

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

REGINALD JACKSON	:	CIVIL ACTION
	:	
v.	:	NO. 03-5398
	:	
DAVID DIGUGLIELMO, et al.	:	

MEMORANDUM AND ORDER

Kauffman, J.

April 27, 2006

Now before the Court is the petition of Reginald Jackson (“Petitioner”) for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner is currently incarcerated in the State Correctional Institution in Graterford, Pennsylvania. For the reasons that follow, the petition will be denied.

I. PROCEDURAL HISTORY

On March 3, 1988, a jury sitting in the Court of Common Pleas of Philadelphia returned a verdict of guilty against Petitioner on three counts of first-degree murder, three counts of robbery, three counts of possessing an instrument of crime, one count of terroristic threats, and one count of carrying firearms on a public street.¹ During the penalty phase, the jury was unable to agree on

¹ The trial court set forth the facts of the offenses as follows:

On August 26, 1986, at approximately 11:00 p.m., at Progress Plaza in North Philadelphia, Janet Ford was parked at a banking machine. A car approached with the defendant sitting in the rear passenger seat. The defendant reached out of the window, put a gun to Ms. Ford’s head and demanded her pocketbook. . . .

The second incident occurred on September 5, 1986 at 3:30 a.m., as the defendant and Howard Riley sat in a car parked at the corner of 12th Street and Columbia Avenue in North Philadelphia. Witnesses heard a gunshot and saw Riley stagger out of the car and fall to the ground. The defendant then exited from the car with a silver gun in his hand, walked over to Riley and searched through his pockets. . . .

The third incident occurred near 24th and Jefferson Streets in North Philadelphia at approximately 10:00 p.m. on September 12, 1986. Larry Lesesne, sat in his car, behind the parked car of eyewitness Dana Lomax. The defendant

the appropriateness of the death penalty. Accordingly, Judge Michael R. Stiles imposed three sentences of life imprisonment to be served consecutively.

After retaining new counsel, Petitioner filed a timely appeal to the Pennsylvania Superior Court raising the following: (1) whether there was probable cause for a warrantless arrest and whether Petitioner was under arrest before he was frisked; (2) whether reasonable suspicion existed to allow police to immediately stop Petitioner upon sight and frisk him; (3) whether all the evidence obtained by the police, after the stop and frisk, was tainted by an illegal stop and frisk; (4) whether the trial court erred in obtaining biographical information from Petitioner while in custody; and (5) whether the trial court erred in consolidating all of Petitioner's cases. On February 1, 1990, the Superior Court affirmed the judgment of sentence. The Pennsylvania Supreme Court denied allocatur. Commonwealth v. Jackson, 588 A.2d 508, (Pa. 1990).

On January 20, 1995, Petitioner filed a pro se petition for state collateral review pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. § 9541 et seq. He thereafter retained counsel who, on January 24, 1997, filed an amended PCRA petition containing five claimed errors by trial counsel: (1) failure to request Petitioner's FBI extract before presenting a character witness at trial, and failing to request a mistrial; (2) failure to request a Kloiber charge; (3) failure to object to the introduction of composite drawings of Petitioner; (4) failure to cross-examine August Bailey on the grant of immunity she received for her testimony in Petitioner's case; and

walked over to Mr. Lesesne's car, pulled a silver gun on Lesesne and demanded money. When Lesesne refused the demand, the defendant shot him. . . .

The fourth attack occurred at 2:30 a.m. on September 14, 1986. James McNeil and his nephew, Karl Grubbs, were stopped at a red light at 6th and Berks Streets in North Philadelphia, when the defendant approached McNeil on the driver's side of the car and another man approached Grubbs on the passenger side. The defendant pointed a silver gun at McNeil and demanded money. When McNeil attempted to put the car in reverse in an effort to escape, the defendant shot him. McNeil managed to move the car away from the defendant, but soon lost consciousness and crashed. . . .

Riley, Lesesne, and McNeil all died from their wounds. Commonwealth of Penn v. Jackson, Nov. Term 1986 (June 26, 1989).

(5) failure to request an alibi charge with respect to the Lesesne murder. Petitioner also alleged ineffective assistance of appellate counsel for failing to raise the aforementioned claims on direct appeal. In a supplemental petition, he asserted the additional claim that his appellate counsel had an inherent conflict of interest. On April 24, 2001, the PCRA court dismissed the petitions. The PCRA Court first found that the ineffective assistance of trial counsel claims had been waived because they had not been raised on direct appeal; nevertheless, it also rejected those claims on the merits. Commonwealth v. Jackson, (PCRA Opinion April 24, 2001).

