

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

MARK CHRISTIAN,	:	CIVIL ACTION
Petitioner	:	No. 03-4066
v.	:	
NEAL MECHLING, et al.,	:	
Respondents	:	

MEMORANDUM OPINION AND ORDER

RUFE, J.

August 8, 2006

Before the Court are the objections of Mark Christian (“Petitioner”) to Magistrate Judge Carol Sandra Moore Wells’s Report and Recommendation (“R&R”) in the above-captioned case. The R&R ably addresses the relevant legal issues, sets forth the relevant factual and procedural history, and clearly states the bases for its recommendation to dismiss the Petition for Writ of Habeas Corpus (the “Petition” or the “instant Petition”). Nevertheless, the Court, as it must, has independently reviewed the record in this matter and herein addresses each of Petitioner’s objections.

I. Factual Background and Procedural History

In the fall of 1987, Petitioner was the ring-leader of a multi-tier crack cocaine distribution enterprise in Philadelphia, Pennsylvania. Petitioner’s criminal organization employed several individuals with a variety of duties and varying levels of responsibility. Among Petitioner’s high-level operators and henchmen were Miguel Martinez (“Martinez”), Kelly Robinson (“Robinson”), and John Garrett (“Garrett”). Among Petitioner’s low-level drug sellers were thirteen-year-old Cornell Williams (“Cornell”), fifteen-year-old Anthony Williams (“Anthony”), and their friend Joey Jones (“Joey”). A short time after they began selling drugs for Petitioner, Cornell and Anthony were beset with difficulties that strained their relationship with their superiors. In sum, the drug ring estimated that Cornell and Anthony were responsible for approximately \$7,000 in lost

revenue due to mishandling drugs in their charge and theft.

To alleviate the problem posed by Cornell and Anthony, Petitioner told Martinez to take whatever action was necessary. In response, on March 15, 1988, Martinez and two confederates took Anthony to a secluded area along West River Drive in Philadelphia, where Martinez shot Anthony in the back of the head at close range; he died the next day. On March 18, 1988, Martinez and a confederate took Cornell and Joey to a secluded area near Philadelphia International Airport, where Cornell was killed by two gunshots to the back of the head at point-blank range; Joey escaped.

Following his arrest, Petitioner was tried along with Martinez, Robinson, and Garrett in the Court of Common Pleas of Philadelphia County on charges of first-degree murder, kidnapping, and criminal conspiracy. During closing argument, the prosecutor compared Petitioner to a notorious gangster and cinematic villain in the following manner:

And you all remember those gangster movies. You remember the movies where the boss would sit there and he would sit in his chair and people would come in to him and they would say, somebody is not paying their bills, and I don't know if he wrote anything out to anybody, if he said drive them here, taken [sic] them there, load your gun, take your gun out of your pocket, commit that murder, leave the body there.

But what would the guy say, Frank Nitty, on the untouchables [sic], "Take care of him. Do it. Do what you got to do."

Well, that's what happens in this white powder justice business.¹

In its final charge to the jury, the court instructed on accomplice liability as follows:

¹ Commonwealth v. Christian, No. 1195, slip op. at 7 (Pa. Super. Ct. February 17, 1999) (citing N.T. 12/20/1989 at 46-47). As the record accompanying the Petition does not contain the notes of testimony from December 20, 1989, the Court relies on the Superior Court's citation to the record.

Now, you may find a defendant guilty of a crime without finding that that person personally engaged in the conduct required for the commission of that crime. That's called liability by being an accomplice to the act.

Now, a defendant may be guilty of a crime if he is an accomplice of another person who commits that crime. A defendant does not become an accomplice merely by being present at the scene or knowing about the crime. He may be an accomplice if, with the intent of promoting and facilitating the commission of a crime, he solicits, encourages or assists the other person in planning or committing the crime. . . .

It's going to be your duty in this case to determine whether Anthony Williams and Cornell Williams died as a result of gunshot wounds inflicted upon them by a defendant in this case, or whether a defendant was an accomplice of the person who actually inflicted the fatal wounds; and if so, whether such killing amounted to murder of the first-degree, murder of the second-degree, murder of the third-degree, or voluntary manslaughter.²

The court further instructed the jury that first-degree murder requires the specific intent to kill, and that an intentional killing involves a willful, deliberate, and premeditated act.

On December 23, 1989, Petitioner was convicted on two counts of first-degree murder, three counts of criminal conspiracy, and four counts of kidnapping. In the penalty phase of the state proceeding, Petitioner's trial attorney attempted to explain to the jurors why Petitioner did not testify on his own behalf during the trial:

The decision to take the stand or not to take the stand is not always the defendant's, although he has to agree with it. Sometimes the attorney makes the decision. Sometimes the attorney makes the right decision; sometimes the attorney makes the wrong decision.

² Id. at 9.

