable application of, clearly established federal law" or unwarranted under the facts presented. 28 U.S.C. § 2254(d). Moreover, we can not find any error in the state court's result. Accordingly, we find no merit to petitioner's contention that he is actually innocent.

Thus, petitioner's Claims 1 through 5 remain. We apply the standard from Section 2254(d) to these Claims.

#### Claim 1

Petitioner contends that trial counsel was ineffective for failing to file a direct appeal from his sentencing. In order to establish an ineffective assistance of counsel claim, petitioner must establish that (1) counsel's performance "fell below an objective standard of reasonableness" and (2) that petitioner was prejudiced as a result. Stickland v. Washington, 466 U.S. 668, 687-692, 104 S.Ct. 2052, 2064-2067, 80 L.Ed.2d 674, 693-696 (1984).

Without evaluating counsel's performance, we determine that petitioner suffered no harm from the failure to file a direct appeal. The Superior Court of Pennsylvania converted petitioner's PCRA appeal to a direct appeal nunc pro tunc. Thereafter, the Superior Court denied petitioner's appeal on the merits. The petitioner has cited no law that established that

the Superior Court violated clearly established federal law by treating petitioner's PCRA claims as a direct appeal and our own research reveals none. Accordingly, we find that petitioner suffered no harm from trial counsel's failure to file a direct appeal from sentence.<sup>10</sup>

### Claim 2

In Claim 2, petitioner argues that trial counsel was ineffective for failing to withdraw his guilty plea as requested by petitioner. Because petitioner has failed to show any prejudice that resulted from trial counsel's alleged ineffectiveness, we conclude that this claim is without merit.

It appears that petitioner wanted to withdraw his guilty plea because the trial court imposed four consecutive sentences on the four charges upon which petitioner was convicted. Petitioner apparently had hoped for concurrent sentences. "A 'misplaced hope for a lighter sentence is not ground for withdrawl of a plea'" in Pennsylvania. Rather, Pennsylvania requires only that guilty pleas be made knowingly,

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<sup>10</sup> In his objections, plaintiff contends that it was error for the Superior Court to grant his nunc pro tunc appeal because the Fourteenth Amendment to the United States Constitution required Superior Court to examine the full record. However, the Superior Court was satisfied with the state of the record when it reached its decision. Petitioner contended that he was induced to plead guilty because he believe the death penalty would not be employed and because he believed that he would receive concurrent sentences. Petitioner does not explain why the Superior Court needed any record paper to resolve this contention. Accordingly, we overrule petitioner's eighth objection.

intelligently, and voluntarily. Commonwealth v. Martin,  
416 Pa.Super. 507, 512, 611 A.2d 731, 733 (1992).

Petitioner does not explain how the application of Pennsylvania law to his case violated clearly established federal law. Petitioner argues that if he had know that the trial court would impose consecutive sentences then he would have taken his chances at trial. This is not grounds to withdraw a guilty plea. Martin, supra. Accordingly, we find that Claim 2 is without merit.

### Claim 3

In Claim 3, petitioner contends that PCRA counsel was ineffective for failing to raise his assertion that trial counsel was ineffective for failing to withdraw his plea and file a direct appeal. The Superior Court agreed with petitioner, and, as a result, considered this contention on its merits.

As a remedy for counsel's failure to file a direct appeal, the Superior Court granted petitioner's appeal as a direct appeal nunc pro tunc. The Superior Court then determined that petitioner's contention that trial counsel was ineffective because of the failure to withdraw the guilty plea was without merit. For the reasons expressed in our discussion of Claims 1

and 2 above, we also find that Claim 3 is without merit.<sup>11</sup>

#### Claim 4

Petitioner asserts in Claim 4 that trial counsel was ineffective for failing to advise petitioner of the availability of the defenses of voluntary intoxication and diminished capacity to the charge of murder of the first degree.

The PCRA court took testimony regarding this issue on April 24, 2000. At that hearing petitioner's trial counsel, Gregg Blender, Esquire, testified that he had met with petitioner over 25 times. Commonwealth v. Greene, No. 90-5079, 90-5080, at 29 (C.C.P. Bucks April 24, 2000). Attorney Blender testified that voluntary intoxication and diminished capacity were the only defenses that he found applicable, and that he discussed them numerous times with the petitioner. Id. at 30, 35.

In addition, Attorney Blender testified that he had investigated these defenses and was prepared to go to trial upon those defenses on the day that petitioner decided to change his plea to guilty. Id. at 35-36. Senior Judge Ward F. Clark, who

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<sup>11</sup> In his fifth objection, petitioner avers that Magistrate Judge Caracappa incorrectly interprets the Superior Court's decision. He contends that the Superior Court did find that trial counsel was ineffective during the guilt plea colloquy. Petitioner is mistaken. The Superior Court found that the issue was preserved for its consideration by petitioner's claim that PCRA counsel was ineffective for not raising the issue. Upon review of the merits, however, the Superior Court found that trial counsel was not ineffective when representing petitioner during the guilty plea colloquy. See Commonwealth v. Greene, No. 00-2276, at 7 (Pa. Super. Ct. September 11, 2001). Accordingly, petitioner's fifth objection is overruled.

presided over the PCRA court, found Gregg Blender to be a credible witness and accepted his testimony. Commonwealth v. Greene, No. 90-5079, 90-5080, at 2 (C.C.P. Bucks July 14, 2000).