Petitioner appealed the PCRA decision to the Superior Court of Pennsylvania, which affirmed on April 4, 2002. Commonwealth v. Jackson, 803 A.2d 793 (Pa. Super. Ct. 2002). On September 26, 2002, the Pennsylvania Supreme Court denied allocatur. Commonwealth v. Jackson, 809 A.2d 902 (Pa. 2002).

After once again retaining new counsel, Petitioner filed the instant application for a Writ of Habeas Corpus on September 25, 2003. He then filed a Supplemental Petition on June 4, 2004. Together, the two petitions assert thirteen claims for relief:

1. Petitioner was stopped without probable cause and searched without reasonable suspicion;
2. The police used unlawfully obtained evidence to obtain a search warrant;
3. The search was based on a tainted search warrant and the scope of the search exceeded the warrant;
4. Ineffective assistance of appellate counsel due to an actual conflict of interest;
5. The prosecution failed to advise Petitioner's trial counsel that one of its witnesses had received a grant of immunity for her trial testimony;
6. The trial court erred in consolidating petitioner's three cases at trial;
7. Ineffective assistance of trial counsel for failing adequately to present character testimony at trial and ineffective assistance of appellate counsel for failing to raise this issue on appeal;
8. Ineffective assistance of trial counsel for failing to object to an inadequate jury instruction

on identification testimony and ineffective assistance of appellate counsel for failing to raise this issue on appeal;

9. Ineffective assistance of trial counsel for failing to object to the introduction of composite drawings at trial and ineffective assistance of appellate counsel for failing to raise this issue on appeal;
10. Ineffective assistance of trial counsel for failing to present an alibi witness and ineffective assistance of appellate counsel for failing to raise this issue on appeal;
11. Ineffective assistance of trial counsel for failing to seek an alibi instruction pertaining to the Lesesne murder and ineffective assistance of appellate counsel for failing to raise this issue on appeal;
12. Ineffective assistance of trial counsel for failing to object to hearsay statements of the arresting police officer; and
13. Ineffective assistance of trial counsel for failing to cross-examine one of the Commonwealth's witnesses.

The Court designated United States Magistrate Judge Charles B. Smith to submit a Report and Recommendation ("R&R"). See 28 U.S.C. § 636(b)(1)(B); Local R. Civ. P. 72.1(I)(b). In his R&R, Magistrate Judge Smith found that the Petitioner's claims were either procedurally defaulted or without merit, and therefore recommended that the Petition be dismissed. Petitioner has filed timely objections to Magistrate Judge Smith's R&R, which requires the Court to "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). With the exception of the dismissal of claim eleven, Petitioner specifically objected to each of Magistrate Judge Smith's findings.² Accordingly, the Court will review each of the claims set forth above, except

² The R&R denies claim eleven on the ground that Petitioner has not demonstrated that trial counsel's failure to request an alibi instruction fell below "an objective standard of reasonableness," and that he is consequently unable to satisfy the first prong of the test set out in Strickland v. Washington, 466 U.S. 668 (1984). Petitioner's objections, however, refer only to the second prong of the Strickland test, which concerns whether prejudice exists. See Petitioner's Objections at 19-20. Because the objections to claim eleven fail to specifically

claim eleven, which will be denied.

II. PROCEDURAL DEFAULT

28 U.S.C. § 2254 limits habeas relief to those petitioners who have first “exhausted the remedies available in the courts of the States.” 28 U.S.C. § 2254(b)(1)(a). A petitioner has exhausted his state remedies only when all avenues for review of his claim in state court have been foreclosed. 28 U.S.C. § 2254(b)(3). Courts, however, have added an additional condition for post-conviction relief: the habeas court must “ask not only whether a prisoner has exhausted his state remedies, but also whether he has properly exhausted those remedies, i.e., whether he has fairly presented his claims to the state courts[.]” O’Sullivan v. Boerckel, 526 U.S. 838, 848 (1999) (emphasis in original).

Exhaustion is considered improper where a claim has been procedurally defaulted – that is, where the state court denies relief based on “independent and adequate” procedural grounds without reaching the merits of the constitutional claim. In such a case, the petitioner’s failure to exhaust his claims properly would then act as a bar against federal habeas review. Bronshstein v. Horn, 404 F.3d 700, 707 (3d Cir. 2005) (quoting Coleman v. Thompson, 501 U.S. 722, 729 (1991)) (“The procedural default doctrine precludes a federal habeas court from ‘reviewing a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.’”).