I don't know what decision I made. But you didn't hear from him during the trial in chief. You did hear from him today. You heard him tell what happened.³

The jury deadlocked on Petitioner's sentence, and, following a denial of Petitioner's Motion for a New Trial, the court sentenced Petitioner to two consecutive terms of life imprisonment for his murder convictions and terms of five to ten years imprisonment (running concurrently with the sentences for first-degree murder) for his convictions for criminal conspiracy and kidnapping.

On June 30, 1995, Petitioner filed a counseled amended petition under Pennsylvania's Post Conviction Relief Act ("PCRA")⁴ seeking reinstatement of his appellate rights *nunc pro tunc*. After conducting a hearing and finding that Petitioner's failure to file a timely direct appeal was the result of "confusion and miscommunication between [P]etitioner and trial counsel," the court reinstated Petitioner's right to take a direct appeal from the judgment of sentence on March 13, 1996.⁵ Thereafter, Petitioner appealed his sentence to the Pennsylvania Superior Court arguing that his trial counsel was ineffective for: (1) failing to object to the jury charge on accomplice liability; (2) preventing Petitioner from taking the witnessstand at trial; and (3) failing to object to the prosecutor's closing argument reference to "Frank Nitty."⁶ On February 17, 1999, the Superior Court affirmed Petitioner's sentence.⁷ On June 22, 1999, the Pennsylvania Supreme Court denied

³ N.T. 12/26/1989, at 110.

⁴ 42 Pa. Cons. Stat. Ann. § 9543 (2005).

⁵ Habeas Corpus Pet., Ex. B at 1.

⁶ Christian, No. 1195, slip op. at 1-2.

⁷ See id.

Petitioner's request for discretionary review.⁸

In a letter dated June 29, 1999 (the "June 29th letter"), Norris Gelman ("Gelman")—Petitioner's appellate attorney—informed Petitioner that the Pennsylvania Supreme Court denied discretionary review of his conviction, and reminded Petitioner that he owed Gelman \$1,000 for filing the *allocatur* petition. The June 29th letter also stated:

We have a year from the date of [the order denying discretionary review in the Pennsylvania Supreme Court]—June 22, 1999, to file a habeas in the federal courts. We should be thinking about that now, and if you are interested your parents will contact me and we will discuss fees. I know they have been long suffering under the obligation to pay legal fees and there is nothing I can do about that. . . . When you have discussed it with your parents or when they have discussed it with you, either way you or they can call me.⁹

Neither Petitioner nor his parents subsequently contacted Gelman about filing a federal habeas petition.¹⁰

On June 30, 2000, Gelman informed Petitioner during a telephone conversation that he no longer represented him.¹¹ Further, Gelman informed Petitioner by letter dated July 6, 2000 (the "July 6th letter") that "[t]he time for filing the federal habeas passed in late June. You do have some time left—perhaps 10 weeks—to file a PCRA Petition in the state courts and you should definitely do that."¹²

⁸ Commonwealth v. Christian, 559 Pa. 687 (1999) (table).

⁹ Tr. 5/20/2004, Ex. R.

¹⁰ See Tr. 5/20/2004, Ex. S; see also id. at 38.

¹¹ Id. at 67.

¹² Tr. 5/20/2004, Ex. S.

On September 13, 2000, Petitioner filed a *pro se* PCRA petition. The court appointed counsel on October 18, 2000, and Petitioner filed an amended PCRA petition on March 21, 2001. On April 18, 2002, after a hearing, the court dismissed the amended PCRA petition. On February 14, 2003, the Superior Court affirmed the dismissal. On July 10, 2003, Petitioner filed the instant Petition in federal court pursuant to 28 U.S.C. § 2254.¹³

Therein, Petitioner states four grounds for habeas corpus relief: (1) his trial attorney was ineffective for failing to object to the court's jury instruction on accomplice liability; (2) his trial attorney was ineffective for preventing Petitioner from testifying; (3) his trial attorney was ineffective for failing to object and/or move for a mistrial when the prosecutor compared Petitioner to "Frank Nitty" during closing argument; and (4) the evidence presented at trial was insufficient to support his convictions.¹⁴

On August 27, 2003, the Court referred the Petition to Magistrate Judge Wells.¹⁵ During a hearing conducted on May 20, 2004 and May 25, 2004, Magistrate Judge Wells received evidence, including the oral testimony of Petitioner, Gelman, and Leon McQuine ("McQuine")¹⁶ concerning the timeliness of the Petition. Gelman testified at the hearing that the payment he received from McQuine did not include compensation for filing a federal habeas petition.¹⁷ According to McQuine and Petitioner, however, the money they paid to Gelman included payment

¹³ Doc. #1.

¹⁴ Habeas Corpus Pet. at 9-10.

¹⁵ See Doc. #3.

¹⁶ McQuine is Petitioner's father. He helped subsidize Petitioner's defense, appeals, and collateral attacks of his sentence.

