

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

JAMES SMITH, : CIVIL ACTION  
Petitioner, :  
v. :  
DONALD T. VAUGHN, et al. : NO. 96-8482  
Defendants. :

MEMORANDUM AND ORDER

Yohn, J. June, 1997

State prisoner James Smith ("petitioner") petitions for federal habeas corpus relief pursuant to 28 U.S.C. § 2254. For the reasons that follow, the court will DENY his petition.

I. BACKGROUND<sup>1</sup>

On November 18, 1982, petitioner was found guilty of murder in the first degree, criminal conspiracy and aggravated

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1. The following background information is derived from petitioner's habeas petition, the Commonwealth's answer, the magistrate's report and recommendation, certain trial testimony (N.T. 11/8/1982-11/10/1982, N.T. 11/12/1982, N.T. 11/15/1982, N.T. 11/17/1982-11/18/1992), the post-trial opinion of the trial court, see Commonwealth v. Smith, Nos. 4649-53/4656-60, slip. op. (Phila. Ct. Com. Pl. Nov. 11, 1983), the Superior Court's opinion on direct appeal, see Commonwealth v. Smith, No. 03452, slip. op. (Pa. Super. 1985), the PCHA court's opinion, see Commonwealth v. Smith, No. 4656 1/1, slip. op. (Phila. Ct. Com. Pl. Sept. 24, 1992), the PCHA appeal to the Superior Court, see Commonwealth v. Smith, No. 03023, slip. op. (Pa. Super. 1993), and the PCRA appeal to the Superior Court, see Commonwealth v. Smith, No. 733, slip. op. (Pa. Super. 1995).

A large portion of the district attorney's file in this case has been lost so the court has been unable to rely on petitioner's briefs filed on direct appeal to the Superior Court or to the Supreme Court.

assault.<sup>2</sup> On November 11, 1983, post-verdict motions filed on behalf of petitioner were denied and petitioner was sentenced to life imprisonment for the murder and to concurrent terms of two and one-half (2 1/2) to five (5) years imprisonment for aggravated assault and criminal conspiracy. See Commonwealth v. Smith, Nos. 4649-53/4656-60, slip. op. (Phila. Ct. Com. Pl. Nov. 11, 1983).

Petitioner appealed his conviction to the Superior Court of Pennsylvania. On direct appeal, he raised the following issues: (1) whether the trial court erred by admitting the hearsay testimony of police officers Becker, Gillespie and Graham; (2) whether the trial court erred by allowing the Commonwealth to change Bill of Information No. 4660 from "did possess a handgun" to "did stab Anthony Tyler" after both the

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2. The facts underlying petitioner's convictions are as follows: During the afternoon of January 29, 1982, petitioner and Robert Tyler, the decedent, were involved in an argument at a bar. Later that evening in the bar, petitioner continued to argue with Anthony Tyler, the decedent's brother, and petitioner attempted to provoke Anthony Tyler to fight him, but Tyler refused. Petitioner then approached Kevin Isaac, his co-defendant, and they began to talk. When their conversation ended, petitioner, openly displaying a knife, approached Robert Tyler from behind, and Kevin Isaac, upon receiving a nod from petitioner, proceeded from the back of the bar to a position directly facing Tyler. Without any provocation or threats, Kevin Isaac then pulled out a gun and shot and killed Robert Tyler. After the shooting, Anthony Tyler "tussled" with Kevin Isaac for the gun to prevent Isaac from shooting Tyler's brother a second time. While this was occurring, petitioner began stabbing Anthony Tyler from behind. Anthony Tyler collapsed to the floor of the bar where he was kicked repeatedly by petitioner. Anthony Tyler's injuries required several days of hospitalization. See Commonwealth v. Smith, Nos. 4649-53/4656-60, slip. op. (Phila. Ct. Com. Pl. Nov. 11, 1983).

