

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

NATHAN IZZARD :  
 :  
 v. : CIVIL ACTION  
 :  
 KENNETH KYLER, et al. : NO. 02-CV-8515  
 :

**SURRICK, J.**

**DECEMBER 22, 2004**

**MEMORANDUM & ORDER**

Presently before the Court is Nathan Izzard's ("Petitioner") Petition Under 28 U.S.C. §2254 for Writ of Habeas Corpus By A Person In State Custody (Doc. No. 1), Magistrate Judge Peter Scuderi's Report and Recommendation recommending denial of the Petition (Doc. No. 13), and Petitioner's Objections to the Magistrate Judge's Report and Recommendation (Doc. No. 14). For the following reasons, we will overrule Petitioner's Objections and deny the Petition.

**I. FACTUAL AND PROCEDURAL HISTORY**

In 1990, at Petitioner's murder trial, the following facts were established:

On January 6, 1989, [Petitioner] approached Mark Burton and [Teddy Acevedo,] the twelve-year old victim at the intersection of Hutchinson and Clearfield Streets in Philadelphia. [Petitioner] pointed a semi-automatic weapon at Burton's chest and demanded money. As Burton produced the five dollars he had with him, the victim pulled out a toy gun and said, "he ain't giving you shit." [Petitioner] turned, cocked his weapon, and fired. The victim cried, "he shot me," ran a few feet, collapsed on the sidewalk, and died.

*Commonwealth v. Izzard*, 803 A.2d 793, slip op. at 1 (Pa. Super. Ct. 2002) (table). Two days after the shooting, Petitioner gave a statement to police, in which he confessed to robbing Burton and killing Acevedo:

It was about 3:30 in the morning, and I was walking. When I got to Hutchinson and Clearfield Streets, I saw a guy by the name of Mark. I do not know his last name. Mark was selling some crack to someone. When I got to the

corner, I told Mark to give me some money. I told him to give it up. I snatched some money and drugs out of his hand. While I was there, there were some other people there. There were a few people. I turned around after I took the money, and I seen [sic] somebody with a gun pointed at me. I pushed the gun away from my face. I was still holding Mark with my other hand.

After I pushed the gun away from my face, this guy pointed the gun back in my face. He clicked the gun at me. I had a gun, one in my right hand. After he clicked the gun at my face, I pointed the gun like around him, and he like stepped into it when I fired the shot. I heard the guy say something like, "He shot me," or "She shot me," and then I ran.

(N.T. 3/15/90 at 98-99.)

Petitioner was tried by a jury in the Court of Common Pleas, Philadelphia County. On March 21, 1990, Petitioner was convicted of murder in the first degree, robbery, recklessly endangering another person, and possession of an instrument of crime. (N.T. 3/21/90 at 213-18.) On March 22, 1990, after a penalty hearing, the jury returned a sentence of life imprisonment. (N.T. 3/22/90 at 238-39.) Following the denial of post-trial motions, the trial court sentenced Petitioner to life imprisonment on the murder conviction. The trial court also sentenced him to concurrent terms of two-and-a-half to five years imprisonment for the weapons offense, one to two years imprisonment for recklessly endangering another person, and ten to twenty years imprisonment for robbery. *Commonwealth v. Izzard*, 643 A.2d 704, slip op. at 1 (Pa. Super. Ct. 1994) (table).

Petitioner did not file a direct appeal. However, Petitioner did file a counseled petition for collateral relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541 *et seq.*, requesting to have his appellate rights reinstated *nunc pro tunc*. *Izzard* 643 A.2d 704, slip op. at 1. The state court granted Petitioner's request and, on November 16, 1992, Petitioner filed a Notice of Appeal with the Pennsylvania Superior Court,

asserting only one claim: whether his trial counsel was ineffective for failing to object to the Commonwealth's impermissible exclusion of black venirepersons. *Id.* at 2. On February 1, 1994, the Superior Court affirmed the judgment of sentence, concluding that Petitioner had failed to establish a prima facie case of racial discrimination in the Commonwealth's use of peremptory challenges. *Id.* at 3-4. Petitioner then filed a Petition for Allowance of Appeal in the Pennsylvania Supreme Court, which was denied on August 24, 1994. *Commonwealth v. Izzard*, 648 A.2d 787 (Pa. 1994) (table).

On January 16, 1997, Petitioner filed a counseled PCRA petition, which was dismissed as meritless on July 21, 2000. *Commonwealth v. Izzard*, 803 A.2d 793, slip op. at 2 (Pa. Super. Ct. 2001) (table) [hereafter *Izzard*slip op.]. Petitioner appealed this decision to the Pennsylvania Superior Court, arguing the following claims: (1) ineffectiveness of trial counsel for failing to object to the trial court's jury instruction on first degree murder and specific intent to kill; (2) ineffectiveness of trial counsel for failing to object when the trial court excluded a jury instruction on self-defense and "unreasonable belief" manslaughter; (3) ineffectiveness of trial counsel for failing to explicitly link the testimony of potential witness Victor Velazquez to the defense of self-defense and/or "unreasonable belief" manslaughter; (4) ineffectiveness of trial counsel for failing to obtain and introduce the criminal record of witness Mark Burton; (5) ineffectiveness of trial counsel for failing to object when the court rejected the jury's request to have Petitioner's police statement read back to them; and (6) ineffectiveness of all prior counsel for failing to raise these claims earlier. *Id.* at 3-9. On April 9, 2002, the Superior Court affirmed the denial of PCRA relief. *Id.* Petitioner filed a Petition for Allowance of Appeal in the Pennsylvania Supreme Court, which was denied on October 4, 2002. *Commonwealth v. Izzard*,

809 A.2d 902 (Pa. 2002) (table).

On December 10, 2002, Petitioner filed the instant Petition for a writ of habeas corpus, raising the following claims:

1. The trial court committed constitutional error in failing to properly instruct the jury as to the elements of first-degree murder and in failing to distinguish between killing with malice and an intentional killing, trial counsel was ineffective for failing to object to the deficient instruction, and appellate counsel was ineffective for not raising this issue on direct appeal;
2. The trial court committed constitutional error in failing to instruct the jury on self-defense or “unreasonable belief” manslaughter, trial counsel was ineffective for failing to object to the deficient instruction, and appellate counsel was ineffective for not raising this issue on direct appeal; and
3. Trial counsel was ineffective for failing to impeach witness Mark Burton with his criminal record, and appellate counsel was ineffective for failing to investigate or raise this issue on direct appeal.