¹⁷ Tr. 5/25/2004 at 30-31.

for filing a federal habeas petition.¹⁸

II. Discussion

A. Equitable Tolling

As a threshold matter, the Court addresses Petitioner's objection to the R&R's conclusion that Petitioner's habeas application should be dismissed as untimely. The Antiterrorism and Effective Death Penalty Act ("AEDPA") contains a limitations period for habeas corpus applications. The relevant section provides:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.¹⁹

¹⁸ On cross examination, McQuine expressed that he understood that Gelman would file a federal habeas petition on his son's behalf because Gelman "was supposed to deal with the appeal to the finishing of the case." Id. at 85. Similarly, Petitioner testified during cross examination that he was "under the impression" that Gelman would file a federal habeas petition on his behalf "because he never give [sic] me an indication that it would not be filed." Tr. 5/20/2004 at 61.

¹⁹ 28 U.S.C. § 2244(d)(1) (2006).

The one-year limitation period is tolled, however, for “[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.”²⁰

Petitioner’s one-year limitation period for filing his habeas application began to run from the date that his judgment became final “by the conclusion of direct review or the expiration of the time for seeking such review” because: (1) Petitioner was not prevented from filing his habeas application due to unconstitutional state action; (2) he is not raising a newly recognized constitutional right; and (3) the factual predicate of the claims Petitioner raises in the Petition were known to him since the conclusion of his trial.²¹ Petitioner’s conviction became final on September 20, 1999—ninety days after June 22, 1999.²²

Therefore, the one-year limitation period for filing his habeas petition ran continuously from September 20, 1999 to September 13, 2000 (358 days), when Petitioner filed a *pro se* PCRA petition. Beginning September 13, 2000, the limitations period was tolled pending the determination of Petitioner’s PCRA petition. The Superior Court affirmed the dismissal of the PCRA petition on February 14, 2003; petitioner did not seek review of the dismissal with the Pennsylvania Supreme Court. Therefore, the determination of the PCRA petition became final on

²⁰ 28 U.S.C. § 2244(d)(2) (2006).

²¹ 28 U.S.C. § 2244(d)(1)(B)-(D).

²² After ninety days, the state court judgment became final because the time for seeking certiorari with the United States Supreme Court expired. See S. Ct. R. 13(1). Under § 2244(d)(1)(A), a state court judgment becomes final and the statute of limitations begins to run “at the conclusion of review in the United States Supreme Court or when the time for seeking certiorari review expires.” Jones v. Morton, 195 F.3d 153, 157 (3d Cir. 1999) (quoting Kapral v. United States, 166 F.3d 565, 575 (3d Cir. 1999)).

March 17, 2003,²³ and the tolling period ended on that date.²⁴ Thus, the one-year limitation period for Petitioner to file his federal habeas petition resumed on that date—leaving him seven days, or until March 24, 2003, to file a timely habeas petition. Petitioner filed the Petition in this Court on July 10, 2003.

Petitioner contends that the limitations period on his habeas petition should be tolled based on equitable considerations from: (1) April 24, 1996 to June 22, 1999—the period during which he pursued a direct appeal of his conviction; (2) June 23, 1999 to July 6, 2000—the period during which he was represented by Gelman; (3) September 13, 2000 to February 14, 2003—the period during which his PCRA application was pending; and (4) February 18, 2003 to March 19, 2003—the time period during which he could have sought certiorari to the United States Supreme Court.²⁵ The limitations period on Petitioner’s habeas petition was not tolled from April 24, 1996 (the date that the AEDPA went into effect) to June 22, 1999 because the limitations period did not begin to run until September 20, 1999—the date the state court judgment of sentence became final. The Court agrees with Petitioner insofar as he contends that the limitations period on filing the Petition was tolled from September 13, 2000 to March 17, 2003—during the pendency of his PCRA petition.²⁶ However, Petitioner’s contention that the limitations period should be equitably tolled from June 23, 1999 to July 6, 2000 is without merit.

²³ Pa. R. App. P. 903 (instructing that appeals from the final orders of lower courts must “be filed within [thirty] days after the entry of the order from which the appeal is taken”).

²⁴ Swartz v. Meyers, 204 F.3d 417, 418 (3d Cir. 2000) (concluding that a PCRA petition is pending “during the time between the Pennsylvania Superior Court’s ruling and the expiration of time for seeking an allowance of appeal from the Pennsylvania Supreme Court.”).

²⁵ Obj. to R&R 5.

²⁶ The Court notes, however, that the limitations period was tolled during this time on the strength of the AEDPA statute itself and not equitable considerations. See 28 U.S.C. § 2244(d)(2).