A. *Claims Four, Five and Six*

Magistrate Judge Smith found that Petitioner had failed to raise claims four, five, and six at the state level, and that any attempt to do so now would be untimely. He therefore concluded that the claims were procedurally defaulted. Petitioner contends that Magistrate Judge Smith

address the Magistrate Judge’s analysis and conclusions, they do not warrant de novo review. Palmer v. Apfel, 995 F. Supp. 549, 552 n.4 (E.D. Pa. 1998) (“A party who files objections to a magistrate judge’s report and recommendations is obliged to file ‘specific’ objections.... General or blanket objections do not comply with [the rules] and need not be addressed by the District Court.”); Frye v. Sullivan, 1991 U.S. Dist. LEXIS 5305, at *3-4 (E.D. Pa. Apr. 18, 1991) (“The court is not obliged to review those aspects of the United States Magistrate Judge’s Report and Recommendation to which a specific objection has not been asserted.”).

misapprehended the record, and that, in fact, he had raised these claims on state review.

As to claim four, Petitioner argues that his counsel on direct appeal, Robert Miller (“Miller”), was ineffective due to an actual conflict of interest. Prior to Petitioner’s trial, Miller represented August Bailey (“Bailey”), a former girlfriend of Petitioner’s, in negotiations with the Commonwealth. See Supplemental Petition for Relief at 5. Through those negotiations, Miller brokered a deal whereby Bailey would testify against Petitioner at trial in exchange for a grant of immunity on a number of offenses she was known to have committed. Id. Petitioner argues that when Miller represented him on appeal, Miller had an obligation to raise certain questions about Bailey’s testimony and the immunity deal on which it was based, but failed to do so because of his obligations to Bailey.

Petitioner made precisely this argument in Supplemental Amended Post Conviction Relief Petition. See Supp. Amended Post Conviction Relief Petition, May 21, 1999 (Exh. A. to Petitioner’s Objections to the Report and Recommendation). Accordingly, the Court finds that claim four is not procedurally defaulted and the claim will be considered on the merits.

As to claim five, Petitioner argues that the Commonwealth failed to disclose Bailey’s immunity agreement in violation of its obligations under Brady v. Maryland, 373 U.S. 83 (1963). He argues that although he did not raise this claim directly, it was inherent in the conflict of interest claim, and so should not be procedurally defaulted. The Court disagrees. Petitioner never sought relief from his conviction in state court based on the Commonwealth’s failure to turn over evidence about Bailey’s immunity deal. That he raised other issues involving Bailey’s immunity does not change the fact that he failed to give Pennsylvania courts “one full opportunity” to consider his Brady claim. O’Sullivan, 526 U.S. at 848. The claim is therefore not eligible for habeas review, and will be dismissed.

In claim six, Petitioner argues that the trial court’s decision to consolidate all three murders into a single trial was unfairly prejudicial and therefore violated his due process rights. He contends that he initially presented this claim on direct appeal, and that consequently the claim was properly exhausted at the state level.

On direct appeal, Petitioner did argue that it “was gross error on the part of the trial court to allow the consolidation of all the appellant’s cases.” However, as Petitioner concedes, his appellate brief relied exclusively on state cases, and failed to explicitly make reference to federal due process requirements. See Petitioner’s Objections at 12; Response to Petition for Writ of Habeas Corpus, Exh. E. Because this was not sufficient to put the state court on notice of the federal constitutional basis of Petitioner’s claim, the Court finds that Petitioner failed to fairly present claim six at the state level. McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999) (holding that “to ‘fairly present’ a claim, a petitioner must present a federal claim’s factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted.”). Accordingly, claim six is procedurally defaulted, and will be dismissed.

B. Claims Ten and Twelve

Claims ten and twelve became procedurally defaulted when Petitioner failed to raise them on direct appeal, which, under Pennsylvania law, had the effect of a waiver. See 42 Pa. C.S.A. § 9544(b). Petitioner, however, contends that the default should be excused and that the Court should consider the claims on the merits.

The bar against reviewing habeas claims that have been procedurally defaulted has two exceptions: a federal habeas court may review such claims when the petitioner can demonstrate “cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” Coleman, 501 U.S. 750. Petitioner contends that his procedural default of claims ten and twelve should be excused on the former ground – cause and prejudice.