(Mem. in Supp. of Pet. for Writ of Habeas Corpus at 7-20.) The Petition was referred to Magistrate Judge Peter B. Scuderi for a Report and Recommendation.

On July 23, 2003, Magistrate Judge Scuderi recommended that all of Petitioner’s claims for relief be denied. (Doc. No. 13.) Petitioner filed the following Objections to the Report and Recommendation:

1. Petitioner objects to the Magistrate Judge’s determination that a jury charge that eliminates the reasonable doubt standard for critical elements of an offense is constitutional, and that trial counsel (or appellate counsel) can ever be effective for failing to object to the same.
2. Petitioner objects to the Magistrate Judge’s determination that petitioner was not denied the effective assistance of counsel (prejudice prong) when counsel failed to secure (and utilize in impeachment) the criminal record of the sole Commonwealth eyewitness, an error that deprived petitioner of his [c]onfrontation rights.

(Doc. No. 14 at 1.)

## II. STANDARD OF REVIEW

The Anti-Terrorism and Effective Death Penalty Act (“AEDPA”), Pub. L. 104-132, 110 Stat. 1214 (1996), requires courts to employ a deferential, “reasonableness” standard of review to a state court’s judgment on constitutional issues raised in habeas petitions. *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 903 (3d Cir. 1999); *see also Lindh v. Murphy*, 521 U.S. 320, 334 n.7 (1997) (describing AEDPA’s standard of review as “highly deferential” to state court determinations). A federal court may overturn a state court’s resolution on the merits of a constitutional issue only if the state court decision “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.” 28 U.S.C. § 2254(d)(1) (2000). The Supreme Court has adopted a two-part standard for analyzing claims under § 2254(d)(1), establishing that the “contrary to” and “unreasonable application of” clauses have independent meaning:

Under the “contrary to” clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the “unreasonable application” clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.

*Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). “[A] federal habeas court may not issue the writ [of habeas corpus] simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411.

This Court must also apply a deferential standard to a state court's determination of facts. A state court's determination of a factual issue is "presumed to be correct," and may be rebutted only by "clear and convincing evidence" to the contrary. 28 U.S.C. § 2254(e)(1) (2000). Habeas relief predicated on an alleged factual error will be granted only if the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d)(2).

We review *de novo* those portions of the Magistrate Judge's Report and Recommendation to which specific objections have been made. 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b); *see also Thomas v. Arn*, 474 U.S. 140, 141-42 (1985) ("[A] United States district judge may refer . . . petitions for writ of habeas corpus[] to a magistrate, who shall conduct appropriate proceedings and recommend dispositions. . . . [A]ny party that disagrees with the magistrate's recommendations 'may serve and file written objections' to the magistrate's report, and thus obtain *de novo* review by the district judge." (citations and footnotes omitted)).

### **III. DISCUSSION**

#### **A. Jury Instructions**

Petitioner first argues that the state court's jury instructions on first-degree murder were improper because the jury was never told that malice and a specific intent to kill were elements that had to be proven beyond a reasonable doubt, that trial counsel was ineffective for not objecting to these instructions, and that appellate counsel was ineffective for not raising these issues on direct appeal. (Mem. in Supp. of Pet. for Writ of Habeas Corpus at 5, 7-10; Doc. No. 14 at 9.) The Magistrate Judge determined that Petitioner's ineffective assistance claim was

exhausted because it had been presented to the PCRA court. (Doc. No. 13 at 6-9.) He also concluded, however, that Petitioner’s direct claim of constitutional error—that the trial court’s first-degree instructions violated the federal Constitution—was procedurally defaulted because it had not previously been raised in state court. (*Id.* at 9-11.) We will address the issue of exhaustion and/or procedural default.

1. Exhaustion / Procedural Default

Absent exceptional circumstances, a state prisoner is required to exhaust all avenues of state review of his claims prior to filing a petition for federal habeas review. 28 U.S.C. § 2254(b)(1) (2000); *O’Sullivan v. Boerkel*, 526 U.S. 838, 839 (1999); *see also Toulson v. Beyer*, 987 F.2d 984, 986 (3d Cir. 1993) (“A state prisoner may initiate a federal habeas petition only after state courts have had the first opportunity to hear the claim sought to be vindicated.”). The policy of the exhaustion requirement is rooted in the tradition of comity: the state must have the “initial opportunity to pass upon and correct” alleged violations of a habeas petitioner’s constitutional rights. *Picard v. O’Connor*, 404 U.S. 270, 275 (1971) (quoting *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971)). A petitioner “shall not be deemed to have exhausted the remedies available . . . if he has the right under the law of the state to raise, by any available procedure, the question presented.” 28 U.S.C. § 2254(c) (2000). In order for a claim to be exhausted, “[b]oth the legal theory and the facts underpinning the federal claim must have been presented to the state courts.” *Evans v. Court of Common Pleas*, 959 F.2d 1227, 1231 (3d Cir. 1992). The habeas petitioner bears the burden of proving that he has exhausted available state remedies. *Toulson*, 987 F.2d at 987.