“Equitable tolling is proper only when the ‘principles of equity would make the rigid application of a limitation period unfair.’”²⁷ Generally, principles of equitable tolling apply when “the petitioner has in some extraordinary way . . . been prevented from asserting his or her rights.”²⁸ Additionally, for a petitioner to invoke equitable tolling he “must show that he . . . ‘exercised reasonable diligence in investigating and bringing the claim. Mere excusable neglect is not sufficient.’”²⁹ As the Third Circuit has noted:

The word “prevent” requires the petitioner to demonstrate a causal relationship between the extraordinary circumstance on which the claim for equitable tolling rests and the lateness of his filing, a demonstration that cannot be made if the petitioner, acting with reasonable diligence, could have filed on time notwithstanding the extraordinary circumstances. If the person seeking equitable tolling has not exercised reasonable diligence in attempting to file after the extraordinary circumstances began, the link of causation between the extraordinary circumstances and the failure to file is broken, and the extraordinary circumstances therefore did not prevent timely filing.³⁰

The Court disagrees with Petitioner’s contention that he is entitled to equitable tolling because Gelman refused to file a federal habeas petition on his behalf. In fact, Petitioner’s argument beseeches the Court to ignore common sense—the Court cannot fathom any reasonable basis for Petitioner to believe that Gelman would prepare yet another petition for review of his conviction without predetermining a fee arrangement for the additional work involved. Because there is nothing

²⁷ Brown v. Shannon, 322 F.3d 768, 773 (3d Cir. 2003) (quoting Miller v. New Jersey State Dep’t of Corr., 145 F.3d 616, 618 (3d Cir. 1998)).

²⁸ Brown, 322 F.3d at 773 (quoting Miller, 145 F.3d at 618).

²⁹ Id.

³⁰ Id. (quoting Valverde v. Stinson, 224 F.3d 129, 134 (2d Cir. 2000)).

extraordinary in an attorney requiring his client to establish a fee arrangement for prospective legal representation, the Court is unpersuaded that Petitioner is entitled to equitable tolling on the basis of Gelman's requirement to discuss additional fees prior to undertaking additional work.

Moreover, the Court disagrees with Petitioner's contention that Gelman's withdrawal of representation prior to filing a federal habeas petition provides the requisite extraordinary circumstance to equitably toll the one-year limitation period for filing the claim. In Brown v. Shannon,³¹ a federal habeas petitioner argued that he was entitled to equitable tolling because his lawyer "abandoned" him by withdrawing representation before filing a federal habeas petition.³² In that case, the petitioner's attorney withdrew his representation without filing a federal habeas petition because he was unsuccessful in obtaining a complete set of trial transcripts, and concluded that he could not effectively represent his client without them. In holding that the attorney's withdrawal did not warrant equitable tolling, the Brown court noted that, since the attorney diligently undertook to obtain the needed trial transcripts and had been forthright with his client concerning his failure to obtain the transcripts and his inability to prepare a habeas petition, the attorney's conduct could not be characterized as misbehavior or irresponsible and, therefore, did not create an extraordinary circumstance that prevented the petitioner from asserting his rights. Additionally, the Brown court noted that the petitioner there had almost one month after his attorney's withdrawal to file a *pro se* federal habeas petition prior to the expiration of the limitation period.

Here, Gelman's conduct cannot be characterized as misbehavior or irresponsible. Gelman was forthright and candid with Petitioner concerning his requirement that a fee arrangement

³¹ Brown, 322 F.3d. 768.

³² Id. at 774.

be agreed upon prior to the commencement of his representation of Petitioner on a federal habeas petition. Moreover, Petitioner's failure to exercise reasonable diligence does not support his contention that Gelman's failure to file a habeas petition on his behalf prior to July 6, 2000 prevented him from exercising his rights. Petitioner had more than two months from the time of Gelman's withdrawal to the expiration of the one-year limitation period for filing a *pro se* federal habeas petition. Two months was more than ample time for Petitioner to prepare and file a habeas petition.³³ Additionally, Gelman did not misbehave or act irresponsibly when he erroneously informed Petitioner in the July 6th letter that the one-year limitation period for filing his federal habeas had already run; however, he did miscalculate. However, "[i]n non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the extraordinary circumstances required for equitable tolling."³⁴

In sum, Petitioner is not entitled to equitable tolling between September 20, 1999 and July 6, 2000. Because Gelman's withdrawal without first filing a habeas petition did not in an extraordinary way prevent Petitioner from exercising his rights, the limitation period ran continuously from the day Petitioner's conviction became final until the day he filed his PCRA application. As such, Petitioner's *pro se* habeas petition—filed 108 days late—was untimely.

B. Petitioner's Substantive Claims

The Court agrees with the R&R's conclusion that even if his habeas petition was timely filed, Petitioner's claims lack merit. Section 2254 provides in relevant part:

(d) An application for a writ of habeas corpus on behalf of a

³³ See *id.*

³⁴ *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir. 2001).