“Cause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim.” Murray v. Carrier, 501 U.S. 478, 492 (1986). The “cause” Petitioner relies on to “excuse” his default of claims ten and twelve is his appellate counsel’s ineffective assistance. His contention, in other words, is that the procedural default of claims ten and twelve should be excused based on his counsel’s ineffectiveness in failing to raise them.

Errors committed by counsel at the state level can constitute cause that would excuse a procedural default, but “only if [the ineffectiveness rises to] an independent constitutional violation.” Coleman, 501 U.S. at 755; Johnson v. Pinchak, 392 F.3d 551, 563 (3d Cir. 2004) (“Attorney error may constitute cause only where such error rises to the level of ineffective assistance of counsel in violation of the Sixth Amendment.”). However, the fact that appellate counsel’s ineffectiveness is being cited as an “excuse” for a procedural default rather than as an independent claim for relief does not alter the requirement that “the States should have the first opportunity to address and correct alleged violations of [a] state prisoner’s federal rights.” Coleman, 501 U.S. at 731. The exhaustion doctrine “requires that a claim of ineffective assistance of counsel be presented to the state courts as an independent claim before it may be used to establish cause for procedural default.” Murray, 477 U.S. at 489. Thus, before considering whether appellate counsel’s failure to raise claims ten and twelve rose to the level of a constitutional violation – a violation which, if established, would excuse Petitioner’s default of those claims – the Court must first inquire whether Petitioner gave the Pennsylvania courts a full opportunity to resolve the issue themselves.

The record reveals that Petitioner never argued before the state courts that Miller was ineffective for failing to raise claims ten and twelve. It follows that Petitioner’s contention that there was cause for his original default of claims ten and twelve is itself defaulted and those claims will be denied.

III. MERITS

Claims one through four, seven through nine, and thirteen will be considered on the merits.

A. Legal Standard

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 28 U.S.C. § 2241 et seq., which imposes substantive limitations on the collateral relief available in federal court. Section 2254(d) provides that:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any

claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (emphasis added). A state court ruling is “contrary to” clearly established Supreme Court precedent “if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [its] precedent." Williams v. Taylor, 529 U.S. 362, 405-06 (2000). A state court decision is an "unreasonable application" of Supreme Court precedent if it "identifies the correct governing legal rule from [the Supreme] Court's cases, but unreasonably applies it to the facts of the particular state prisoner's case." Id. at 407. When making the "unreasonable application" inquiry, the federal habeas court should ask "whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 409.

B. Claims One, Two and Three

Claims one, two and three assert that Petitioner’s conviction was based on evidence that was obtained in violation of the Fourth Amendment. Ordinarily, habeas relief is not available for such claims; the one exception is where the petitioner demonstrates that the State has failed to provide a full and fair opportunity to litigate the claim. See Stone v. Powell, 428 U.S. 465, 494 (1976) (“[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.”). Thus, “[e]ven otherwise potentially meritorious Fourth Amendment claims are barred on habeas [review] when the petitioner had a full and fair opportunity to litigate them.” Deputy v. Taylor, 19 F.3d 1485, 1491 (3d Cir. 1994).

Petitioner makes two arguments as to why he was not given a full and fair hearing of his Fourth Amendment claims: (1) “the record and findings of fact on the suppression issue are

scant;” and (2) “[c]ounsel’s performance in prosecuting the suppression issue was clearly deficient[.]” Petitioner’s Objections to Magistrate’s Report and Recommendation at 17.

Neither of these arguments suffice to overcome the bar against habeas relief based on Fourth Amendment violations. Whether a petitioner has had a full and fair opportunity to litigate a Fourth Amendment claim turns on the extent to which the state provided “adequate processes.” United States v. Brown, 2005 WL 1532538 at *5 (E.D. Pa. June 28, 2005). Generally, the “processes” are considered adequate when the petitioner was given the opportunity to raise the claim during trial and again on direct appeal. Hickey v. Jeffes, 571 F.2d 762, 766 (3d Cir. 1978). Whether the petitioner actually took advantage of the opportunity is irrelevant; so long as the opportunity was available, the bar against raising the Fourth Amendment claims on collateral review applies. Cohen v. Gillis, 2004 WL 1622026 at *3 (E.D. Pa. July 16, 2004) (“It ... appears well settled that Stone bars federal habeas review of a Fourth Amendment claim when a petitioner could have litigated that claim in the state tribunals—whether or not the petitioner actually litigated the claim.”).