The exhaustion requirement does not apply, however, when “state procedural rules bar a

petitioner from seeking further relief in state courts.” *Lines v. Larkins*, 208 F.3d 153, 160 (3d Cir. 2000). In such cases, exhaustion is not possible because the state court would refuse to hear the merits of the claim on procedural grounds, and any attempt to assert the claims would be futile. *Id.* However, this does not mean a federal court may, without more, proceed to the merits of petitioner’s claims. “[C]laims deemed exhausted because of a state procedural bar are procedurally defaulted.” *Id.* Federal courts may not consider the merits of a procedurally defaulted claim unless “the petitioner ‘establishes ‘cause and prejudice’ or a ‘fundamental miscarriage of justice’ to excuse the default.”” *Id.* (quoting *McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999)); *see also Dretke v. Haley*, 124 S. Ct. 1847, 1852 (2004) (“[W]e have recognized an equitable exception to the bar when a habeas applicant can demonstrate cause and prejudice for the procedural default.”).

Petitioner’s direct claim regarding the constitutionality of the first-degree murder jury instructions was exhausted at the state level in Petitioner’s PCRA proceedings. In his brief to the PCRA court, Petitioner argued that he

was denied the effective assistance of counsel *and due process of law* when trial counsel failed to object to the trial court’s closing instruction defining murder, as that instruction (a) failed to set forth the distinct elements of first degree murder and require that each such element be proved beyond a reasonable doubt and (b) erroneously permitted a conviction for murder when the Commonwealth only had to prove that a death occurred by criminal agency, therefore impermissibly reducing the Commonwealth’s burden of proof.

Am. Pet. for Post-Conviction Collateral Relief at 1, *Commonwealth v. Izzard* (emphasis added); *see also id.* at 8 (arguing that “the failure to secure . . . an instruction [regarding the burden of proof on all elements of first-degree murder] deprived appellant of a due process right guaranteed

by the United States Constitution”).<sup>1</sup> The same constitutional due process argument was raised in Petitioner’s appeal to the Pennsylvania Superior Court, *see* Appellant’s Br. at 14-18, *Commonwealth v. Izzard*, 803 A.2d 793 (Pa. Super. Ct. 2002) (table) (No. 2383 EDA 2000), and his petition for allowance of appeal with the Pennsylvania Supreme Court, *see* Pet. for Allowance of Appeal at 6-9, *Commonwealth v. Izzard*, 809 A.2d 902 (Pa. 2002) (table) (No. 175). Petitioner couched his argument as both an ineffectiveness claim and as an objection to the constitutionality of the underlying jury instruction, and the latter issue was properly presented to the state courts. Because Petitioner’s direct claim of constitutional error was properly presented to the state court, it was exhausted and not procedurally defaulted. *See Hameen v. Delaware*, 212 F.3d 226, 247 (3d Cir. 2000) (“[T]o satisfy the exhaustion requirement, a defendant only need have given the state courts the opportunity to pass on the merits of a claim.” (citing *Picard*, 404 U.S. at 275)).

We next address whether the AEDPA’s restrictive standard of review applies to Petitioner’s direct claim regarding the jury instructions. Under § 2254(d)(1), if a claim raised in a habeas petition “was adjudicated on the merits in State court proceedings,” we may not grant the writ “unless the adjudication of the law . . . resulted in a decision that was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1) (2000). This standard does not apply, however, if “the state court has not reached the merits of a claim” that was properly “presented to a federal habeas court.” *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001); *see also Chadwick v. Janecka*,

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<sup>1</sup> “[T]he due process clause [of the federal Constitution] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970).

312 F.3d 597, 606 (3d Cir. 2002) (“[I]f an examination of the opinions of the state courts shows that they misunderstood the nature of a properly exhausted claim and thus failed to adjudicate that claim on the merits, the deferential standards of review in AEDPA do not apply.”). Here, the Superior Court clearly ruled on the merits of Petitioner’s direct claim by determining that the jury instructions were proper. *See Izzard*, slip op. at 5 (“Appellant states that [the jury instructions] thus violated his constitutional rights. We disagree.”); *id.* (“After reviewing the entire charge as a whole we find that the trial court correctly charged the jury.”); *id.* at 6 (“We find that [Petitioner]’s contention that the trial court improperly instructed the jury on first degree murder without merit.”). AEDPA’s standard of review therefore applies to Petitioner’s direct claim regarding the constitutionality of the jury instructions on first-degree murder.

2. Propriety of Jury Instructions

Petitioner argues that the state court’s first-degree murder charge was erroneous because it failed to instruct the jury that the government had the burden to prove two elements of the offense of first-degree murder, “malice and intentionality,” beyond a reasonable doubt. (Mem. in Supp. of Pet. for Writ of Habeas Corpus at 7-10; Doc. No. 14 at 5-6.) Addressing the merits of this claim on collateral appeal, the Pennsylvania Superior Court stated:

The trial court enumerated each charge and reviewed the elements of each crime with the jury. When the trial court reached the murder charge, it stated:

You may find the defendant guilty of murder in the first degree, guilty of murder in the second degree, guilty of murder in the third degree, guilty of voluntary manslaughter, or not guilty. I shall define each of those crimes for you.

Now, in all murder, whatever the degree, there is an element which we call malice. If there is no malice, there is no murder, and malice has a legal definition . . . .

N.T. 3/19/90 at 178-79. The court proceeded to define malice for the jury and then defined each degree of murder, clearly outlining the particular elements of each degree. *Id.* at 179-83. The court then addressed the burden of proof, and explained reasonable doubt. The court stated that “the prosecution has the burden of only proving the essential elements of the crime beyond a reasonable doubt. And in a homicide case, there are three essential elements. One, that a death has occurred. Two, that the death resulted from a criminal agency, and three that the defendant was legally responsible for that death.” *Id.* at 184-85.