We will not disturb the state court's credibility determinations without compelling justification. State court decisions and the reasons that support their decisions are entitled to substantial deference. See Williams, 529 U.S. at 386, 120 S.Ct. at 1509, 146 L.Ed.2d at 414. Accordingly, we find no factual basis for Claim 4 and, therefore, conclude that it is without merit.

#### Claim 5

In Claim 5, petitioner contends that trial counsel was ineffective for failing to subpoena and interview witnesses during the hearing for reconsideration of sentence. In particular, petitioner asserts that trial counsel should have subpoenaed and interviewed Rusty Coles and Curtis Gratz.

During the April 24, 2000 hearing, Senior Judge Clark also took testimony on this issue. During the hearing, petitioner admitted that he had not given trial counsel Mr. Coles' or Mr. Gratz's name prior to the motion for reconsideration hearing. Commonwealth v. Greene, No. 90-5079, 90-5080, at 22 (April 24, 2000).

In Commonwealth v. Williams, 730 A.2d 507, 511 (Pa.

Super 1999) the Superior Court of Pennsylvania articulated a four-prong test concerning claims of ineffective assistance of counsel as follows:

[I]n the context of a claim of failure to call witnesses [petitioner] must...prove: (1) the existence and availability of the witnesses; (2) counsel's awareness of, or duty to know of the witnesses; (3) the witnesses' willingness and ability to cooperate and appear on behalf of the [petitioner]; and (4) the necessity of the proposed testimony in order to avoid prejudice.

Petitioner admitted that he did not tell counsel of the existence of either Mr. Coles or Mr. Gratz. Accordingly, petitioner cannot satisfy the second factor of the Williams test.

Moreover, plaintiff cannot establish that prejudice resulted from the failure of either witness to testify. Mr. Greene's counsel carefully prepared a defense based upon voluntary intoxication and diminished capacity and was prepared to go to trial with these defenses on the day that Mr. Greene decided to plead guilty. In the preparation of those defenses, counsel had interviewed and prepared experts, Mr. Greene's friends and neighbors, and even one of Mr. Greene's bartenders. Petitioner does not assert anything to which Mr. Coles or Mr. Gratz could have testified that was not already covered in the preparation of these other witnesses. Accordingly, petitioner cannot establish the fourth element of the Williams test.

Finally, petitioner does not assert the Pennsylvania standard for determining whether counsel was ineffective for

failing to call a witness violates clearly established federal law. Moreover, we find no support for such a position. Accordingly, we find Claim 5 without merit.

#### Certificate of Appealability

A certificate of appealability should be issued if petitioner demonstrates that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 1035, 154 L.Ed.2d 931, 944 (2003). Petitioner presents neither any issue upon which reasonable jurists could debate nor an argument which deserves encouragement to proceed.

Petitioner has not presented any novel issues of fact or law. All of petitioner's Claims are resolved by procedural default, by clearly established Pennsylvania law, or by the absence of any factual support. Petitioner does not aver, and we can find no support for the averment, that any of the clearly established Pennsylvania law cited herein, or by the defense, violates clearly established federal law. Accordingly, we decline to issue a certificate of appealability.

Conclusion

For the foregoing reasons, we approve and adopt Magistrate Judge Caracappa's Report and Recommendation. Furthermore, we deny the Petition for Writ of Habeas Corpus by a Person in State Custody and decline to issue a certificate of appealability.

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

THOMAS GREENE, )  
)  
) Civil Action  
Petitioner, ) No. 02-CV-9128  
)  
)  
vs. )  
)  
WILLIAM STICKMAN, Superintendent, )  
)  
THE DISTRICT ATTORNEY OF THE )  
COUNTY OF BUCKS COUNTY, and )  
)  
THE ATTORNEY GENERAL OF THE STATE )  
OF PENNSYLVANIA )  
)  
Respondents. )

O R D E R

NOW, this 29th day of March, 2004, upon consideration of the Petition for Writ of Habeas Corpus by a Person in State Custody filed by petitioner Thomas Greene on December 18, 2002; upon consideration of the Brief in Support of Habeas Corpus

Petition filed by petitioner on December 18, 2002; upon consideration of the Answer to Petition for Habeas Corpus Relief and Memorandum of Law in Support Thereof filed by respondents on March 24, 2003; upon consideration of the Report and Recommendation of Magistrate Judge Linda K. Caracappa filed on July 31, 2003; upon consideration of Petitioner's Objections to Report and Recommendation Filed by Magistrate Judge Caracappa filed August 13, 2003; upon consideration of Respondent's Answer to Petitioner's Objections to Report and Recommendation Filed by Magistrate Judge Caracappa filed August 27, 2003; upon consideration of the record papers; upon consideration of the decisions of the Pennsylvania courts that ruled upon petitioner's motions before the state courts; it appearing that Magistrate Judge Caracappa's Report and Recommendation correctly determined the legal issues presented in this action; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that the Report and Recommendation is approved and adopted.

IT IS FURTHER ORDERED that petitioner's Petition for Writ of Habeas Corpus by a Person in State Custody is denied.

IT IS FURTHER ORDERED that petitioner's objections are overruled.

IT IS FURTHER ORDERED that no probable cause exists to issue a certificate of appealability.

BY THE COURT:

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James Knoll Gardner  
United States District Judge