Here, Petitioner was able to raise his Fourth Amendment claims with the trial court; when those claims were denied, Petitioner appealed, and the Superior Court affirmed the trial judge’s decision. These “processes” were sufficient to trigger the bar against collateral review of Fourth Amendment claims. Because the analysis turns on whether the Commonwealth provided an opportunity to raise the claims, Petitioner’s contention that trial counsel’s representation was deficient is unavailing.³ See Hubbard v. Jeffes, 653 F.2d 99, 103 (3d Cir. 1981); Brown, 2005 WL 1532538 at *5 (“[I]f a defendant fails to raise a Fourth Amendment claim on direct review due to his attorney’s incompetence, the defendant may not obtain review of the claim on collateral attack so long as the government did not restrict the defendant from bringing the claim

³ The bar against habeas review of Fourth Amendment claims does not extend to a claim that trial counsel was ineffective in his representation with regard to a Fourth Amendment issue. Thus, had Petitioner sought relief on Sixth Amendment grounds and argued that trial counsel was ineffective in his handling of the Fourth Amendment claims, his claim would have been cognizable. See Kimmelman v. Morrison, 477 U.S. 365, 383 (1986).

in any way.”). Petitioner’s second contention that the lack of detail in the trial judge’s findings deprived him of a fair opportunity to litigate his Fourth Amendment claim is also without merit, since “an erroneous or summary resolution by a state court of a Fourth Amendment claim does not overcome the bar [against habeas relief].” Marshall v. Hendricks, 307 F.3d 36, 82 (3d Cir. 2002) (emphasis added). Accordingly, the Court finds that Petitioner is not entitled to habeas relief on claims one, two, and three.

C. Claim Four

Claim four asserts that Petitioner’s counsel on direct appeal was tainted by an “actual conflict of interest.” The alleged conflict arose from Miller’s role in negotiating an immunity agreement for Petitioner’s former girlfriend, Bailey. Under the terms of that agreement, Bailey testified against Petitioner at trial. The theory of claim four is that Miller’s obligations to Bailey precluded him from raising two crucial claims regarding Bailey’s testimony when he represented Petitioner on direct appeal: first, that trial counsel was ineffective in not cross-examining Bailey regarding her immunity deal; and second, that the Commonwealth failed to disclose the immunity deal in violation of its Brady obligations.

To establish a due process violation based on an attorney’s conflict of interest, Petitioner must

[f]irst demonstrate that some plausible alternative defense strategy or tactic might have been pursued. He need not show that the defense would necessarily have been successful if it had been used, but that it possessed sufficient substance to be a viable alternative. Second, he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney’s other loyalties or interests.”

United States v. Morelli, 169 F.3d 798, 810 (3d Cir. 1999) (quoting United States v. Gambino, 864 F.2d 1064, 1070 (3d Cir. 1988)).⁴ The second prong of the test is met “only if the proposed alternative strategy (a) could benefit the instant defendant and (b) would violate the attorney’s

⁴ This standard applies when the alleged conflict of interest manifested itself in counsel’s failure to act. This is in contrast to a case where an attorney affirmatively adopts a course of conduct adverse to his client’s interest. Duncan v. Morton, 256 F.3d 189, 197 (3d Cir. 2001).

duties to the other client.” Morelli, 169 F.3d at 811 (emphasis in original).

On PCRA review, the Superior Court considered and rejected the conflict of interest claim on the merits, finding that Petitioner had failed to show that the proposed alternative strategy – raising the claims pertaining to Bailey’s testimony – was in conflict with Miller’s obligations to Bailey. Because the Superior Court applied the proper legal standard, this Court must defer to its decision unless Petitioner demonstrates that the Superior Court’s application of the law was “objectively unreasonable.” Williams, 529 U.S. at 409.

Petitioner has failed to make that showing. Miller negotiated Bailey’s immunity deal prior to Petitioner’s trial in March 1988, and there is nothing in the record to suggest that Miller had a professional relationship with Bailey at the time that he entered an appearance on Petitioner’s behalf. But even if Miller had continued to represent Bailey in some capacity, Petitioner has failed to explain why that representation would present a conflict. There is no indication that Miller would have compromised Bailey’s immunity deal in any way or would have made her a prosecution target by raising the arguments about her testimony on Petitioner’s appeal. At most, the airing of Bailey’s immunity deal may have caused her some discomfort; but Miller did not have a duty to save Bailey from embarrassment. Absent such a duty, Petitioner is unable to establish that the “alternative strategy” he has identified is “inherently in conflict” with Miller’s obligations to Bailey under the second prong of the test. See Morelli, 169 F.3d at 811 (holding that no conflict exists unless by following an “alternative strategy” on the petitioner’s behalf, the attorney would subject another client to prosecution); Gambino, 864 F.2d at 1071. Accordingly, the Court finds that the Superior Court was correct to conclude that Miller’s professional relationship with Bailey did not create a conflict of interest. Claim four will therefore be denied.

D. The Ineffective Assistance of Counsel Claims

Claims seven, eight, nine, and thirteen assert that Petitioner’s trial counsel was ineffective and, with the exception of claim thirteen, that appellate counsel was ineffective in failing to so argue on appeal. In order to establish a Sixth Amendment violation, the petitioner must show (1) that his “counsel’s performance was deficient” and (2) that the deficient performance prejudiced

the defense.” Strickland v. Washington, 466 U.S. 668, 687 (1984).

A petitioner’s burden under the first prong is to show that his counsel’s representation fell below an “objective standard of reasonableness.” Id. A court must “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that under the circumstances, the challenged action ‘might be considered sound trial strategy.’” Id. At 689. With respect to the prejudice prong of the Strickland test, the question is whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694.

On PCRA review, the Superior Court considered and rejected claims seven, eight, nine, and thirteen. In doing so, it applied the Pennsylvania standard for such claims, which is the functional equivalent of Strickland. See Rompilla v. Horn, 355 F.3d 233, 249 (3d Cir. 2004) (rev’d on other grounds); Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987) (holding that the Pennsylvania test for ineffective assistance of counsel is equivalent to Strickland). Accordingly, the Court must determine whether the Superior Court’s denial of Petitioner’s ineffective assistance claims amounted to an unreasonable application of clearly established federal law. Williams, 529 U.S. at 409.

1. Claim Seven

In claim seven, Petitioner asserts that trial counsel’s decision to have Willie Thomas (“Thomas”), Petitioner’s Aunt, testify as to his character without first investigating his criminal record constituted ineffective assistance of counsel. At trial, Thomas testified that Petitioner was well-behaved and had a good reputation in his hometown of Georgetown, South Carolina. She also stated that Petitioner was never in trouble and she was sure that if he had ever gotten in trouble while he was living in Georgetown, she would have known about it. See Commonwealth v. Jackson, 803 A.2d 793 at 6 (Pa. Super. Ct. 2002) (table). To impeach that testimony, the Commonwealth introduced on cross-examination an FBI abstract indicating that Petitioner had

been arrested twice while living in Georgetown. Petitioner argues that trial counsel either was unaware of Petitioner's criminal history or failed to realize that by presenting character testimony, he was "opening the door" to evidence as to the arrests, and that the uninformed decision to present character testimony significantly prejudiced the defense.

On PCRA review, the Superior Court rejected this argument, finding that even if trial counsel's decision to put Thomas on the stand was "objectively unreasonable," Petitioner had failed to establish that the deficient representation had prejudiced his defense. This, the Superior Court explained, was because the Commonwealth's case was so "unassailable" that the jury's knowledge of Petitioner's prior offenses did not serve to undermine confidence in the trial's outcome. *Id.* at 9. The Court agrees. The jury heard Janet Ford ("Ford") testify that she had looked Petitioner squarely in the face when he was robbing her. She described how he had held a gun half an inch from her head and said "Give me your pocketbook or I'll blow you're mother f--- head off." (Trial Tr. at 269, Feb. 19, 1988). Another eyewitness, Dana Lomax ("Lomax"), testified that she watched Petitioner attempt to rob Lesesne and then shoot him. (Trial Tr. at 711, Feb. 24, 1988). A third Commonwealth witness, Alfred Griffith, testified that after hearing a gun shot, he saw Riley stagger from a car and fall to the ground. He then watched Petitioner, with a silver revolver in hand, run to where Riley was lying, and search through Riley's pockets. (Trial Tr. at 534-40, Feb. 23, 1988). A final eyewitness, Karl Grubbs, testified to observing a man matching Petitioner's description shoot James McNeil. In addition to the eyewitness testimony, the Commonwealth presented substantial circumstantial evidence, including several of the victims' personal possessions that the police had retrieved from Petitioner's residence and ballistics tests indicating that a single gun was used to commit all the shootings.