[Petitioner] asserts that this last statement concerning homicide removed “from the reasonable doubt ‘calculus’ the requirements that two elements, those of malice and of the specific intent to kill, be proved beyond a reasonable doubt.” [Petitioner] states that this violates his constitutional rights. We disagree.

After reviewing the entire charge as a whole we find that the trial court correctly charged the jury. The alleged improper charge was on murder generally, not the specific degree. It is clear from the record that the jury in this case deliberated at length on the degree of murder. In response to the jury’s question concerning the different degrees of murder, the court again explained that first the jury must find there was a murder, and explained the elements of murder. The court then stated, “now, if you should decide that a murder has occurred, your next step is to determine whether it was first degree murder, second degree murder, or third degree murder.” N.T. 3/20/90 at 202-03. The court then did a “shorthand” definition of each degree and then defined each degree again at length. *Id.* at 204-206. The jury foreperson then again stated that he was confused, and the court again explained the differences of each degree of murder, including first degree murder. *Id.* at 207-209. The trial court clearly and correctly charged the jury.

We also reject [Petitioner]’s argument that the trial court erroneously charged the jury on malice. As discussed above, the trial court explained and defined malice for the jury . . . . The trial court therefore did not improperly confuse malice and specific intent.

We find that [Petitioner]’s contention that the trial court improperly instructed the jury on first degree murder without merit. . . .

*Izzard* slip op. at 4-6.

Clearly established federal law requires the government to prove every element of a criminal offense beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970) (“The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”); *see*

also *United States v. Hernandez*, 176 F.3d 719, 728 (“It is axiomatic that ‘the Due Process Clause requires the government to prove a criminal defendant’s guilt beyond a reasonable doubt. . . .’” (quoting *Victor v. Nebraska*, 511 U.S. 1, 22 (1994))). Instructions which suggest that a jury may convict without proving each element of a crime beyond a reasonable doubt violate the constitutional rights of the accused. *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979); see also *Everett v. Beard*, 290 F.3d 500, 510 (3d Cir. 2002), cert. denied, 123 S. Ct. 877 (2003). In reviewing a potentially ambiguous jury instruction, we must “inquire ‘whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way’ that violates the Constitution.” *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)); see also *Victor*, 511 U.S. at 6 (“[T]he proper inquiry is not whether the instruction ‘could have’ been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it.” (quoting *Estelle*, 502 U.S. at 72)).

In its initial charge, the court properly explained to the jury that malice was a required element of any degree of murder:

[I]n all murder, whatever the degree, there is an element which we call malice. If there is no malice, there is no murder, and malice has a legal definition.

The legal definition is as follows:

Malice consists of either an express intent to kill or an express intent to inflict great bodily harm or of a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences and a mind regardless of social duty which creates an unjustified disregard for the likelihood of death or great bodily harm and an extreme indifference to the value of human life.

(N.T. 3/19/90 at 178-79.) Then, the trial court accurately described the *mens rea* requirement for first-degree murder:

I now define murder in the first degree. A criminal homicide constitutes murder in the first degree when it is committed in the first degree. A criminal

homicide constitutes murder in the first degree when it is committed by an intentional killing. As used in this statute, intentional killing means, among other things, any kind of willful, deliberate and pre-meditated killing. A killing is willful and deliberate if the defendant consciously decides to kill the victim and it is premeditated if the defendant possessed a fully formed intent to kill at the time when he acted even though there need not have been any appreciable amount of time between the time that the defendant first conceived the idea of killing and the time when he acted.

The design to kill can be formulated in a fraction of a second.

In killing, whether or not the defendant committed the kind of intentional killing required for first degree murder, you should consider the testimony of the expert witnesses as well as all of the other evidence which may shed light on what was going on in the defendant's mind at the time of the alleged killing.

An intentional killing may be found from expressed words used by the defendant or it may be implied from either words or conduct of the defendant.

If the defendant intentionally used a deadly weapon on a vital part of the victim's body, you may infer from this that the killing was intentional. Specific intent as well as malice may be inferred from the use of a deadly weapon on a vital part of the body.

*(Id. at 179-81.)*

After a discussion of the elements of second- and third-degree murder and voluntary manslaughter, the trial court gave its charge regarding the Commonwealth's burden of proof. It stated that "[t]here is only one burden of proof[,] and that burden is on the Commonwealth. The measure of that burden is to convince you of the guilt of the defendant beyond a reasonable doubt." *(Id. at 184.)* The court then explained the concept of reasonable doubt, stating that "a reasonable doubt does not mean beyond all doubt or beyond any doubt. It does not mean proof to a mathematical certainty or absolute certainty, nor must the proof demonstrate the complete impossibility of innocence." *(Id. at 185.)* Rather, "[i]t must be a real doubt and cannot be a doubt fashioned or conjured up in the minds of you the jury to escape an unpleasant verdict. It must be an honest doubt arising out of the evidence itself, the kind of doubt that will restrain a reasonable man or woman from acting in a matter of importance to himself or herself." *(Id.)*

The court instructed the jury that “[i]f you have such a doubt as to the guilt of the defendant[,] or as to any of the factors upon which his guilt may depend, it is your duty to acquit him.” (*Id.* at 186.)

All of the foregoing statements accurately describe the reasonable doubt standard as determined by the United States Supreme Court. Trial courts may define reasonable doubt for the jury, although they are not required to do so. *Victor*, 511 U.S. at 6; *see also* 26 James Wm. Moore et al., Moore’s Federal Practice ¶ 630.22 (“When defining reasonable doubt for the jury, the court may look to terminology that has been recommended by the Supreme Court.”). The Supreme Court has approved instructions that, like the one in this case, define reasonable doubt as “a doubt that would cause a reasonable person to hesitate to act.”<sup>2</sup> *Victor*, 511 U.S. at 20. As mentioned above, the government also has the burden to prove every element of an offense beyond a reasonable doubt. *Estelle*, 502 U.S. at 78; *In re Winship*, 397 U.S. at 364. Here, the charge instructed the jury that it must find that each element of first-degree murder has been proven beyond a reasonable doubt in order to convict him. *See* N.T. 3/19/90 at 186 (“If you have such a [reasonable] doubt as to the guilt of the defendant *or as to any of the factors upon which his guilt may depend*, it is your duty to acquit him.” (emphasis added)).