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 States³⁵

“[S]ection 2254(d) firmly establishes the state court decision as the starting point in habeas review.”³⁶ The Supreme Court construed this provision in Williams v. Taylor³⁷ and concluded that “[u]nder 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 the [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.”³⁸ The Williams court went on to hold that “[u]nder 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.”³⁹

Therefore, this Court may not grant the Petition on the basis of a conclusion that the state court erroneously applied clearly established federal law.⁴⁰ Rather, “a federal habeas court

³⁵ 28 U.S.C. § 2254(d)(1) (2006).

³⁶ Moore v. Morton, 255 F.3d 95, 104 (quoting Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 885 (3d Cir. 1999) (en banc)).

³⁷ 529 U.S. 362 (2000).

³⁸ Id. at 412-13.

³⁹ Id. at 413.

⁴⁰ Id. at 414.

making the ‘unreasonable application’ inquiry should ask whether the state court’s application of clearly established federal law was objectively unreasonable.”⁴¹ Against this backdrop, the Court reviews *de novo* those portions of the R&R to which Petitioner has objected.⁴²

1. Ineffective Assistance of Counsel Claims

Three of Petitioner’s four grounds for habeas relief claim ineffective assistance of trial counsel and, thus, call for application of the familiar two-part test for ineffectiveness set forth in Strickland v. Washington.⁴³ Specifically, in order for Petitioner to prevail on his ineffective assistance of counsel claims:

First, [he] must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, [he] 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 whose result is reliable.⁴⁴

Concerning deficient performance, Petitioner “must show that counsel’s representation fell below an objective standard of reasonableness.”⁴⁵ Strickland teaches that “[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to

⁴¹ Id. at 409.

⁴² See 28 U.S.C. § 636(b)(1) (2005).

⁴³ 466 U.S. 668 (1984).

⁴⁴ Id. at 687.

⁴⁵ Id. at 688.

evaluate the conduct from counsel's perspective at the time."⁴⁶ Furthermore, Strickland instructs that due to the "difficulties inherent in making the evaluation, 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."⁴⁷ Moreover, Strickland admonishes that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."⁴⁸

a. Failure to Object to the Jury Instruction

Petitioner first objects to the R&R's conclusion that the Superior Court's rejection of his claim that trial counsel was ineffective for failing to object to the trial court's instruction on accomplice liability was not contrary to or an unreasonable application of established federal law. Petitioner contends that his attorney's failure to object to the instruction on accomplice liability permitted the jury to erroneously convict him on the charge of first-degree murder based on the intent of the actual shooter and based on his complicity in the boys' kidnapping. The Court's review of this argument requires analysis of the challenged portions of the trial court's jury instruction in context of the entire charge and determination of "whether there is a reasonable likelihood that the jury has applied the challenged instructions in a way that violates the Constitution."⁴⁹

In its decision, the Superior Court considered the following in reaching its conclusion

⁴⁶ Id. at 689.

⁴⁷ Id. (internal quotations omitted).

⁴⁸ Id. at 690.

⁴⁹ Smith v. Horn, 120 F.3d 400, 410 (3d Cir. 1997) (internal quotations omitted).

that the instruction given at Petitioner’s trial was adequate: (1) the instruction tracked the language of Pennsylvania’s criminal statute on accomplice liability and the Pennsylvania Suggested Standard Jury Instructions; (2) the instruction required the jury to determine “whether a defendant was an accomplice of the person who actually inflicted the fatal wounds”; (3) the fact that a person who inflicts fatal wounds, necessarily, commits murder and not kidnapping; and (4) the charge instructed the jury that an accomplice to first-degree murder must act with the intent of promoting or facilitating a deliberate, willful, and premeditated killing.

Jury instructions on accomplice liability that “reinforce the notion that an accomplice for one purpose is an accomplice for all purposes” do not fulfill the constitutional guarantee of due process.⁵⁰ Therefore, where an individual is tried on first-degree murder and other, non-homicide crimes but the jury instructions do not specify which crimes implicate accomplice liability and which do not, courts have found that the instructions impermissibly alleviate the prosecutorial burden of establishing that a defendant accused of complicity in committing murder in the first-degree had the specific intent to kill the victim.⁵¹ Such is not the case here.

Here, there is not a reasonable likelihood that the jurors understood the accomplice liability instruction to mean anything other than complicity in the murder of Cornell and Anthony Williams. As such, there is not a reasonable likelihood that the jurors applied the instruction in a manner that violated Petitioner’s constitutional rights. The charge clearly instructs that accomplice liability must emanate from the principal’s infliction of fatal wounds. Since the instruction specifies

⁵⁰ Id. at 414.

⁵¹ See, e.g., Laird v. Horn, 414 F.3d 419, 427 (3d Cir. 2005) (involving defendant tried for first-degree murder, kidnapping, and aggravated assault, among other crimes); see also Smith, 120 F.3d at 414 (involving a defendant tried on murder and robbery charges).

the only permissible source of complicity as the person who inflicted of the fatal wounds, it strains credulity to argue that the jury was permitted to convict Petitioner if it found the source of complicity to be the person who kidnapped the boys. As such, the argument that the trial court's jury instruction on accomplice liability violated Petitioner's due process rights is meritless.