In light of such overwhelming evidence, the jury's awareness that Petitioner had been arrested in Georgetown is of little or no significance. Accordingly, the Court finds that the Superior Court was correct to conclude that trial counsel's decision to put Petitioner's aunt on the stand did not rise to the level of a Sixth Amendment violation.

2. Claim Eight

In claim eight, Petitioner asserts that trial counsel was ineffective for failing to request a jury instruction that the identification testimony the Commonwealth presented should be viewed with caution. Petitioner contends that trial counsel should have requested a cautionary instruction with regard to the testimony of the two prosecution witnesses who identified him as the perpetrator: Janet Ford and Dana Lomax. On PCRA review, the Superior Court rejected that claim, finding that the witness' identification testimony was free of the sort of taint that would warrant a Kloiber instruction, and that trial counsel was therefore not ineffective in failing to raise request such an instruction.⁵

Because the Superior Court applied the correct standard, its decision must stand unless Petitioner demonstrates that it was an unreasonable application of clearly established federal law. A review of Ford's and Lomax's testimony reveals that the Superior Court was correct in its determination that a cautionary Kloiber instruction would not have been appropriate. First, Ford's testimony establishes that Petitioner was approximately two feet away from her during the robbery and that she had a clear view of his face for over two minutes. (Trial Tr. at 269-78, Feb. 19, 1988). Moreover, in a lineup, Ford identified Petitioner as the perpetrator. (Trial Tr. at 316, Feb. 19, 1988).

The identification testimony of the second witness, Lomax, was also sufficiently reliable as to make a Kloiber charge unnecessary. First, like Ford, Lomax had sufficient opportunity to observe Petitioner. As noted above, Lomax testified at trial that she witnessed Petitioner rob and then shoot Lesesne. (Trial Tr. at 711 Feb. 24, 1988). The lighting conditions were "very good"

⁵ In Commonwealth v. Kloiber, 106 A.2d 820, 826 (Pa. 1954), the Pennsylvania Supreme Court noted that

where the opportunity for positive identification is good and the witness is positive in his identification and his identification is not weakened by prior failure to identify, but remains, even after cross examination, positive and unqualified, the testimony as to identification need not be received with caution – indeed the cases say that 'his positive testimony as to identity may be treated as a statement of fact.

and there was nothing obstructing her view of Petitioner. (Trial Tr. at 704 Feb. 24, 1988).

Events after the shooting also corroborate the reliability of Lomax's identification. On September 23, 1986, she went to the police station and was shown photographs of eight men. She picked out Petitioner's photograph as the person who had committed the shooting. She was then taken to a lineup, from which she identified Petitioner as the perpetrator. (Trial Tr. at 732-33 Feb. 24, 1988).

Petitioner seeks to impeach Lomax's identification by pointing to discrepancies in the descriptions of Petitioner she gave to the police at various points during the investigation. The day of the incident, Lomax told the police that Petitioner "did not have a moustache or a beard." (Trial Tr. at 749 Feb. 24, 1988). However, the next day, Lomax told a police artist that the assailant did, in fact, have a moustache. (Trial Tr. at 753 Feb. 24, 1988). The prosecutor asked about this discrepancy on redirect. Lomax explained that the night of the incident, after she had given her initial description, she "dreamed about the defendant and when I went down and gave him – gave the artist the sketch, his picture was in my mind I dreamt that he – that he came after my family and killed my father." (Trial Tr. at 753 Feb. 24, 1988). Lomax's confusion as to whether the perpetrator had facial hair is insignificant, particularly in light of her unhesitating identification of Petitioner from the lineup. Commonwealth v. Upshur, 764 A.2d 69, 77-78 (Pa. Super. Ct. 2000) (holding that a cautionary instruction is inappropriate where the witness had unobstructed view of defendant and had made consistent identifications pre-trial).

In short, Ford's and Lomax's testimony identifying Petitioner as the perpetrator of the crimes they witnessed was not subject to the sort of uncertainty that would warrant a Kloiber instruction. Because such an instruction would not have been appropriate, trial counsel cannot be faulted for failing to request it. Accordingly, the Court finds that the Superior Court's determination was not an "unreasonable application" of clearly established federal law and that Petitioner is not entitled to relief on claim eight.

3. Claim Nine

In claim nine, Petitioner asserts that trial counsel was ineffective for failing to object to

the prosecution's introduction into evidence of composite police sketches on the grounds that they were inadmissible hearsay. The first sketch at issue was introduced during Lomax's testimony. As noted above, Lomax testified that the day after she witnessed the murder, she went to the police station and met with a "composite artist." (Trial Tr. at 724 Feb. 24, 1988). She gave the artist a description of the shooter. She testified that when she looked at the finished sketch, she told the police artist that it "resembled" the shooter. Id. At trial, Lomax was shown Commonwealth Exhibit number 91, which she identified as the sketch made that day. (Trial Tr. at 727-28 Feb. 24, 1988).

The second contested sketch was introduced during the testimony of Karl Grubbs ("Grubbs"). Grubbs testified that he met with a police artist the same day he witnessed the shooting of his uncle. (Trial Tr. at 938-41 Feb. 25, 1988). He explained that he gave the artist a description of both the shooter and another man who had accompanied him. The artist then prepared the sketches according to his direction. When the sketches were finished, Grubbs told the artist that neither of the sketches resembled the two men he had witnessed. Id. After Grubbs explained the process used to generate the sketches, the prosecutor showed him Commonwealth Exhibits 114 and 115, which he identified as the drawings he had helped generate. Grubbs then explained the various ways in which the sketches failed to accurately depict the two men he had seen the night of the shooting.

On PCRA review, the Superior Court found that even if trial counsel should have objected to the drawings, their admission did not affect the outcome of the trial and that Petitioner was therefore unable to establish that he was prejudiced by any alleged misjudgment of trial counsel. That determination was not objectively unreasonable. As noted above, Lomax positively identified Petitioner during trial. She told the jury that there was no question in her mind that Petitioner was the man who shot Lesesne. (Trial Tr. at 733 Feb. 24, 1988). The jury's access to the composite drawings would therefore not have made a difference. The impact of the Grubbs drawings was also insignificant, first, because Grubbs told the jury that they were not an accurate portrayal of the offenders and second, because he never, either before or during trial,

identified Petitioner as the perpetrator.

Accordingly, the Court finds that the Superior Court's determination that Petitioner is unable to establish prejudice on claim nine was not "objectively unreasonable," and claim nine will be denied.

4. Claim Thirteen

In claim thirteen, Petitioner asserts that trial counsel was ineffective for failing to cross-examine Petitioner's former girlfriend, August Bailey, regarding her immunity deal. The PCRA Court found that even if trial counsel had questioned Bailey about her immunity deal, it would not have changed the outcome of the trial, and that consequently Petitioner was unable to establish prejudice. See Commonwealth v. Jackson, (PCRA Opinion April 24, 2001). This Court agrees. Given the strength of the Commonwealth's case, which, as noted above, included a number of eyewitnesses, two of whom made in-court identifications of Petitioner, any additional doubt as to Bailey's credibility that could have arisen from the jury's knowledge of the immunity deal would most likely not have affected the outcome of the trial.

Accordingly, the Court finds that the PCRA Court's conclusion that Petitioner is unable to establish prejudice under the second prong of Strickland is not objectively unreasonable. Claim thirteen will therefore be denied.

5. Ineffective Assistance of Appellate Counsel

Because the ineffectiveness of trial counsel claims were without merit, appellate counsel was not ineffective in failing to raise them. Mannino, 212 F.3d at 840. Accordingly, Petitioner's ineffective assistance of appellate counsel claims will be denied.

IV. CONCLUSION

Because Petitioner's claims are either procedurally defaulted or without merit, his petition for a Writ of Habeas Corpus will be denied.

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

REGINALD JACKSON : **CIVIL ACTION**
 :
 v. : **NO. 03-5398**
 :
DAVID DIGUGLIELMO, et al.

ORDER

AND NOW, this 27th day of April, 2006, upon consideration of the Report and Recommendation of United States Magistrate Judge Charles B. Smith (docket no. 19) and Petitioner's Objections thereto, and after de novo review of the pleadings and record in this case, it is **ORDERED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;
2. The Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254 (docket no. 1), is **DENIED** and **DISMISSED**;
3. Because Petitioner has failed to make a substantial showing of the denial of a constitutional right, no certificate of appealability shall issue.

BY THE COURT:

/s/ Bruce W. Kauffman _____

BRUCE W. KAUFFMAN, J.