Petitioner asserts that language in the court’s instructions had the effect of removing the Commonwealth’s burden regarding the elements of malice and specific intent to kill. (Doc. No. 14 at 6-7.) He points to the following statement by the trial court:

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<sup>2</sup> The Supreme Court has also approved instructions similar to the one given by the trial court that explain that reasonable doubt does not mean proof to a mathematical certainty. *See Holland v. United States*, 348 U.S. 121, 138 (1954) (“The Government must . . . prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty.”).

[A]s I said before, the prosecution has the burden of only proving the essential elements of the crime beyond a reasonable doubt. And in a homicide case, there are three essential elements. One, that a death has occurred. Two, that the death resulted from a criminal agency, and three that the defendant was legally responsible for that death.

(N.T. 3/19/90 at 184-85.) Petitioner argues that because the court failed to mention that malice and specific intent were also “essential elements” of the crime of first-degree murder, it effectively instructed the jurors that those two elements did not need to be proven beyond a reasonable doubt. (Doc. No. 14 at 6-7.) We disagree.

The above recited statement to which Petitioner objects discussed the “essential elements” common to the various crimes collectively classified as criminal homicide. Under Pennsylvania law, criminal homicide includes first-, second-, and third-degree murder, as well as voluntary and involuntary manslaughter. 18 Pa. Cons. Stat. § 2501(b) (2002). The trial court’s instruction stated that for all of these crimes, there were three common elements that had to be established beyond a reasonable doubt.<sup>3</sup> (N.T. 3/19/90 at 184-85.) Contrary to Petitioner’s assertion, it did not state that those were the *only* elements that needed to be proven beyond a reasonable doubt. Just prior to its reasonable doubt charge, the trial court explained all of the essential elements of first-, second-, and third-degree murder, and discussed the differences between them. It stated that an essential element of second-degree murder was that the killing occurred during the perpetration of a felony and that this element had to be proven beyond a reasonable doubt. (*Id.* at 181.) The court also distinguished between the elements of first- and

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<sup>3</sup> In describing the common elements of homicide, the trial court employed language that was nearly identical to that used by other Pennsylvania courts. *See, e.g., Commonwealth v. Thomas*, 239 A.2d 354, 357 (Pa. 1968) (“In a homicide case, the Commonwealth must prove beyond a reasonable doubt that (1) a death has occurred, (2) that the death resulted from criminal agency, and (3) that the defendant is legally responsible for the death.”).

third-degree murder, instructing the jury that third-degree murder required that the government prove the element of malice beyond a reasonable doubt, but not the element of specific intent to kill, which applied only to first-degree murder. (*Id.* at 182.) Taking the trial court’s instructions as a whole, the charge accurately conveyed to the jury that the government carried the burden of proving beyond a reasonable doubt all the elements of murder, including malice and specific intent to kill.

Petitioner also contends that the trial court’s answers to the jury’s questions regarding the instructions had the effect of removing the Commonwealth’s burden on the elements of malice and specific intent. (Mem. in Supp. of Pet. for Writ of Habeas Corpus at 8-9; Doc. No. 14 at 5-6.) In response to a question asking the trial court to “re-read the definition of the various degrees of murder and manslaughter,” (N.T. 3/19/90 at 193), the judge stated:

First thing I will do is to break it down very simplistically to you and then I shall read it for you. The way I break it down is I talk to the ladies and I give the ladies the job of explaining it to the men when you get in the jury deliberating room. And I talk with the ladies in terms of recipes.

Now, whenever you have certain ingredients, you have a cake. If you have certain other ingredients, you will have a salad. If you have certain other ingredients, you will have ice cream.

Think of the elements of the crimes just like you think of the ingredients of a dish. Different crimes have different elements. First degree has certain elements, second degree has certain elements, third degree has certain elements and voluntary manslaughter has certain elements.

The essential difference in first degree is you have intent to kill. In second degree, we call it felony murder. The intent of the felony in this case was robbery, and attaches to the murder. In the third degree you have the intent to do great bodily harm but not to murder. Voluntary manslaughter, you have a killing done with intense passion, brought on by sufficient provocation of the victim.

(*Id.* at 194.) The court then repeated its prior instruction regarding malice and specific intent, and instructed the jury that both of these elements (“ingredients”) were necessary for the crime of first-

degree murder.<sup>4</sup> (*Id.* at 195-96.)

The next day, the jury again asked the court to “clarify the difference between the degrees of murder.” (N.T. 3/20/90 at 202.) The trial judge instructed as follows:

Now, the defendant is charged with murder. There are three elements to murder. And those three elements are Number 1, has a death occurred? Number 2, was the death as a result of a criminal agency and Number 3, is the defendant legally responsible for that death?

Now, that is to determine whether a murder has occurred.

Now, if you should decide that a murder has occurred, your next step is to determine whether it was first degree murder, second degree murder, or third degree and if you will recall yesterday, I gave you my recipe in the sense of I was telling you that each degree of murder has certain ingredients just like types of food would have certain ingredients.

So now, first degree murder had the intent to kill.

Skip over second degree for a moment.

Third degree murder has the intent to do great bodily harm, but not to kill.

Second degree murder is what we call a felony murder, and the intent which attaches to the original felony and in this case it is robbery supplies the intent for second degree murder.

Now, having given you that in a shorthand way, I shall again read to you the language I read before.