It is well settled that “[t]here can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a meritless argument.”⁵² Because Petitioner's challenge to the jury instruction on accomplice liability lacks merit, trial counsel's performance was not deficient for failing to object to the jury charge. Therefore, the Superior Court's conclusion that trial counsel did not render ineffective assistance for failing to object to an adequate jury instruction is not contrary to clearly established federal law.

Additionally, the Superior Court's conclusion that Petitioner suffered no prejudice as a result of his lawyer's failure to object to the charge is not an unreasonable application of federal law. To constitute prejudice, trial counsel's failure to object to the jury instruction must undermine the Court's confidence in the outcome of the case.⁵³ As the Superior Court noted, notwithstanding the jury's specific understanding of how to apply the instruction, the prosecution's theory of the case at trial was that Cornell and Anthony were murdered on Petitioner's orders.⁵⁴ As such, a verdict of guilty on Petitioner's charge of first-degree murder would defy logic unless the jury concluded that Petitioner intended for his subordinates to kill the boys. Moreover, the evidence produced at trial,

⁵² United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999).

⁵³ Strickland, 466 U.S. at 694.

⁵⁴ Commonwealth v. Christian, No. 1195, slip op. at 10.

including testimony by Joey, established that Petitioner specifically ordered the murders of Cornell and Anthony Williams.⁵⁵ Therefore, even if the jury charge on accomplice liability was objectionable and trial counsel inexcusably failed to object to it, the Court is confident that the outcome of Petitioner's trial would have been the same absent trial counsel's deficient performance.

b. Refusal to Permit Petitioner to Testify at Trial

Petitioner next objects to the R&R's conclusion that the Superior Court's decision on Petitioner's contention that trial counsel was ineffective for preventing him from testifying was not contrary to or an unreasonable application of clearly established federal law. Strickland requires the Court assessing attorney performance to "reconstruct the circumstances of counsel's challenged conduct" and "evaluate the conduct from counsel's perspective at the time."⁵⁶ Moreover, Strickland requires the Court to "indulge a strong presumption that counsel's conduct . . . might be considered sound trial strategy."⁵⁷

Here, trial counsel publicly second-guessed his advice to Petitioner that he not testify at trial. At the point when trial counsel questioned that advice, one of Petitioner's co-defendants—the only defendant to testify during the trial—had been acquitted of murdering Anthony Williams. Based on the acquittal of the testifying defendant, it was reasonable for trial counsel to conclude that the jury placed some value on hearing from the accused. Therefore, it was sound trial strategy for trial counsel to attempt to reconcile an acquitted co-defendant's decision to testify with

⁵⁵ See N.T. 11/30/1989, at 55.

⁵⁶ Strickland, 466 U.S. at 689.

⁵⁷ Id.

his convicted client's decision not to testify. In fact, trial counsel highlighted to the jury the fact that, although deprived of Petitioner's version of events during trial, the jury "heard him tell what happened" during the sentencing hearing.⁵⁸

Furthermore, the Superior Court's conclusion that "an attorney has a great deal of influence over his client's decision to testify" is typified by the circumstances here. Petitioner would have the Court take trial counsel's statement that "[t]he decision to take the stand or not to take the stand is not always the defendant's" to mean that he was unconstitutionally forbidden by his lawyer to testify in his own defense.⁵⁹ However, read in context, trial counsel's statement precludes this interpretation. Trial counsel's statement, while acknowledging that trial counsel exercised significant influence over Petitioner's decision not to testify, also acknowledges that Petitioner agreed with the decision for him not to take the stand. Thus, because trial counsel's decision not to allow Petitioner to testify at trial, as well as Petitioner's acquiescence in that decision, was clearly sound trial strategy, Petitioner's contention that his attorney rendered ineffective assistance of counsel by disallowing Petitioner to testify cannot prevail.

c. Prosecutor's Comparison of Petitioner to "Frank Nitty"

Petitioner next objects to the R&R's conclusion that the Superior Court's finding that trial counsel was not ineffective for failing to object to the prosecutor's reference to Frank Nitty during summation was not contrary to or an unreasonable application of established federal law. Distilling principles established by the Supreme Court, the Third Circuit counsels that a court

⁵⁸ N.T. 12/26/1989, at 110.

⁵⁹ Obj. to R&R 9.

reviewing claims of ineffective assistance of counsel on the basis of a failure to object to improper prosecutorial remarks during summation “must examine the prosecutor’s offensive actions in context and in light of the entire trial, assessing the severity of the conduct, the effect of the curative instructions, and the quantum of the evidence against the defendant.”⁶⁰ The Superior Court’s conclusion that the prosecutor’s comparison of Petitioner to Frank Nitty “did not prejudice the jurors to the point that they were incapable of weighing the evidence and rendering a true verdict” is not contrary to clearly established federal law.⁶¹ Put in context of the complete trial, the prosecutor’s reference to Frank Nitty did not “so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.”⁶²

Assessing the severity of the conduct, the Superior Court noted that the prosecutor compared Petitioner to Frank Nitty to combat the defendants’ denial that they had conspired to murder the boys and to illustrate the meaning of conspiracy and accomplice liability.⁶³ Additionally, the fact that the Superior Court discounted the prejudicial impact of the comparison on its observation that most of the jurors likely did not know Frank Nitty affirms the court’s proper assessment of the severity of the remark. Furthermore, the Superior Court explained that, in light of the “evidence of [Petitioner]’s ruthless and business-like approach to his drug operations, the comparison to Frank Nitty fell within the ambit of fair comment.”⁶⁴ As such, it is clear that the

⁶⁰ Moore v. Morton, 255 F.3d 95, 107 (3d Cir. 2001).

⁶¹ Christian, No. 1195, slip op. at 8.

⁶² Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).

⁶³ See Christian, No. 1195, slip op. at 8.

⁶⁴ Id.

Superior Court properly considered the quantum of evidence against Petitioner when deciding his prosecutorial misconduct claim.

Finally, the fact that the trial court did not give a curative instruction on the prosecutor's statement is not legally significant because the comparison of Petitioner to Frank Nitty was not, itself, improper. Therefore, since there were no impermissible inferences for the jury to draw from the prosecutor's argument, there was nothing for the trial court to cure. However, even assuming, *arguendo*, that the prosecutorial remark was improper, Petitioner cannot prevail on this claim because trial counsel's failure to object to the comparison did not prejudice Petitioner's defense. The prosecution's singular reference to Frank Nitty during summation shrinks in comparison to the first-hand testimony provided by Joey, and the other evidence presented at trial, that Petitioner ordered the execution of the boys. As such, the Court concludes that the outcome of Petitioner's trial would have been no different absent trial counsel's failure to object to the Frank Nitty reference.

2. Insufficient Evidence Claim

Petitioner next objects to the R&R's conclusion that the evidence presented at his trial was sufficient to convict him of first-degree murder.⁶⁵ In reviewing Petitioner's insufficient evidence claim, the Court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."⁶⁶ This determination must be made "with explicit reference to the substantive

⁶⁵ Habeas Corpus Pet. 14.

⁶⁶ Orban v. Vaughn, 123 F.3d 727, 732 (3d Cir. 1997) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

elements of the criminal offense as defined by state law.”⁶⁷

In Pennsylvania, “a criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.”⁶⁸ An intentional killing is “[k]illing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing.”⁶⁹ Additionally, pursuant to Pennsylvania law, “circumstantial evidence alone can be sufficient to convict a defendant of a crime[,] . . . and [t]he use of a deadly weapon on a vital part of the body is sufficient to establish the specific intent to kill.”⁷⁰ Further, Pennsylvania law sets forth criminal complicity, in relevant part, as follows:

(a) General rule.— A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.

(b) Conduct of another.— A person is legally accountable for the conduct of another person when: . . .

(3) he is an accomplice of such other person in the commission of the offense.

(c) Accomplice defined.— A person is an accomplice of another person in the commission of an offense if:

(1) with the intent of promoting or facilitating the commission of the offense, he:

(i) solicits such other person to commit it.⁷¹

⁶⁷ Id. (quoting Jackson, 443 U.S. at 324 n.16).

⁶⁸ 18 Pa. Cons. Stat. Ann. § 2502 (1998).

⁶⁹ Id.

⁷⁰ Commonwealth v. Rivera, 565 A.2d 131, 135 (Pa. 2001).

⁷¹ 18 Pa. Cons. Stat. Ann. § 306 (1998).

Here, the jury heard testimony from Joey and Garrett that Petitioner ordered his subordinates—including Garrett—to kill Anthony, Cornell, and Joey. Additionally, the jury heard testimony that shortly after Petitioner ordered their execution, Anthony and Cornell were killed by gunshots to the back and back of the head, respectively. Based on the testimony of Joey and Garrett, viewed in the light most favorable to the prosecution, a rational trier of fact could conclude that Petitioner solicited his subordinates to kill Anthony and Cornell; thus, a rational juror could conclude under Pennsylvania law that Petitioner was an accomplice to the intentional killing of the boys.

3. Actual Innocence Claim

Finally, Petitioner objects to the R&R's rejection of his request for an expanded evidentiary hearing on whether he is actually innocent of ordering the murders of Anthony and Cornell Williams. To support his claim of actual innocence, Petitioner points to the statement given by Garrett on March 10, 2005 (the "March 10th interview"), which he claims constitutes new evidence proving his innocence. The March 10th interview was conducted by Christopher Milton ("Milton"), Chief Investigator for the Philadelphia Protection Service, who contacted Garrett at the behest of Petitioner's court-appointed habeas attorney, Roland Jarvis ("Jarvis").⁷² The March 10th interview, in its entirety, reads:

- Q: What made you testify against Mark Christian?
A: On the advice of my counsel I testified against Mark.
- Q: Were you promised anything by the DA's office [when you testified against him]?
A: No! I did what my lawyer instructed me to do, I

⁷² The docket report in this case shows that Magistrate Judge Wells appointed Jarvis to represent Petitioner at the May 20, 2004 hearing on equitable tolling. Research reveals that Philadelphia Protection Service is a private investigative company headed by Milton.

denied what the DA offered, which was two twenty too [sic] forty consecutive years.

Q: Is there any truth to the suggestion that Mark Christian was the head of an alleged drug distribution ring?

A: No!

Q: Are you aware that Mark Christian is non-Jamaican and that Mark Christian claims that he is innocent?

A: Yes! Mark is from Ghana!

Q: Do you feel you may be in danger as a result of making this statement?

A: No! I do not.⁷³

Federal courts reviewing requests for habeas corpus relief from state court convictions 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.”⁷⁴ A petitioner’s failure to present “federal claims in state court bars the consideration of those claims in federal court by means of habeas corpus because they have been procedurally defaulted.”⁷⁵ However, the Supreme Court has identified the following two exceptions to the procedural default bar:

In all cases in which a state prisoner has defaulted his federal claims in state court[,] . . . federal habeas review of the claims is barred unless the prisoner 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

⁷³ Obj. to R&R, Ex. A-2.

⁷⁴ Cristin v. Brennan, 281 F.3d 404, 410 (3d Cir. 2002) (quoting O’Sullivan v. Boerckel, 526 U.S. 838, 848 (1999) (emphasis in original)).

⁷⁵ Cristin, 281 F.3d at 410 (citing Coleman v. Thompson, 501 U.S. 722, 731 (1991)).

miscarriage of justice.⁷⁶

The foregoing exceptions would permit Petitioner to attempt to establish the cause for his failing to bring his actual innocence claim during state court proceedings and to demonstrate actual prejudice or argue that failure to consider his actual innocence claim in federal court would result in a fundamental miscarriage of justice, notwithstanding his failure to present his actual innocence claim for adjudication to any state court before finally raising the claim in his objections to the R&R, if: (1) Petitioner’s actual innocence claim alleged a violation of federal law and (2) Petitioner’s allegations of violations of federal law were not time barred. But, Petitioner’s claim of actual innocence on the basis of Garrett’s statement “is not cognizable under the federal habeas statute because it rests on state, rather than federal, law.”⁷⁷ Moreover, because Petitioner’s allegations of violation of federal law are time barred, his actual innocence claim based on after-discovered evidence stands alone—unsupported by any allegations of violation of federal law. “It has long been recognized that ‘[c]laims of actual innocence based on newly discovered evidence’ are never grounds for ‘federal habeas relief absent an independent constitutional violation.’”⁷⁸ Therefore, the Court agrees with the Conclusion of the R&R that Petitioner’s bald claim of actual innocence does not warrant an expanded evidentiary hearing in federal court.⁷⁹

⁷⁶ Id. at 750.

⁷⁷ Fielder v. Varner, 379 F.3d 113, 122 (3d. Cir. 2004).

⁷⁸ Id. (quoting Herrera v. Collins, 506 U.S. 390, 400 (1993)).

⁷⁹ The Court notes that this memorandum opinion adopts the R&R’s conclusion on Petitioner’s actual innocence claim, not its analysis of the claim. Although the R&R’s substantive analysis is sound and exhaustive, the Court declines to reach the merits of Petitioner’s actual innocence claim on the basis that it is improper for a federal court adjudicating a habeas petition on a state court conviction to address procedurally defaulted state law claims in the first instance.

III. Conclusion

For the foregoing reasons, the Court overrules Petitioner's Objections and approves and adopts the R&R.

An appropriate Order follows.

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

MARK CHRISTIAN,, Petitioner	:	
	:	CIVIL ACTION
	:	No. 03-4066
v.	:	
	:	
NEAL MECHLING, et al., Defendants	:	

ORDER

AND NOW, this 8th day of August 2006, upon careful consideration of Petitioner Mark Christian's Petition for Writ of Habeas Corpus [Doc. #1], the Response thereto [Document #9], the Report and Recommendation of United States Magistrate Judge Carol Sandra Moore Wells [Doc. #36], and Petitioner's Objections thereto [Doc. ## 46, 51], and for the reasons set forth in the attached Memorandum Opinion, it is hereby **ORDERED** that:

1. The Report and Recommendation is **APPROVED and ADOPTED**;
2. The Petition for Writ of Habeas Corpus is **DENIED**;
3. There is no probable cause to issue a certificate of appealability; and
4. The Clerk of Court shall mark this case **CLOSED** for statistical purposes.

It is so **ORDERED**.

BY THE COURT:

Cynthia M. Rufe, J.