Commonwealth and defense had rested; (3) whether the evidence was sufficient to sustain the verdict; (4) whether the verdict was against the weight of the evidence; (5) whether the trial court erred in denying petitioner's demurrer to the charges; (6) whether the trial court erred in denying petitioner's motion for a directed verdict; and (7) whether the trial court erred in denying petitioner's motion to quash the return of the bills of information. See Commonwealth v. Smith, No. 03452, slip. op. (Pa. Super. 1985). The Superior Court rejected petitioner's claims. See id.

Petitioner then sought discretionary review by the Supreme Court of Pennsylvania but that request was denied on March 10, 1986.<sup>3</sup>

On July 20, 1987, petitioner filed a pro se petition under the Post Conviction Hearing Act (PCHA). See 42 Pa. C.S.A. § 9541 et seq. (replaced in 1988 by the Post Conviction Relief Act (PCRA)). There, petitioner raised the following three ineffective assistance of counsel claims: 1) that trial counsel failed to object to the jury charge; 2) that trial counsel mistakenly challenged a juror for cause instead of peremptorily; and 3) that trial counsel failed to object to leading questions

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3. As noted above, a large portion of the district attorney's file in this case has been lost and therefore the Commonwealth has been unable to supply the court with a copy of the brief filed by petitioner on direct appeal to the Supreme Court. For purposes of this petition, therefore, the court will assume that petitioner raised the same issues on direct appeal to the Supreme Court as he did on direct appeal to the Superior Court.

employed by the prosecution on direct examination. The PCHA court dismissed petitioner's petition. See Commonwealth v. Smith, No. 4656 1/1, slip. op. (Phila. Ct. Com. Pl. Sept. 24, 1992). Petitioner then appealed to the Superior Court raising the same three counts of ineffective assistance of counsel. The Superior Court also rejected these counts, see Commonwealth v. Smith, No. 03023, slip. op. (Pa. Super. 1993), and petitioner did not appeal them to the Supreme Court.

On October 29, 1993, petitioner filed a second pro se petition for state collateral relief, this time pursuant to the PCRA. The PCRA court dismissed his second petition without appointing counsel and without holding a hearing.<sup>4</sup> Petitioner then appealed claiming 1) that the evidence was insufficient to sustain the first degree murder conviction because the Commonwealth failed to prove the element of "shared intent;" 2) that trial counsel was ineffective for failing to call certain defense witnesses; and 3) that the PCRA court erred in dismissing his petition without appointing counsel and without holding a hearing. The Superior Court rejected petitioner's contentions concluding that the first issue had been previously litigated on direct appeal and therefore was not subject to further review, that the second issue had been waived and was meritless and that the third issue was meritless. See Commonwealth v. Smith, No. 733, slip. op. (Pa. Super. 1995). On July 9, 1996, the

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4. This opinion has not been provided to this court so it is unclear exactly what issues were raised at this point.

Pennsylvania Supreme Court denied petitioner's petition for allowance of appeal. See Commonwealth v. Smith, No. 958, slip. op. (Pa. 1996).<sup>5</sup>

On December 19, 1996, petitioner filed the instant habeas petition. In it he complains that the trial court denied him due process when it 1) admitted the hearsay testimony of police officers Becker, Gillespie and Graham; 2) permitted the Commonwealth to amend Bill of Information No. 4660 after both the Commonwealth and defense had rested; 3) allowed petitioner's convictions to stand based on insufficient evidence; 4) rejected petitioner's claim that the verdict was against the weight of the evidence; 5) denied his demurrer to the charges, 6) denied his motion for a directed verdict; and 7) denied his motion to quash the return of the bills of information. Petitioner also alleges that trial counsel provided ineffective assistance of counsel by failing 8) to object to the trial court's jury charge, 9) to challenge a juror for cause, 10) to object to the prosecutor's leading questions, and 11) to call unnamed defense witnesses.