(*Id.* at 202-04.) The court then re-read its initial set of instructions, including those pertaining to malice and specific intent to kill, and again explained that they were necessary elements to the crime of first-degree murder. (*Id.* at 204-06.)

Petitioner argues that under the “ingredients” analogy used by the trial court, the jury was instructed that there were some components of the crimes of murder that had to be proven beyond a reasonable doubt, and then there were supplemental “ingredients”—malice and specific intent to kill—that had to be proven by some other, unspecified burden of proof. (Doc. No. 14 at 4-6.) Again, we disagree. The jury sought clarification regarding the differences between the

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<sup>4</sup> The trial court also repeated its prior definitions of second- and third-degree murder and voluntary manslaughter for the jury. (N.T. 3/19/90 at 196-99.)

various degrees of murder, and asked the trial court to explain the differences again or to provide the instructions in writing. (N.T. 3/19/90 at 193.) The trial court judge declined to provide the instructions in writing, explaining that she could not do so under state law, but did give supplemental instructions regarding the various elements of first-, second-, and third-degree murder.<sup>5</sup> (*Id.* at 194-98.) The jury did not, however, ask for further explanation regarding the reasonable doubt standard, so it is not surprising that the trial court declined to restate its earlier charge in that regard. (*Id.* at 186.) The court’s failure to recharge the jury on the Commonwealth’s burden of proof was not constitutional error. *See Victor*, 511 U.S. at 5 (holding that “so long as the court instructs the jury on the necessity that the defendant’s guilt be proved beyond a reasonable doubt” with respect to all elements of the crime, and that the instruction “correctly convey the concept of reasonable doubt to the jury,” there is no constitutional error); *see also Drossos v. United States*, 2 F.2d 538, 540 (8th Cir. 1924) (“The jury were told the elements of the offenses charged against the defendant, and the degree of proof necessary by the instructions as to reasonable doubt as applied to the whole case, and it was not necessary to repeat the caution as to a reasonable doubt . . .”). We are satisfied that the Pennsylvania Superior Court did not act contrary to, nor unreasonably apply, clearly established Supreme Court precedent in determining that the trial court’s jury instructions were proper.

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<sup>5</sup> Although the trial court’s “ingredients” analogy may have been an unconventional method of explaining the distinctions between the various forms of murder, it was not incorrect as a matter of state law. The analogy explained that first-degree murder required malice and specific intent to kill, that second-degree murder was felony murder, and that third-degree murder required malice or intent to cause great bodily harm, but not a specific intent to kill. In Pennsylvania, the trial court has broad discretion in phrasing its charge and may freely choose its own wording, provided the court accurately and adequately presents the law to the jury. *See, e.g., Commonwealth v. Jacobs*, 639 A.2d 786, 791 (Pa. 1994); *Commonwealth v. Ahlborn*, 657 A.2d 518, 520 (Pa. Super. Ct. 1995).

Petitioner is therefore not entitled to relief on his direct claim or his ineffective assistance claim on this issue.<sup>6</sup>

### 3. Harmless Error

Even if we were to conclude that the trial court did commit constitutional error with respect to its jury instructions, we would also have to conclude that the error was not harmless in order to determine that the state court's denial of Petitioner's claim was objectively unreasonable.<sup>7</sup> In determining whether trial error is harmless, a habeas court's inquiry is whether

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<sup>6</sup> Petitioner's trial and appellate counsel cannot be deemed ineffective for failing to raise meritless objections to jury instructions. *United States v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999); *Reinert v. Larkin*, 211 F. Supp. 2d 589, 606 (E.D. Pa. 2002).

<sup>7</sup> Relying on *Sullivan v. Louisiana*, 508 U.S. 275 (1993), Petitioner argues that an improper jury instruction concerning the application of reasonable doubt to every element of an offense "effectively denies the defendant the right to a jury trial and thus can never be harmless error." (Mem. in Supp. of Pet. for Writ of Habeas Corpus at 11.) We disagree. In *Arizona v. Fulminate*, 499 U.S. 279 (1991), the Supreme Court divided the class of constitutional violations that may occur during a criminal proceeding into two categories: (1) ordinary trial errors, which are subject to ordinary harmless-error analysis on review; and (2) "structural defects" in the trial, which so dramatically "affect the framework within which the trial proceeds" that automatic reversal is required. *Id.* at 307-10; *see also United States v. Dominguez Benitez*, 124 S. Ct. 2333, 2339 (2004) ("It is only for certain structural errors undermining the fairness of a criminal proceeding as a whole that even preserved error requires reversal without regard to the mistake's effect on the proceeding."). The Supreme Court has recognized a "strong presumption" that any error falls into the first of these categories. *Rose v. Clark*, 478 U.S. 570 (1986).

In *Sullivan*, the Supreme Court held that an erroneous instruction regarding the reasonable doubt standard is a structural error not subject to harmless error analysis. 508 U.S. at 281-82. However, that case is distinguishable from Petitioner's challenge to the allegedly erroneous jury instructions at issue here. The error in *Sullivan* involved the trial court's explanation of the reasonable doubt standard itself. The trial court in *Sullivan* gave a definition of "reasonable doubt" that was essentially identical to the one held unconstitutional in *Cage v. Louisiana*, 498 U.S. 39, 40 (1990) (per curiam), where the trial court erroneously stated that a reasonable doubt was a doubt where there was "grave uncertainty," "moral certainty," and "actual substantial doubt." In *Cage*, the Court held that these instructions were unconstitutional, concluding that "a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Id.* at 41.

Petitioner's argument here, however, is not that the reasonable doubt standard given by

the “error ‘had [a] substantial and injurious effect or influence in determining the jury’s verdict.’” *Calderon v. Coleman*, 525 U.S. 141, 145 (1998) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); see also *Hassine v. Zimmerman*, 160 F.3d 941, 955 (3d Cir. 1998) (“[C]onstitutional trial error is not harmless if the court is in ‘grave doubt’ as to whether the error had a substantial and injurious effect or influence in determining the jury’s verdict.” (quoting *O’Neal v. McAninch*, 513 U.S. 432, 436 (1995))). This [deferential] standard “reflects the ‘presumption of finality and legality’ that attaches to a conviction at the conclusion of direct review.” *Calderon*, 525 U.S. at 146-47 (quoting *Brecht*, 507 U.S. at 633).

Here, we are compelled to conclude that any possible error regarding the Commonwealth’s burden of proof on the elements of malice and specific intent was harmless. We reach this conclusion because the overwhelming evidence in this case established that Petitioner acted with malice and specific intent to kill in shooting the victim. Pennsylvania courts have stated that “‘the fact that an actor uses a dangerous weapon on a vital part of the body by another human being . . . justif[ies] a jury finding 1) that the actor possessed the requisite malice required in common law murder, and 2) that the act was committed pursuant to a specific intent to kill.’” *Commonwealth v. Myers*, 621 A.2d 1009, 1014 (Pa. Super. Ct. 1993) (quoting *Commonwealth v. O’Searo*, 352 A.2d 30, 36 (Pa. 1976)). Mark Burton, an eyewitness to the

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the trial court was inappropriate, but that the trial court failed to adequately explain that the reasonable doubt standard applied to every element of the offense of first-degree murder, including malice and specific intent to kill. This situation is analogous to *Neder v. United States*, 527 U.S. 1 (1999), where the Supreme Court held that harmless-error analysis applies to cases where the jury instructions omit an element of the offense. *Id.* at 9. In fact, in *Mitchell v. Esparza*, 540 U.S. 12, 15 (2004), the Supreme Court recently rejected an argument similar to Petitioner’s, when, relying on *Neder*, it concluded that a lower federal court erred in determining that the government’s failure to charge an element of an offense “was the functional equivalent of ‘dispensing with the reasonable doubt requirement’” warranting automatic reversal.

murder, testified that Petitioner approached him while he was standing at the intersection of Hutchinson and Clearfield Streets, put a pistol to his chest, and demanded money and drugs. (N.T. 3/19/90 at 28-32.) Burton testified that the victim, who was standing next to him, pulled out a toy pistol, pointed it at Petitioner, and told Petitioner that Burton “ain’t giving you shit.” (*Id.* at 35.) Burton testified that Petitioner then directed his gun at the victim, who was approximately six feet away, waited several seconds, and then pulled the trigger, shooting the victim in the chest. (*Id.* at 35-40.) Burton’s testimony was corroborated by Petitioner’s confession. Petitioner admitted approaching Burton and demanding money and drugs from him. (*Id.* at 98.) The confession indicates that when the victim attempted to intervene, Petitioner pointed the gun at the victim and pulled the trigger, killing him. (*Id.* at 98-99.) In light of this evidence, we conclude that any alleged error regarding the jury instructions did not have a substantial and injurious effect in the jury’s determination that Petitioner acted with malice and the specific intent to kill, and that the Superior Court was therefore not objectively unreasonable in denying Petitioner’s claim regarding the propriety of the jury instructions.

**B. Ineffective Assistance—Failure to Impeach Government Eyewitness With Criminal Record**

Petitioner claims that his trial counsel was ineffective for failing to impeach the Commonwealth’s lone eyewitness, Mark Burton, with his criminal record. Petitioner argues that all prior counsel, including PCRA counsel, were also ineffective for failing to raise this issue. This claim was raised on PCRA review and is exhausted.

In *Williams v. Taylor*, 592 U.S. 362, 367 (2000), the Supreme Court held that the “clearly established federal law” with respect to ineffective assistance of counsel claims is found in

*Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Court established a two-pronged test for evaluating a Sixth Amendment claim of ineffective assistance of counsel:

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.

466 U.S. at 687. Both the "performance" and "prejudice" prongs of the *Strickland* test must be satisfied to establish a Sixth Amendment violation. *Id.*

To demonstrate that counsel's performance was deficient, a petitioner must show that counsel's representation fell below an "objective standard of reasonableness" based on the facts of the case, viewed at the time of counsel's conduct. *Id.* at 688, 690. A strong presumption exists that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689; *see also id.* ("Judicial scrutiny of counsel's performance must be highly deferential . . ."); *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986) ("*Strickland*'s standard, although by no means insurmountable, is highly demanding. . . . Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ . . ."). To establish prejudice, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The Supreme Court has defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Holland v. Jackson*, 124 S. Ct. 2736, 2738 (2004) (quoting *Strickland*, 466 U.S. at 694). This evaluation must be made in light of "the totality of the evidence before the judge or

jury” in the case. *Strickland*, 466 U.S. at 695.

Here, we must determine whether the state court’s denial of Petitioner’s ineffective assistance of counsel claim for failure to cross-examine Burton on his criminal record was objectively unreasonable. *See Woodford v. Viscotti*, 537 U.S. 19, 27 (2002) (per curiam) (“[I]t is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly.’ The federal habeas scheme leaves primary responsibility with the state courts for these judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable.” (citations omitted)). Considering Petitioner’s first claim on direct appeal, the Superior Court stated:

[Petitioner] next asserts that counsel was ineffective for failing to obtain and introduce Burton’s criminal record. At trial, counsel adequately cross-examined Burton, questioning him on prior inconsistent statements as well as on his history of selling drugs. Consequently, counsel’s introduction of Burton’s criminal record would have been of little or no benefit to appellant and we cannot find any prejudice from trial counsel’s failure to impeach Burton on this basis. Absent a demonstration of prejudice, there can be no supportable claim of ineffective assistance of counsel.

*Izzardslip* op. at 8.