On May 7, 1997, the magistrate judge to whom this habeas corpus petition was referred recommended that Smith's petition should be denied. As for the four ineffective assistance of counsel claims (VIII-XI), the magistrate judge concluded that they had been procedurally defaulted and therefore

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5. Once again, because the court has not been given petitioner's brief on PCRA appeal to the Supreme Court, the court assumes that petitioner brought the same PCRA appeal issues to the Pennsylvania Supreme Court as he did to the Superior Court.

they could not be the basis of federal habeas review because petitioner had not shown cause and prejudice for the default. As for the remaining seven claims (I-VII), the magistrate judge concluded that they all related to "alleged evidentiary errors by the trial court" and that petitioner had not properly presented them as federal claims to the state courts. Therefore, they were unexhausted and procedurally defaulted and could not be subject to federal habeas review.

There were no objections filed as to the magistrate judge's report and recommendation.

## II. Standard of Review

Pursuant to 8 U.S.C. § 636(b) (1), a federal court may refer petitions to a magistrate judge to undertake consideration of the petition. The magistrate judge should ultimately submit to the district court a "report as to the facts and [a] recommendation as to the order" regarding the appropriate disposition of the petition. The district court is directed to independently consider and review de novo the magistrate judge's report and recommendation. See id.

In the absence of objections, however, the federal court is not statutorily required to review a magistrate judge's report before accepting it. See Thomas v. Arn, 474 U.S. 140, 149 (1985). However, "the better practice is to afford some level of review to dispositive legal issues raised by the report." See Henderson v. Carlson, 812 F.2d 874, 878 (3d Cir. 1987).

### III. DISCUSSION

#### A. Counts Eight (VIII), Nine (IX) & Ten (X)

Review of the procedural history in this case reveals that although petitioner raised counts VIII, IX and X<sup>6</sup> on PCHA appeal to the Superior Court, petitioner never appealed these counts to the Pennsylvania Supreme Court. The first issue is, therefore, whether these counts have been exhausted and/or are procedurally barred. See 28 U.S.C. § 2254 (b), (c).

Beaty v. Patton, 700 F. 2d 110, 112 (3d Cir. 1983) guides this court's decision. In that case, Beaty, like petitioner, directly appealed his criminal conviction to the Superior Court and to the Pennsylvania Supreme Court. After the Supreme Court denied Beaty's petition for allocatur, Beaty then filed for PCHA relief. That relief was denied by the PCHA court and the Superior Court affirmed. Thereafter, Beaty filed a petition for a writ of habeas corpus in the district court, never appealing the Superior Court's denial of his PCHA petition to the state Supreme Court.

In considering the habeas petition in Beaty, the Third Circuit concluded that Beaty had failed to exhaust his state court remedies. However, the Beaty court also concluded that it would have been futile to order Beaty to return to state court, i.e., file a PCHA appeal to the Pennsylvania Supreme Court,

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6. Count VIII is that trial counsel failed to object to the trial court's jury charge, count IX is that trial counsel failed to challenge a juror for cause, and count X is that trial counsel failed to object to the prosecutor's leading questions.

because "[s]o far as our research has revealed, no such request has ever been granted after this long a delay [i.e. almost six years after the Superior Court decision]." Beaty, 700 F. 2d at 112. Thus, the Third Circuit determined that Beaty had satisfied the exhaustion requirement. See id.

However, the Third Circuit then went on to conclude that "Beaty's failure to file a petition for allocatur in the Pennsylvania Supreme Court constitute[d] a procedural default that deprived the highest state court of an opportunity to consider his constitutional claims." Id.

Petitioner's situation is quite similar to Beaty's because petitioner failed to appeal the Superior Court's PCHA decision to the Pennsylvania Supreme Court and it has been over four years since the Superior Court rendered its decision. Thus, under Beaty, petitioner has procedurally defaulted counts VIII, IX, and X. See Beaty, 700 F. 2d at 112; Caswell v. Ryan, 953 F. 2d 857, 859 (3d Cir. 1992) ("[I]f the petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred . . . there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims.") (citing Coleman v. Thompson, 111 S. Ct. 2546, 2559 (1991) (A federal court may not entertain a constitutional claim in a habeas corpus proceeding if a state court would not review the opinion based on an

independent and adequate state procedural rule.)); Pa. R. App. P. 903 (a) (a "notice of appeal . . . shall be filed within 30 days after the entry of the order from which the appeal is taken"); 42 Pa. Cons. Stat. Ann. § 9545 (b) (1) (all collateral actions must be filed no more than one year from the date the conviction becomes final).

The federal habeas court must refuse to review procedurally defaulted claims unless the petitioner can demonstrate cause for the default and actual prejudice from the alleged constitutional violations or demonstrate that failure to consider the claims would result in a fundamental miscarriage of justice. See Coleman, 111 S. Ct. at 2565; Wainwright v. Sykes, 433 U.S. 72, 87 (1977); Caswell, 953 F. 2d at 857. In this case, petitioner has not made any allegations or presented any evidence demonstrating such cause and prejudice or miscarriage of justice. Therefore, his procedural default cannot be excused and the court cannot grant federal habeas review of counts VIII, IX and X.

B. Count Eleven (XI)

In count XI, petitioner alleges that counsel was ineffective for failing to call unnamed witnesses for the defense whose testimony was likewise unspecified. This count has also been procedurally defaulted because on PCRA appeal, the Superior Court determined that that count was waived under 42 Pa. Con. Stat. Ann. §§ 9543(a)(3). See Commonwealth v. Smith, No. 733, slip. op. (Pa. Super. 1995) ("Because appellant could have raised

the allegation of ineffective assistance of trial counsel for failing to call defense witnesses in his prior PCRA petition, the issue is waived."); Coleman v. Thompson, 111 S. Ct. 2546, 2559 (1991) (A federal habeas court cannot entertain a constitutional claim in a habeas corpus proceeding if a state court has chosen not to review it based on an independent and adequate state procedural rule); Diventura v. Stepniak, Civ. No. 95-443, 1996 WL 107852 at \*3 (E.D. Pa. Mar. 11, 1996) (if state court finds waiver under § 9543(a)(3), adequate and independent state grounds exist).<sup>7</sup>

Thus, because petitioner has not made any allegations or presented any evidence demonstrating cause and prejudice for

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7. The Superior Court also determined that petitioner's claim of ineffectiveness of counsel for failing to call unnamed witnesses was without merit. See Commonwealth v. Smith, No. 733, slip. op. (Pa. Super. 1995) ("[Petitioner] has neither identified the [unnamed] witnesses nor disclosed the nature of their contribution to the fact finding process. Counsel will not be deemed ineffective in a vacuum. It is not enough merely to allege the existence of 'certain witnesses' who may have testified favorably for the defense. Rather [petitioner] must also supply a factual basis indicating (1) the identity of the witnesses; (2) that counsel knew of the existence of the witnesses; (3) the material evidence that the witnesses would have provided; and (4) the manner in which the witnesses would have been helpful to his cause. . . . [Petitioner] has failed to meet these requirements. We will not remand for an evidentiary hearing merely because of a general, nonspecific allegation that counsel 'failed to call numerous people in the bar as defense witnesses.'" (citations omitted).

This substantive determination by the state court does not affect procedural default. In Harris v. Reed, 489 U.S. 255, 264 n. 10 (1989), the Supreme Court pointed out that the adequate and independent state ground doctrine applies whenever the state court relies upon such an adequate and independent state ground, even when, as here, it goes on to address the claim on the merits in an alternative holding. See id.; Sistrunk v. Vaughn, 96 F. 3d 666, 673 (3d Cir. 1996).

his default or demonstrating that failure to consider count XI would result in a fundamental miscarriage of justice, the court cannot grant federal habeas review of count XI.

C. Count One (I)

In his first count, petitioner alleges that the trial court erred in permitting police officers Becker, Gillespie and Graham to present hearsay testimony during the trial.

"If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court." Duncan v. Henry, 115 S. Ct. 887, 888 (1995) (Petitioner must "fairly present" his federal claim to the state courts in order to give the State the "'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights."); Evans v. Ct. of Com. Pl., Delaware County, 959 F. 2d 1227, 1230 (3d Cir. 1992) (The claim brought in federal court must be the substantial equivalent of that presented to the state courts. "Both the legal theory and the facts underpinning the federal claim must have been presented to the state courts and the same method of legal analysis must be available to the state court as will be employed in the federal court.") (citations omitted).

A review of the state court opinions in this case reveals that petitioner's count I evidentiary claim was raised as a state law violation in the state courts and not as a due

process claim. Therefore, under Duncan, it has not been properly exhausted and, under Coleman, it has been procedurally defaulted. See Coleman, 111 S. Ct. 2546, 2559 (1991) (where "the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred[,] . . . there is a procedural default for purposes of federal habeas. . . ." ); 42 Pa. Cons. Stat. Ann. §§ 9543 (a) (3) (petitioner waives those claims not presented in prior PCRA petitions); 9545 (b) (1) (Under the amended Post Conviction Relief Act all collateral actions must be filed no more than one year from the date a conviction becomes final.)

Thus, because petitioner has failed to demonstrate any cause and prejudice for his default or to demonstrate that failure to consider count I would result in a fundamental miscarriage of justice, petitioner is not entitled to habeas review of count I. See Coleman, 111 S. Ct. at 2565; Wainwright v. Sykes, 433 U.S. 72, 87 (1977); Caswell, 953 F. 2d at 857.

#### D. Count Two (II)

Petitioner next contends that the trial court denied him due process by permitting the Commonwealth to amend Bill of Information No. 4660. After the Commonwealth and defense had rested, and prior to closing arguments, the court accepted the Commonwealth's motion to amend the overt act alleged on Bill of Information No. 4660, charging petitioner with criminal

conspiracy to commit murder, from "did possess a handgun" to "did stab Anthony Tyler."<sup>8</sup>

As an initial matter, the court notes that this issue is sufficiently exhausted because it was presented to the trial court on post-verdict motion and on direct appeal to both the Superior Court and the Supreme Court. Although petitioner's briefs may never have explicitly stated to those courts that his count II claim was one of due process (as opposed to a state law violation), it is by its very nature one of due process and therefore petitioner's failure to label it as such in state court does not act as a procedural bar to examination of it on the merits here. See Evans, 959 F. 2d at 1230.<sup>9</sup>

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8. The original Bill of Information No. 4660 read as follows:

**First Count**-That on or about January 29, 1982, in Philadelphia County, James B. Smith with the intent of promoting or facilitating the commission of a crime, unlawfully and feloniously did agree with another person or persons that they or one or more of them would engage in conduct which would constitute such crime or an attempt or solicitation to commit such crime, and did an overt act in pursuance thereof.

**Second Count**-That on the same day and year, in Philadelphia County, James B. Smith with the intent of promoting or facilitating the commission of a crime, unlawfully and feloniously did agree to aid another person or persons in the planning or commission of such crime or an attempt or solicitation to commit such crime, and did an overt act in pursuance thereof.

**Co-Conspirator**-Other unknown persons

**Criminal Objective**-Murder

**Overt Act**-Did Possess a Handgun

9. The Commonwealth conceded this point in its May 15, 1997 letter to this court.

Nevertheless, count II is substantively without merit. Due process means notice and opportunity to respond. According to the United States Supreme Court, a charge or Bill of Information satisfies due process when it contains the elements of the crime, permits the accused to plead and prepare an adequate defense, and allows the disposition to be used as a bar in a subsequent prosecution. See Hamling v. United States, 418 U.S. 87, 117 (1974).<sup>10</sup>

Here, the amended Bill of Information did not charge any additional offenses and involved the exact same general factual situation as had been specified originally. Therefore, the amendment was one of form not substance, and did not prejudice the petitioner who was always on adequate notice of the charges levied against him. See Commonwealth v. Smith, Nos. 4649-53/4656-60, slip. op., at 17-21 (Phila. Ct. Com. Pl. Nov. 11, 1983) (finding no violation in the amendment of the Bill of Information); Commonwealth v. Smith, No. 03452, slip. op. (Pa. Super. 1985) (same). Thus, count II does not call for federal habeas relief.

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10. In Pennsylvania, "[t]he information is, or ought to be, the star and compass of a criminal trial, and must be a notification to the defendant of the charge he has to meet." Commonwealth v. Baranyai, 419 A. 2d 1368, 1373 (Pa. Super. 1980). Under Pa. R. Crim. P. 229, a bill of information may be amended "when there is a defect in form, the description of the offense, the description of any person or property, or the date charged, provided the Information as amended does not charge an additional or different offense." Id.



E. Count Three (III), Five (V), Six (VI) and Seven (VII)

In these four counts,<sup>11</sup> petitioner essentially claims that the trial court denied him due process by permitting his convictions to stand based on insufficient evidence. See Pa. R. Crim. P. 1124 (discussing various ways to challenge the sufficiency of evidence).

As an initial matter, the court notes that petitioner's sufficiency of evidence claims were not unexhausted or procedurally defaulted. Petitioner contested the sufficiency of the evidence in his post-verdict motion to the trial court and on direct appeal to the Superior and Supreme Courts. Although not expressly phrased as due process claims, they are the "substantial equivalent" and are therefore properly before this court. See Evans v. Ct. of Com. Pl., Delaware County, 959 F. 2d 1227, 1230 (3d Cir. 1992) (A count is "fairly presented" so long as the count brought in federal court is the substantial equivalent of that presented in state court.).<sup>12</sup>

Nevertheless, counts III, V, VI and VII are substantively without merit. Before the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), in reviewing

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11. In count III, petitioner expressly asserts that his convictions were based on insufficient evidence. In count V, VI, and VII, petitioner respectively asserts that the state court deprived him of due process by denying his demurrer to the charges, by denying his motion for a directed verdict, and by denying his motion to quash the return of the bills of information.

12. The Commonwealth also conceded this point in its May 15, 1997 letter to the court.

challenges to the sufficiency of the evidence, the general question for habeas courts was not whether there was any evidence to support a conviction, but "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt." Sullivan v. Cuyler, 723 F. 2d 1077 (3d Cir. 1983) (quoting Jackson v. Virginia, 443 U.S. 309, 319 (1979)); Paulett v. Howard, 634 F. 2d 117 (3d Cir. 1980). The habeas court was to apply Jackson's "no rational trier of fact" test directly to the facts, without any deference to prior determinations of the sufficiency of the evidence by the state appellate courts.

However, the AEDPA altered the role of the habeas court in reviewing prior determinations of the sufficiency of the evidence by state appellate courts. Under the amended § 2254 (d), a federal habeas court is statutorily prohibited from granting a writ of habeas corpus on a claim adjudicated on the merits in state court, unless that adjudication 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. See 28 U.S.C. § 2254 (d)(1) & (2).

Thus, under 28 U.S.C. § 2254 (d)(1), a writ of habeas corpus may be issued for evidentiary insufficiency only if the

state courts have unreasonably applied either the Jackson "no rational trier of fact standard," see Gomez v. Acevedo, 106 F. 3d 192, 199 (7th Cir. 1996) (28 U.S.C. § 2254 (d)(1) requires deference to the state court's Jackson determination),<sup>13</sup> or the state equivalent of the Jackson standard. See Evans v. Ct. of Com. Pl., Delaware County, 959 F. 2d 1227, 1233 (3d Cir. 1992) (Regardless of its name, the test for insufficiency of evidence is the same under both Pennsylvania and federal law.). This reasonableness inquiry turns on whether a state court "provided fair process and engaged in reasoned, good faith decision making when applying Jackson's 'no reasonable trier of fact' test." Gomez, 106 F. 3d at 199.

Reviewing for reasonableness the state court determinations of the sufficiency of the evidence in this case, the court cannot say that the state judges acted as unreasonable jurists in their application of the Jackson standard. In its post-verdict opinion, the trial court carefully stated the requirements for convictions of murder in the first degree, aggravated assault and conspiracy in Pennsylvania, and the court employed the proper sufficiency of evidence standard in its analysis. Moreover, the trial court carefully laid out the important pieces of trial evidence. On direct appeal, the appellate court affirmed the trial court's sufficiency of

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13. The Seventh Circuit appears to be the only circuit to have yet reviewed the application of amended § 2254 (d)(1) specifically to a Jackson insufficiency of evidence claim. See Gomez v. Acevedo, 106 F. 3d 192, 199 (7th Cir. 1996).

evidence determination finding that "the lower court's opinion . . . adequately disposed of [the sufficiency issue]." Commonwealth v. Smith, No. 03452, slip. op., at 2 (Pa. Super. 1985). On PCRA appeal, the appellate court determined that the sufficiency of evidence issue had been "previously litigated" because it was adequately heard by the trial court and the appellate court on direct appeal.

Based on the foregoing, it is clear that the state courts' application of the Jackson standard was within the bounds of reasonableness. Therefore, under the AEDPA, it must be respected and the court cannot grant federal habeas relief as to counts III, V, VI and VII.<sup>14</sup>

F. Count Four (IV)

In count IV, petitioner claims that he was deprived of due process because the verdict was against the weight of the evidence. However, a federal habeas court has no power to grant habeas corpus relief because it finds that the state conviction is against the "weight" of the evidence. Therefore, count IV is without merit and does not call for federal habeas relief. See

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14. Nevertheless, a review of the trial testimony as well as the various state court opinions reveals that a "rational trier of fact" could easily have found the essential elements of petitioner's crimes--first degree murder, criminal conspiracy and aggravated assault--beyond a reasonable doubt. See Sullivan v. Cuyler, 723 F. 2d 1077 (3d Cir. 1983) (quoting Jackson v. Virginia, 443 U.S. 309, 319 (1979)). Thus, even under a traditional Jackson analysis, petitioner's count III, V, VI and VII claims cannot form the basis of habeas relief.

Tibbs v. Florida, 457 U.S. 31, 42-45 (1982); Marshall v. Lonberger, 459 U.S. 422, 434 (1983); see also Young v. Kemp, 760 F. 2d 1097, 1105 (11th Cir.1985) (noting that the principle that a federal habeas corpus court cannot grant habeas relief because it finds that the conviction is against the weight of the evidence is "fundamental").

An appropriate order follows.

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

JAMES SMITH,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
	:	
DONALD T. VAUGHN, et al.	:	NO. 96-8482
Defendants.	:	

ORDER

AND NOW, this            day of June, 1997, upon  
consideration of petitioner's petition for a writ of habeas  
corpus, defendants' response, and the report and recommendation  
of the magistrate judge, to which there were no objections filed,  
IT IS HEREBY ORDERED that:

- 1) the petition for a writ of habeas corpus is DENIED  
and DISMISSED; and,
- 2) no certificate of appealability is to be issued.<sup>15</sup>

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William H. Yohn, Jr., Judge

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15. See 28 U.S.C. § 2253 (c)(2) (In order for the district court  
to issue a certificate of appealability, petitioner must make a  
"substantial showing of the denial of a constitutional right.").