We cannot conclude that the state court’s determination was contrary to, or an objectively unreasonable application of the *Strickland* standard for ineffective assistance of counsel. With respect to the performance prong, Petitioner’s trial counsel was arguably deficient in failing to investigate Mark Burton’s criminal record and the pending charges against him and to impeach him with them. Burton was the only eyewitness presented by either party at trial. As discussed above, Burton testified that he was standing on a corner when Petitioner approached him, put a semi-automatic weapon to his chest, and demanded money. (N.T. 3/19/90 at 28-31.) According

to Burton, when Petitioner demanded money from him, the victim, who was standing nearby, pulled out a toy gun and pointed it at Petitioner. (*Id.* at 34.) Burton testified that Petitioner then shot and killed the victim. (*Id.* at 38.)

As the Supreme Court stated in *Strickland*, “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” 466 U.S. at 691. Trial counsel failed to investigate or impeach Burton with evidence of his 1987 robbery prior conviction, for which he was sentenced to three years’ probation, or the fact that he had aggravated assault charges pending at the time of trial. (Pet. for Writ of Habeas Corpus at 18.) Burton’s criminal record for robbery could have been used to impeach his credibility.<sup>8</sup> The pending charges could have been used to impeach him based upon bias and/or motive to fabricate in return for a possible “deal” with the prosecution to testify for the Commonwealth. *See Commonwealth v. Thompson*, 739 A.2d 1023, 1031 (Pa. 1999) (holding that pending criminal charges may be considered to determine if a witness had a potential bias in aiding the Commonwealth). It is difficult to conceive of a theory or strategy that justifies counsel’s failure to acquire and utilize this evidence to discredit Burton. However, even if trial counsel’s performance was deficient, Petitioner was not prejudiced by counsel’s failures. “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*;

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<sup>8</sup>Under the Pennsylvania Rules of Evidence, the commission of a crime of dishonesty or false statement (*crimen falsi*) is admissible to impeach a witness. Pa. R. Evid. 609(a). Pennsylvania courts have determined that robbery constitutes a *crimen falsi*. *Commonwealth v. Strong*, 563 A.2d 479, 482 (Pa. 1989).

*see also id.* at 695 (“[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.”). We conclude that the Superior Court was not objectively unreasonable in determining that, based on the other evidence in the case, Petitioner was not prejudiced by counsel’s failure to impeach Burton with his criminal history. On direct examination, Burton admitted that he had previously sold drugs at the intersection of Hutchinson and Clearfield Streets. (N.T. 3/19/90 at 28.) Burton also admitted that at the time he was approached by Petitioner, he was standing with another man and was in the process of selling drugs. (*Id.* at 29.) On cross-examination, trial counsel impeached Burton with the statement that he had previously given to the police. (*Id.* at 46-66.) There were numerous inconsistencies between Burton’s testimony and his prior statement. Even without evidence of Burton’s criminal history, his lack of credibility had been clearly established.

The most damaging evidence against Petitioner was his own confession. On January 8, 1989, Petitioner gave a statement to Detectives Manhoni and Kelhower. (*Id.* at 96.) In that statement, Petitioner corroborated Burton’s testimony:

It was about 3:30 in the morning and I was walking. When I got to Hutchinson and Clearfield Streets, I saw a guy by the name of Mark. I do not know his last name. Mark was selling some crack to someone. When I got to the corner, I told Mark to give me some money. I told him to give it up. I snatched some money and drugs out of his hand. While I was there, there were some other people there. There were a few people. I turned around after I took the money, and I seen somebody with a gun pointed at me. I pushed the gun away from my face. I was still holding Mark with my other hand. After I pushed the gun away from my face, this guy pointed the gun back in my face. He clicked the gun at me. I had a gun, one in my right hand. After he clicked the gun at my face, I pointed the gun like around him, and he like stepped into it when I fired the shot. I heard the guy say something like, “He shot me,” or “She shot me,” and then I ran. I ran right up Clearfield Street up towards 11th. As I was running, I started to get rid of some of my shit. I got rid of the gun. I threw the gun under the sewer hole, but I don’t know where. I took my hat off and my jacket and threw them down some

alleyway as I was running. I ran back to my house and stayed there for a while and then I changed. Then I went to a friend's house and went to sleep.

(*Id.* at 98-99.) Petitioner argues the further impeachment of Burton would have aided his argument that the veracity of his confession was in question. We disagree. Petitioner did seek to challenge the confession through cross-examination of Detective Manhoni by showing that it was obtained through coercion and that it was false. (*Id.* at 107-13.) He offered no other evidence, however, that challenged the confession. We fail to see how further discrediting Burton would have advanced Petitioner's position concerning the veracity of his confession. Under the circumstances, we conclude that the determination by the Superior Court was not contrary to, nor an objectively unreasonable application of, clearly established Supreme Court precedent, and Petitioner is not entitled to the habeas relief that he has requested.

An appropriate Order follows.

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

NATHAN IZZARD :  
 :  
 : CIVIL ACTION  
 v. :  
 :  
 : NO. 02-CV-8515  
 KENNETH KYLER, et al. :

**ORDER**

AND NOW, this 22<sup>nd</sup> day of December, 2004, upon consideration of the Petition for Habeas Corpus (Doc. No. 1, No. 02-CV-8515), the Report and Recommendation of Magistrate Judge Peter Scuderi (Doc. No. 13, No. 02-CV-8515), and Petitioner's Objections To Magistrate Judge's Report and Recommendation (Doc. No. 14, No. 02-CV-8515), it is hereby ORDERED that:

1. Petitioner's Objections to the Magistrate Judge's Report and Recommendation are OVERRULED.
2. The Petition Under 28 U.S.C. §2254 For Writ of Habeas Corpus By a Person in State Custody is DENIED.
3. There is no basis for the issuance of a Certificate of Appealability.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge