

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

LEONARD BLACKWELL	:	CIVIL ACTION
	:	
v.	:	
	:	
DAVID LARKINS, <u>et al.</u>	:	No. 97-CV-1999

MEMORANDUM AND ORDER

Yohn, J. July , 1998

On December 20, 1988, Leonard Blackwell ("Blackwell") was convicted of first-degree murder, along with several other crimes, in the Court of Common Pleas in Philadelphia County. After unsuccessfully appealing and collaterally attacking his conviction in various state forums, Blackwell, the petitioner, filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1994 & Supp. 1997). The magistrate judge recommended that the petition be denied with prejudice. Subsequent to the magistrate's recommendation, the petitioner obtained counsel and filed objections to the magistrate's report. Based on developments that occurred since the issuance of the magistrate's report, I will modify the report and recommendation and deny the petitioner's petition with prejudice.

Factual and Procedural Background

On September 5, 1987, Blackwell fatally stabbed his girlfriend in the throat and then threatened to do the same to his neighbor. See Commonwealth v. Blackwell, No. 8710-0581-0583 (Phila. Ct. C.P. July 24, 1990). This incident led to his conviction for first- degree murder, aggravated assault, possession of an instrument of crime and

recklessly endangering another person. Id. On January 25, 1990, Judge Poserina sentenced Blackwell to life imprisonment as well as consecutive one to two year terms for the other convictions. Id.

On direct appeal of his conviction, Blackwell claimed that trial counsel was ineffective for failing to object to: (1) the trial court's jury instruction on the definition of malice; (2) the trial court's instruction on reasonable doubt; and (3) the prosecutor's reference, during closing argument, to the defendant's prior abuse of the victim. See Commonwealth v. Blackwell, 588 A.2d 557 (Pa. Super. 1990), alloc. den., 596 A.2d 153 (Pa. 1991). The Superior Court affirmed the trial court's judgment and the Supreme Court of Pennsylvania denied allocatur. See id.

On May 13, 1993, Blackwell collaterally attacked his conviction by filing a petition for relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 PA. C.S.A. § 9541 et seq. (Supp. 1997). He raised the following issues in his petition: (1) his murder conviction was against the weight and sufficiency of the evidence; (2) the prosecutor solicited false testimony from witnesses; and (3) trial counsel was ineffective because he failed to: (a) adequately investigate the case; (b) object to the prosecutor's characterization, during closing argument, of the defendant's testimony as a "story"; (c) present evidence of the defendant's diminished capacity; and (d) request a suppression hearing. See Mem. Supp. Blackwell's Application for Post Conviction Collateral Relief. The trial court dismissed the PCRA petition and the Superior Court affirmed the trial court's order. Commonwealth v. Blackwell, No. 8710-0581 (C.P. Phila. Nov. 9, 1993),

aff'd, 655 A.2d 1041 (Pa. Super. 1994), alloc. den., 661 A.2d 871 (Pa. 1995). On June 21, 1995, the Pennsylvania Supreme Court once again denied allocatur. Id.

Blackwell's Habeas Corpus Petition

On March 19, 1997, eleven months after Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (amending 28 U.S.C. § 2254) and almost seven years after the conclusion of the direct review of his conviction, the petitioner filed the instant habeas petition. In it, he raises the following grounds:

- (1) Counsel was ineffective for not objecting to the trial court's jury instructions regarding the definition of first degree murder and malice.¹
- (2) Counsel was ineffective for failing to seek a plea agreement from the prosecution, despite the petitioner's instructions to do so.
- (3) The trial court's repeated extensions of the trial date under PA. R. CRIM. P. 1100 (Rule 1100) violated the petitioner's right to a speedy trial.
- (4) After being warned by the trial judge not to do so, the prosecutor, during closing argument, told the jury not to believe the defendant's "story," and told the jury that the defendant had many aliases.²

¹ This ground is immediately preceded by an assertion that he was denied effective assistance of counsel "at all stages of his trial." However, Rule 2(c) of the Rules Governing § 2254 Cases in the United States District Court provides that applicants "shall specify all the grounds for relief which are available to the petitioner" and "shall set forth in summary form the facts supporting each of the grounds thus specified." In light of Rule 2(c), this court will interpret this claim as one alleging ineffective assistance of counsel for failure to object to the first-degree murder and malice jury instructions.

² The petitioner does not assert which federal right this conduct violated. For purposes of this action the court will give petitioner the benefit of the doubt and assume that Blackwell's assertion amounts to a claim that he was denied a fair trial or denied effective assistance of counsel for counsel's failure to object to this summation.

See Pet.'s Hab. Pet. at 7-8. Additionally, the petitioner raised an issue in his brief that was not specifically alleged in his habeas corpus petition. He claims that he was denied effective assistance of counsel for failing to object to the trial court's charge concerning reasonable doubt. See Pet's Br. Supp. Pet. for Writ of Habeas Corpus, at 13. Because the petitioner was pro se when he filed his petition and the Commonwealth has not objected his failure to include this claim in his petition, I will consider it as Claim V.

Before the court now are the petitioner's habeas petition and the respondents' response thereto, the magistrate judge's report and recommendation and two sets of Blackwell's objections thereto, along with the state court record. After the magistrate judge issued the report and recommendation, the petitioner, through counsel, withdrew his claim of ineffective assistance of trial counsel for failure to seek a plea bargain. Telephone Conf. with Judge Yohn and J. Gelb, Pet'r's Att'y, 3/24/98. Upon review of the foregoing materials, the court will dismiss with prejudice Blackwell's petition for habeas corpus.

I. STANDARD OF REVIEW

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). The AEDPA amended the standards habeas courts should employ when reviewing state court judgments in § 2254 proceedings. Since petitioner filed his habeas petition on March

See Haines v. Kerner, 404 U.S. 519, 520 (1972) (holding that a pro se petitioner's papers are to be read with benevolence, "however inartfully they are pleaded").

19, 1997, eleven months after the statute's enactment, the court will apply AEDPA's amended standards to the petitioner's claims for federal habeas corpus relief. See Lindh v. Murphy, 117 S. Ct. 2059, 2063 (1997) (habeas petitions filed after AEDPA's enactment governed by AEDPA).

The federal habeas corpus statute, 28 U.S.C. § 2254, provides that a district court will consider a petition for a writ of habeas corpus presented by an individual "in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." § 2254(a). This section also provides that a district court need not consider a petition unless the petitioner has fulfilled certain procedural requirements, such as having "exhausted the remedies available in the courts of the State." § 2254(b)(1)(A). State remedies are not deemed exhausted if the petitioner "has the right under the law of the State to raise, by any available procedure, the question presented." § 2254(c).

When a claim that has been previously adjudicated by the state courts is procedurally fit for habeas review, the AEDPA raises the level of deference a federal court must pay to the factual and legal determinations made by the state courts. See Dickerson v. Vaughn, 90 F.3d 87, 90 (3d Cir.1996) (stating, in dicta, that amended § 2254 uses a "more deferential test" with respect to state court findings). As will be discussed later, the amended version of § 2254 provides that factual determinations made by a state court are presumed correct, see § 2254(e)(1) and that claims adjudicated on the merits in state proceedings should not be overturned unless they are

contrary to or involve an unreasonable application of clearly established federal law.
See § 2254(d).

II. DISCUSSION

A. The Exhaustion Requirement

A federal court will ordinarily dismiss a petition for a writ of habeas corpus under 28 U.S.C. § 2254 if the petitioner has not “fairly presented” each claim raised therein to the highest state court empowered to consider it. See Castille v. Peoples, 489 U.S. 346, 349 (1989). Furthermore, § 2254 expressly provides that “[a]n applicant shall not be deemed to have exhausted the remedies available in the [state] courts, within the meaning of this section, if he has the right under the law of the state to raise, by any available procedure, the question presented.” § 2254(c).

Petitioner’s first and fifth claims, that he was denied effective assistance of counsel because counsel failed to object to the trial court’s instructions on homicide and that he was denied effective assistance of counsel because counsel failed to object to the trial court’s instruction on reasonable doubt, are properly exhausted. These claims were raised on direct appeal to the Superior Court and in Blackwell’s petition for allocatur. See Commonwealth v. Blackwell, 588 A.2d 557 (Pa. Super. 1990), alloc. den. 596 A.2d 153 (Pa. 1991). Thus, Blackwell fairly presented these claim to Pennsylvania’s highest state court, see Castille v. Peoples, 489 U.S. at 351 (claim is properly exhausted when theoretical and factual basis presented to highest state court), and I will consider them on the merits.

B. Procedural Default

28 U.S.C. § 2254(c) provides that “[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the state to raise, by any available procedure, the question presented.” To that end, state courts must be given every opportunity to address federal claims arising in state proceedings. Doctor v. Walters, 96 F.3d 675, 681 (3d Cir. 1996).

To protect that opportunity, the Third Circuit has cautioned that a court:

should dismiss the petition for failure to exhaust state remedies *even if it is unlikely that the state court would consider the merits* to ensure that, in the interests of comity and federalism, state courts are given every opportunity to address claims arising from state proceedings.

Doctor v. Walters, 96 F.3d 675, 681 (3d Cir. 1996) (emphasis supplied); accord Belle v. Stepanik, No. 95-2547, 1996 WL 663872, at *8 (E.D. Pa. Nov. 14, 1996).

Moreover, if a state court previously refused to review a claim pursuant to a state law “that is independent of the federal question and adequate to support the judgment” a federal court will not consider the claim. Coleman v. Thompson, 501 U.S. 722, 729-30 (1991). This is known as the doctrine of procedural default. Id. A prisoner has procedurally defaulted his claim only if state law “clearly forecloses” further state consideration of an unexhausted claim. Id. In those circumstances, forcing the prisoner to return to state court would be futile and the court, instead, should dismiss the claim. Id.; Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993). The only time a federal court will excuse a defendant for failure to comply with a state procedural rule is

when the defendant can show cause for his or her noncompliance with the rule and actual prejudice from the alleged violation, see Coleman v. Thompson, 501 U.S. 722, 746 (1991), or if the prisoner can show that a fundamental miscarriage of justice will result from a refusal to correct the alleged constitutional violation. See Schlup v. Delo, 513 U.S. 298, 314 (1995).

1. Claim IV

Despite the rather stringent standards surrounding the doctrine of procedural default, the petitioner's fourth claim, alleging that he was denied a fair trial by the prosecutor's reference to the defendant's testimony as a "story," is procedurally defaulted. Sistrunk v. Vaughn, 96 F.3d 666, 674 (3d Cir. 1996), held that a state court's determination that a litigant failed to satisfy the procedural requirements of the PCRA and, therefore, is not entitled to have the claim reviewed on its merits, also barred the federal habeas court from entertaining the issue. There, the petitioner sought to have a Batson claim reviewed by the federal habeas court despite a previous state court finding that the petitioner forfeited his right to state review of this issue by failing to raise it on direct appeal of his conviction. Id. at 668-69. Absent a showing of cause and prejudice or a demonstration of innocence, the Pennsylvania court's reasoned rejection of the claim on state procedural grounds foreclosed federal consideration of that issue. Id. at 674-75.

On direct appeal of his conviction, Blackwell argued that trial counsel was ineffective for failing to object to the prosecutor's concluding remarks regarding the

petitioner's prior abuse of the victim. Commonwealth v. Blackwell, 588 A.2d 557 (Pa. Super. 1990). He then abandoned this claim in his allocatur petition. Pet.'s Br. Ex. A.³ Nevertheless, he attempted to revive the issue in his PCRA petition by focusing on different comments in the prosecutor's summation, namely those he brings to the court's attention in his fourth claim. See Mem. Supp. Blackwell's Application for Post-Conviction Collateral Relief. Relying on PCRA counsel's Finley letter, the state court found that the Superior Court already ruled out any misconduct or reversible error during the prosecutor's summation. Commonwealth v. Blackwell, No. 8710-0581 (C.P. Phila. Nov. 9, 1993), aff'd, 655 A.2d 1041 (Pa. Super. 1994). Thus, the PCRA court concluded that the claim had been previously litigated under 42 PA. C.S.A. § 9544(a)(2) and, therefore, was not reviewable. See Commonwealth v. Baker, 538 A.2d 892, 894 (Pa. Super.), alloc. den., 546 A.2d 620 (Pa. 1988) (appellant cannot relitigate claim that counsel was ineffective for failing to object to prosecutor's summation merely by focusing on different remarks contained in the summation).

This court's interpretation of the petitioner's fourth claim as one alleging a violation of his right to a fair trial or a violation of his right to effective assistance of counsel, see supra note 2, is likewise immaterial to the conclusion that the claim is procedurally barred. Commonwealth v. Baker, 538 A.2d 892 (Pa. Super. 1988), on which the PCRA court relied, held that a PCRA applicant cannot relitigate a claim that trial counsel was ineffective for failing to object to the prosecutor's summation merely

³ The claim is unexhausted because it has not been presented to the highest state court empowered to consider it. Castille v. Peoples, 489 U.S. 346, 351 (1989).

by focusing on different remarks made in the closing. Id. at 894. In reaching that conclusion, the court noted that Pennsylvania courts have consistently held that “one may not relitigate a finally litigated ground for relief every time a new legal theory is advanced.” Id.; see also Commonwealth v. Senk, 437 A.2d 1218 (Pa. 1981) (appellants’ claim that counsel was ineffective for failing to challenge illegal arrest was finally litigated when prior courts found that appellant’s confession was not the result of an unlawful arrest).

Likewise, in the instant case, the PCRA court found that the Superior Court of Pennsylvania previously reviewed the prosecutor’s entire summation and found no error. Commonwealth v. Blackwell, No. 8710-0581 (C.P. Phila. Nov. 9, 1993), aff’d, 655 A.2d 1041 (Pa. Super. 1994). As such, the legal theory under which Blackwell cloaks his objection to the closing argument is of no moment.

The state court’s finding that Blackwell’s fourth claim constituted a previously litigated issue amounted to a state court’s interpretation of a state statute. Like the forum referred to in Sistrunk, then, Pennsylvania based its refusal to review the petitioner’s fourth claim on independent and adequate state grounds. See Coleman, 501 U.S. at 729-30. This claim is “clearly foreclosed” from further state consideration and, therefore, is not subject to habeas review. Id. Thus, claim IV is dismissed with prejudice.⁴

⁴ The petitioner has not alleged any cause or prejudice to excuse this default. Seizing on the second exception to the default doctrine, however, the petitioner claims that a miscarriage of justice will occur if this court denies his petition because he was “deprived of the opportunity to seek the full benefits of a plea opportunity”

2. Claim III

The petitioner's third claim, alleging that his speedy trial right was violated, is not only procedurally defaulted but is also not cognizable on federal habeas review.⁵ 28 U.S.C. § 2254(a) provides that a federal judge shall entertain a petition for a writ of habeas corpus "only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." The contention that the petitioner has been denied a speedy trial under PA. R. CRIM. P. 1100 does not state a claim under the United States Constitution because Rule 1100 is not coextensive with the constitutional right to a speedy trial. See Wells v. Petsock, 941 F.2d 253, 256 (3d Cir. 1991) (Pennsylvania's Rule 1100 "does not define the contours of the federal constitutional right to a speedy trial").

Moreover, to the extent that the petitioner's third count does state a violation of the United States Constitution, this claim is procedurally defaulted. To be eligible for

Objections to Magistrate Report and Recommendation, Oct. 1997. This allegation is unhelpful to the petitioner because to successfully meet the miscarriage of justice standard, the petitioner must "show that a constitutional violation probably resulted in the conviction of one who was actually innocent." Moreover, petitioner raises this objection in connection with his plea bargain claim, an issue he subsequently withdrew from his habeas corpus petition.

⁵ Claim III is not exhausted. The court does not have a copy of the petitioner's second allocatur petition but its content, for the purposes of finding that the petitioner's third claim is exhausted, is irrelevant. The petitioner did not raise this claim to the PCRA trial court or on the appeal of his collateral attack to the Pennsylvania Superior Court. Raising an issue for the first time on discretionary review to the state's highest court does not constitute a "fair presentation." Castille v. Peoples, 489 U.S. 346, 351 (1989). Thus, even if the petitioner did raise this claim in his allocatur petition, the court would nevertheless deem it unexhausted.

relief under the PCRA, allegations of error that have been waived are ineligible for review. 42 PA. C.S.A. § 9543(3). “[A]n issue is waived if the petitioner could have raised it but failed to do so, . . . in a prior state postconviction proceeding.” § 9544(b). Here, the petitioner excluded his third ground from his direct appeal and his PCRA petition. Thus, pursuing this issue in the state forum is arguably futile because the PCRA’s provisions will most likely bar them from review.

There are a number of exceptions to the waiver rule, however. The applicable exception here allows for judicial review of a claim in order to avoid a demonstrated “miscarriage of justice.” Commonwealth v. Lawson, 548 A.2d 107, 111-112 (Pa. 1988).

This standard is met if the petitioner can demonstrate either that (1) the proceedings resulting in his conviction were so unfair that a miscarriage of justice which no civilized society can tolerate occurred or (2) that he is innocent of the criminal charges.

Commonwealth v. Szuchon, 633 A.2d 1098, 1100 (Pa. 1993). Claims that a petitioner’s speedy trial rights were violated neither relate to a petitioner’s claim of innocence nor do they raise the possibility that a miscarriage of justice occurred. See Commonwealth v. Lawson, 549 A.2d 107, 109-10 (Pa. 1988) (allegation that trial did not timely commence under Pa. R. Crim. Pro. 1100 does not demonstrate miscarriage of justice); Cf. Doctor v. Walters, 96 F.3d 675, 683 (3d Cir. 1996) (citing Lawson, 549 A.2d 107, for the proposition that Rule 1100 violations do not amount to a miscarriage of justice); Commonwealth v. Williams, 660 A.2d 614, 618-19 (Pa. Super. 1995), appeal den., 674

A.2d 1071 (Pa. 1996) (allegation that petitioner's "speedy trial rights were violated" did not amount to miscarriage of justice).

C. Claims I & V are Meritless

1. Standard of Review

As stated, prior to the filing of Blackwell's habeas petition, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214, a statute which establishes a "more deferential" standard of review for claims where "state prisoners challenge their convictions based on constitutional violations." Berryman v. Morton, 100 F.3d 1089, 1102-03 (3d Cir. 1996). These amendments prohibit a district court from granting a habeas petition for any claim heard on the merits at the state level unless such previous 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.

28 U.S.C. § 2254(d). While the Third Circuit has opined that § 2254 subjects mixed questions of fact and law, such as the instant claim for ineffective assistance of counsel, see Strickland v. Washington, 466 U.S. 668, 698 (1984), to a more deferential standard of review, it has refrained from determining the exact amount of deference federal habeas courts must accord these determinations. Berryman, 100 F.3d at 1103 (stating that the inartful drafting of § 2254(d) calls for considerable interpretation of the statute

by the federal courts). Nevertheless, the lack of statutory refinement does not constrain this court from holding that the state court's determination of Blackwell's first and fifth claims did not "result in a decision that was contrary to or involved an unreasonable application of, clearly established federal law." § 2254(d).

2. Ineffective Assistance of Counsel

Adding yet another layer of review to the habeas inquiry, Blackwell frames claims I and V in terms of ineffective assistance of counsel. To state a claim for ineffective assistance of counsel under the Sixth Amendment, the defendant must show that trial counsel was deficient and that this deficient performance prejudiced defendant. Id. The standard of effectiveness entailing constitutionally adequate representation is governed by a two-pronged test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. To avoid painstaking review of counsel's performance in the face of every claim of ineffectiveness, Strickland encourages courts to resolve questions of effectiveness on grounds of prejudice whenever possible. Id. at 697; see also McNeil v. Cuyler, 782 F.2d 443, 449 (3d Cir. 1986). Thus, the court should first determine if the defendant experienced prejudice - that is, if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been

different.” Strickland, 465 U.S. at 694 (emphasis supplied).

The state trial court and the Superior Court of Pennsylvania found that Blackwell was not denied effective assistance of counsel because his underlying claims, that counsel should have objected to the trial court’s instructions on malice and reasonable doubt, were meritless. See Commonwealth v. Blackwell, C.P. 8710-0581-0583, (Phila. Ct. C.P. Phila. July 24, 1990), aff’d Commonwealth v. Blackwell, 588 A.2d 557 (Pa. Super. 1990), alloc. den. 596 A.2d 153 (Pa. 1991). This court agrees with those conclusions, and, therefore, must assume that even if counsel made objections to these instructions, they would not have been granted. See Strickland, 466 U.S. at 695 (“A defendant has no entitlement to the luck of a lawless decisionmaker”) Moreover, even if the judge granted the objections, Blackwell has failed to show that there was “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” Id. at 694. It follows from these conclusions that the petitioner has not demonstrated that he would have experienced any prejudice from the alleged errors. See id. at 687. Because the defendant has not experienced any prejudice from these alleged errors, this court finds that the underlying state court determinations did not “[result] in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law” 28 U.S.C. § 2254(d)(1).⁶ As such, Claims I and V are denied with prejudice.

⁶ Because the state courts found the claim underlying Blackwell’s charge of ineffective assistance of counsel meritless, Blackwell was not afforded the opportunity to develop the factual basis for this claim in the state proceedings. Section 2254(e)(2) provides that a federal court may hold an evidentiary hearing to develop the factual

3. Evaluating the Sufficiency of the Trial Judge’s Jury Instructions

Pennsylvania law, like federal law, directs a court to consider the charge in its entirety when evaluating the sufficiency of an instruction. See Cupp v. Naughten, 414 U.S. 141, 147 (1973); see also Commonwealth v. Prosdocimo, 578 A.2d 1273, 1276 (Pa. 1990). Both state and federal law prohibit courts from invalidating jury instructions for every technical inaccuracy, but direct courts to “evaluate whether the charge sufficiently and accurately apprises a lay jury of the law it must consider in rendering its decision.” Prosdocimo, 578 A.2d at 1276; see also Cupp, 414 U.S. at 147 (recognizing that a judgment of conviction turns on more than just an instruction but is “the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge”).

a. Claim I

Claim I asserts that Blackwell was denied effective assistance of counsel based on his counsel’s failure to object to the trial judge’s instructions on homicide.

Specifically, the petitioner challenges the trial court’s instruction on two intertwined

basis of an undeveloped claim only if:

“the applicant shows that (A) the claim relies on (I) a new rule of constitutional law . . . (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder could have found the applicant guilty of the underlying offense.”

The petitioner does not seek an evidentiary hearing and, therefore, does not advance any arguments as to why he should be entitled to one. As such, he has failed to meet his burden under this section of the statute as well.

grounds: first, he challenges the trial judge's failure to instruct the jury on the mitigating circumstances of malice, such as passion, provocation or an unreasonable belief in the necessity for self-defense, prior to laying out the elements of first-degree murder; second, he challenges the trial judge's coupling of the aforementioned description of first-degree murder with a progression charge. See Pet.'s Br. in Supp. of Pet. for Habeas Corpus. A progression charge in a homicide case occurs when the court instructs "the jury not to consider whether the defendant is guilty of voluntary manslaughter until after it [concludes that] the defendant is not guilty of murder." See Commonwealth v. Hart, 565 A.2d 1212 (Pa. Super. 1989), alloc. den., 581 A.2d 569 (Pa. 1990).

The petitioner argues that the jury was instructed to analyze whether the elements of first-degree murder were met - namely, that the victim is dead, that the defendant killed her, that the killing was intentional and that it was committed with malice. Then, because the trial judge initially defined malice as only "an intent to kill" and did not allude to those circumstances which negate malice in this original definition of the term, the petitioner contends that the jury could have mistakenly assumed that finding that the defendant harbored an intent to kill automatically leads to the conclusion that the defendant committed first-degree murder. To support his argument, Blackwell points out that, under Pennsylvania law, a defendant is guilty only of voluntary manslaughter, a lesser form of homicide, if the jury finds that the defendant had an intent to kill but that negating circumstances were present. Blackwell

concludes that the effect of these instructions essentially precluded the jury from considering voluntary manslaughter as an alternative to first-degree murder.

According to Blackwell, the jury's misunderstanding of the applicable law was further evidenced by the fact that (1) Blackwell's defense to the homicide charge was self-defense; (2) the jury revealed its confusion surrounding the distinction between voluntary manslaughter and murder by returning a question to the judge regarding intent and malice as they relate to murder; (3) and, when responding to the jury's question, the judge again failed to include the reducing circumstances in his definition of malice. The petitioner concludes that counsel's failure to object to this constellation of instructions undermined the fairness of the trial to such a degree that petitioner was denied effectiveness assistance of counsel.

The trial judge properly apprised the jury of the appropriate law and, therefore, the petitioner's ineffectiveness claim ultimately fails.

At the outset of the homicide charges, the trial court gave the jury a brief introduction to the law of homicide and its categories, murder and manslaughter. Tr., 12/19/88 at 129. He then distinguished murder and manslaughter by the presence or absence of malice. Id. The judge then defined malice:

Malice when used in the law of criminal homicide has a special meaning. It does not mean simple hatred, spite, or ill will. The word "malice" is a shorthand way of referring to any of various bad mental states or attitudes which a person who kills must have for the killing to be murder.

A killing is with malice, and therefore, murder, if the killer acted with one of the following states of mind: An intent to kill, or an intent to inflict serious bodily harm, or wickedness of disposition, hardness of heart,

cruelty, recklessness of consequences, and a mind regardless of social duty indicating an unjustified disregard for the probability of death or great bodily harm, and an extreme indifference to the value of human life. Malice is the thing which distinguishes murder from other types of homicide.

Id. at 131-32.

Then, during the trial judge's definition of first-degree murder, the court further instructed the jury that:

[A] killing is with malice if it is with a specific intent to kill, and without lawful justification or excuse. Or if it's not made under circumstances that would reduce the killing to voluntary manslaughter.

Id. at 133-34.

During his definition of voluntary manslaughter, the trial judge reiterated that finding that the defendant killed under circumstances that would reduce the killing to voluntary manslaughter negates a finding of malice. Id. He then defined those negating circumstances in detail:

In my earlier definition of malice I indicated that there can be no malice when there are certain reducing circumstances present. When those circumstances are present, a killing may be voluntary manslaughter but never murder. That is true when a defendant kills in the heat of passion following serious provocation or kills under an unreasonable belief in justifying circumstances.

Accordingly, you may find malice only if you are satisfied beyond a reasonable doubt that the defendant was not acting under a sudden and intense passion resulting from serious provocation by the victim, or under an unreasonable belief that the circumstances were such that if they existed, they would have justified the killing.

In other words, if there was passion as a result of provocation, it may negate malice. If there was imperfect justification, that may negate malice. But acts of passion or justification are not a defense to manslaughter.

. . . .

Put another way, a person who kills another under circumstances which would amount to murder is only guilty of voluntary manslaughter if at the time of the killing he is acting under sudden and intense passion resulting from serious provocation by the other person.

Id. at 137 - 139.

The trial court ended its instruction with what is known as a progression charge.

Here, the court provided:

[w]hen you are voting, when you voted on murder in the first degree, you find him guilty, you don't have to vote on third or voluntary. If you find him not guilty on first, then vote again on third. If you find him not guilty on third, then vote again on voluntary. But only one, or none.

Id. at 145. Thus, the court instructed the jury to consider the crimes in descending order of seriousness and not to consider the less serious forms of homicide if the jury found him guilty of first-degree murder.

After approximately one and one-half hours of deliberation the jury returned a question to the court. The jury asked the court to "[d]efine malice and intent as stated in first-degree homicide, first-degree murder." Id. at 155-56. The court answered by reiterating that malice distinguishes manslaughter from murder and that without malice the crime rises no higher than manslaughter. The court then defined malice exactly as it did in the initial instruction on malice - without including that malice is negated by mitigating circumstances. Id. at 156-57; see supra at 15-17. Thus, the court answered the jury's question directly, but did not remind the jury that mitigating circumstances can negate the presence of malice; an alleged error that petitioner contends so

undermined the fairness of the trial that the petitioner was denied his Sixth Amendment right by his counsel's failure to object to this instruction.

Implicit in this argument is the assumption that if defense counsel objected to the instruction, the trial judge inevitably would have agreed with defense counsel and supplemented the charge to the petitioner's liking.⁷ He has not met his burden, however, of showing this to be so.

The Pennsylvania Crimes Code provides that "a person is guilty of criminal homicide if he intentionally, knowingly, . . . or negligently causes the death of another." 18 PA. C.S.A. § 2501(a). "A criminal homicide constitutes murder in the first-degree when it is committed by an intentional killing." § 2502(a). Malice is an essential element of the crime of murder and is the factor that distinguishes murder from manslaughter. See Commonwealth v. Weinstein, 451 Pa. A.2d 1344 (Pa. 1982). "Malice exists where there is particular ill will, and also where there is a wickedness of disposition, hardness of heart, wanton conduct, cruelty, recklessness of consequences and a mind without regard for social duty." Commonwealth v. Marks, 704 A.2d 1095, 1100 (Pa. Super. 1997); Commonwealth v. Melechio, 658 A.2d 1385, 1388 (Pa. Super. 1995). Voluntary manslaughter is committed when the actor kills with specific intent, but that intent contains no malice by reason of passion, provocation or an unreasonable belief in the necessity to kill. Commonwealth v. Pitts, 404 A.2d 1305 (Pa. 1979).

The instant charge, when taken as a whole, was a proper statement of the law.

⁷ The court would note that the petitioner has not provided the court with a proposed version of what would constitute an adequate jury charge.

See Cupp v. Naughten, 414 U.S. 141, 147 (1973) (jury charge must be evaluated in its entirety). The judge accurately apprised the jury of the elements of homicide, first- and third-degree murder, and voluntary manslaughter. He included in the charge the proper definition of malice and noted that malice is a necessary element of first-degree murder. He repeatedly distinguished murder and manslaughter as the presence or absence of malice. Furthermore, on more than one occasion during the charge, the trial judge informed the jury that malice can be negated by certain reducing circumstances and properly defined those circumstances.

Likewise, the judge's answer to the jury's question properly defined malice and intent as they relate to murder. See Marks, 704 A.2d at 1100 (Pa. Super. 1997). The judge's failure to include the reducing circumstances in his answer is not an improper statement of the law. See Commonwealth v. Hart, 565 A.2d 1212 (Pa. Super. 1989), alloc. den., 581 A.2d 569 (Pa. 1990). Indeed, Pennsylvania law defines malice as "the intent to kill or inflict great bodily harm" Id. Thus, the judge properly defined malice to the jury, as it requested.

Moreover, the Superior Court of Pennsylvania has held that if the jury knows at the start of its deliberations that "mitigating circumstances must be considered in determining guilt or innocence on all the crimes charged . . . and what those mitigating circumstances were" the progression charge in a homicide case is proper.

Commonwealth v. Loach, 618 A.2d 463, 470-71 (Pa. Super. 1992) (en banc), alloc.

den., 635 A.2d 219 (Pa. 1993).⁸ As such, this court cannot find the charge invalid because the defendant was unhappy with the timing of its presentation. See Commonwealth v. Loach, 618 A.2d at 470 (implying that if charge, taken as whole, clearly and properly informs the jury of all elements of murder the instruction is correct).

Further undermining claim I is the fact that the petitioner has failed to show that even if the instructions were in error and the trial judge had granted this objection, that it would have altered the outcome of the proceedings. See Strickland, 466 U.S. at 694.

⁸ In fact, the Pennsylvania Superior Court has explicitly rejected the petitioner's arguments on two occasions. See Commonwealth v. Loach, 618 A.2d 463 (Pa. Super. 1992), alloc. den., 635 A.2d 219 (Pa. 1993); Commonwealth v. Hart, 565 A.2d 1212 (Pa. Super. 1989), alloc. den., 581 A.2d 569 (Pa. 1990). In Loach, the court "began its charge by telling the jury that it had the right to find the appellant guilty of any or none of the forms of criminal homicide charged in the case." Loach, 618 A.2d at 469. The court then defined malice without laying out the specific mitigating circumstances which can negate such a finding. Id. Instead, immediately after defining malice and prior to defining first-degree murder, the trial court instructed the jury that a killing could be without malice when certain reducing circumstances are present. Id. He then instructed the jury that those circumstances would reduce the charge to voluntary manslaughter and that the judge would explain more about those circumstances when he defined that crime. Id. The court reserved instructing the jury on what constitutes these mitigating circumstances until the judge defined voluntary manslaughter, much later in the charge. Id.

The Superior Court rejected the petitioner's argument that the failure of the trial court to define in more detail these mitigating circumstances at an earlier point in the charge rendered the progression charge improper. Id. at 470. The Superior Court found that the jury was "made aware that mitigating circumstances are relevant to the question of whether a defendant is guilty of first- or third-degree murder (because they go to the issue of whether malice has been shown). . . ." Id. Impliedly, the Superior Court concluded that as long as the charge clearly apprises the jury of all of the relevant considerations, the exact timing of the instructions will not render the charge deficient. See id.

Thus, Blackwell has failed on two prongs to show that he experienced prejudice from counsel's alleged errors, a necessary element of an ineffectiveness claim. The petitioner's strongest claim of prejudice lies in his challenge to the court's answer to the jury's request for a clarification of "malice and intent as stated in first-degree homicide, first-degree murder." Id. at 155-56. The court answered this request by reiterating that malice distinguishes manslaughter from murder. Id. The court then defined malice exactly as it did in the original set of jury instructions - without including that malice is negated by mitigating circumstances. Id. at 156-57; see supra at 2 (quoting Tr., 12/19/88, at 131-32). The court then summed up the answer by stating:

Now, if the malice you find is malice of the specific intent to kill, that's first degree. If the malice you find is an intent to inflict serious bodily harm, that's malice in the third degree definition. Or if you don't find any malice, then you have to go and consider voluntary manslaughter. But all of this presupposes that you pass judgment on the self-defense. Okay? All right. That's it. That's my explanation.

Id. at 157. Thus, when answering the jury's request, the court did not remind the jury that mitigating circumstances can rebut the malice element of murder. The petitioner argues that the failure to remind the jury of these negating circumstances, especially where the petitioner raised self-defense, could have impacted the deliberations.

McNeil v. Cuyler, 783 F.2d 443 (3d Cir. 1986), considered a similar argument.

There, the petitioner alleged several errors on counsel's part, one of which was counsel's failure to object to or request a supplement to the trial court's charge on voluntary manslaughter. Id. at 446. The trial judge initially defined first- and second-degree murder and discussed that form of voluntary manslaughter based on "heat of

passion” and “provocation.” Id. There was a brief reference during the actual charge to the theory of voluntary manslaughter based on an unreasonable belief that the killing was necessary for self-defense. Id. After two hours of deliberation, the jury returned with a question, asking “for the legal definition of voluntary manslaughter.” Id. The trial court’s response included only an abbreviated definition of voluntary manslaughter, without any reference to the “unreasonable belief” theory. Id.

Noting that such a fact-laden inquiry into trial counsel’s effectiveness requires a detailed and careful examination of the evidence presented, the court scrutinized the record with an eye toward the probable effect this error would have had on the outcome of the trial. See id. at 449. The court reasoned that this error did not “[alter] the crucial factual finding that McNeil shot a man who was backing away from him with his hands up and apologizing.” Id. at 450. “Indeed, a fair reading of [the defendant’s] own testimony would largely eliminate fear as his dominant emotion at the time of the shooting.” Id. at 451. Noting that a verdict that is only “weakly supported by the record is more likely to be affected by errors than one with overwhelming support,” the Third Circuit found that the petitioner had not met his burden of proving that there was a “reasonable probability, that but for counsel’s unprofessional errors, the result of the proceedings would be different.” Id. (quoting Strickland, 465 U.S. at 694)(emphasis supplied).

Likewise, Blackwell argues that because self-defense was in issue the trial judge’s failure to remind the jury of the “unreasonable belief” theory of self-defense

could have affected the outcome, especially in light of the fact that the jury asked a question regarding malice. The evidence presented at the trial and the jury's verdict, however, undermine this argument.

Three eyewitnesses to the murder consistently testified that the petitioner approached the victim while she was unarmed and standing on the porch of her sister-in-law's house. Tr., 12/16/88, at 78-80 (Test. of C. Byrd); Tr. 12/15/88, at 32-34 (Test. of A. Washington); 12/16/98, at 116-117 (Test. of P. Burch). He then pulled a knife from his belt and repeatedly stabbed the victim, Byrd, in the abdominal area and in the throat, as Byrd begged him to stop. Id. Two of those witnesses, plus another, also testified that after Blackwell murdered Byrd, he began chasing the victim's companion, Albert Washington, with the knife. Tr., 12/16/88, at 39-40 (Test. of M. Williams); Tr., 12/16/88, at 81-82 (Test. of C. Byrd); Tr., 12/15/88 at 37-39 (Test. of A. Washington). When one of the witnesses ran to the corner to call the police, the petitioner left the scene and dropped the knife. Tr., 12/19/88, at 53-54 (Test. of L. Blackwell).

Apparently, the victim's homicide was the culmination of a sustained pattern of abuse she suffered at the hands of the defendant. Several witnesses testified that the defendant and the victim had a stormy relationship and that the defendant repeatedly threatened and attacked the victim. Tr., 12/16/88 at 46-48 (Test. of M. Williams); Tr., 12/16/88 at 75-77 (Test. of C. Byrd); Tr., 12/15/88 at 108-110 (Test. of A. Smith). One witness testified that she saw, on one occasion prior to the actual murder, the

defendant place a knife to the victim's neck and threaten her. Tr., 12/16/88 at 48 (Test. of M. Williams).

The only contradictory evidence presented during the course of the trial was the testimony of the defendant himself. The defendant testified that the three witnesses who claimed that he attacked Byrd with a knife and repeatedly stabbed her were lying. Tr., 12/19/88 at 56-57, (Test. of L. Blackwell). In the defendant's version, Byrd and two of the witnesses who were on the porch at the time of the murder initially attacked him. Id. To defend himself, Blackwell claimed that he began waving his knife and unintentionally stabbed Byrd to death. Id. at 40-44. He then testified that, even though he fled the scene and dropped the knife, he was not aware that he had stabbed anyone until he called his sister, who told him Byrd was dead. Id. at 44, 54-56. He stuck to this testimony despite the fact that the medical examiner testified that Byrd had at least three 6-inch stab wounds in her body, one in her breast, one in her stomach, and one in her throat. Id. at 55.

Blackwell also denied that he chased Byrd's companion around a car several times and threatened to kill him as well. Id. at 44-45. Again, Blackwell claimed that the witnesses who testified that they saw him doing this were lying. Id. at 59-61.⁹

⁹ Indeed, the jury convicted Blackwell of aggravated assault with regard to his attack on Washington. See Commonwealth v. Blackwell, No. 8710-0581-0583 (Phila. Ct. C.P. Aug. 24, 1990). To reach this verdict the jury must have rejected the defendant's testimony that the witnesses who allegedly saw Blackwell chasing Washington with a knife and threatening to kill him were lying. This rejection inevitably leads to the conclusion that the jury did not find Blackwell credible and, more likely than not, rejected his version of the murder as well.

Nevertheless, Blackwell did not suggest any motivation on the part of the witnesses to lie.

This court finds that this verdict was strongly supported by the record. The Commonwealth presented three witnesses to the murder, all of whom testified that the petitioner stabbed the victim multiple times while she was unarmed and begging him to stop. Moreover, there was overwhelming evidence that the petitioner repeatedly threatened and attacked the victim prior to actually killing her. The petitioner's defense, that all of the witnesses were lying, was completely unsupported by any evidence except for the petitioner's own testimony. As such, this court cannot find that the petitioner has shown that there is a reasonable probability that the jury would have discounted the testimony of four disinterested eyewitnesses in favor of the defendant's self-serving version of the events in issue. See Strickland, 104 S. Ct. at 2069 (a verdict that is strongly supported by the record is not likely to be affected by trial counsel's errors).

b. Claim V

In Claim V, the petitioner asserts that he was denied effective assistance of counsel because trial counsel failed to object to the instruction on reasonable doubt. This court finds that because the trial judge's instruction on reasonable doubt amounted to a proper statement of the law, claim V does not amount to ineffective assistance of counsel. See Cupp v. Naughten, 414 U.S. 141, 147 (1973); see also Commonwealth v. Prosdocimo, 578 A.2d 1273, 1276 (Pa. 1990) (both federal and state law prohibit courts

from invalidating jury instructions that properly apprise the jury of the relevant law).

The trial judge charged the jury on reasonable doubt as follows:

[T]he defendant is presumed to be innocent. You start with that idea. And he stays presumed innocent, and just because he has been arrested and brought here for trial does not change that presumption of innocence. The defendant remains so presumed innocent unless and until you conclude based on the careful review of the evidence that the Commonwealth has proved him guilty beyond a reasonable doubt of the particular crime charged. Defendant is not required to prove that he is innocent.

. . . .

Now, although the Commonwealth has the burden of proof, that does not mean the Commonwealth must prove its case beyond all doubt or to a mathematical certainty, nor must the Commonwealth demonstrate the complete impossibility of innocence. A reasonable doubt is a doubt which would cause reasonable, careful, and sensible person to pause, hesitate, or refrain from acting upon a matter of highest importance in his own personal affairs. A reasonable doubt must fairly arise out of the evidence that was presented or out of the lack of evidence presented with respect to some element of each of the crimes charged.

Tr., 12/19/88, at 117-18. As the petitioner admits, this charge accurately states the law of reasonable doubt and does not amount to error. See Commonwealth v. Burns, 187 A.2d 552, 560 (Pa. 1963).

Relying on Commonwealth v. Young, 317 A.2d 258, 261 (Pa. 1974), however, the petitioner claims that the following charge invalidated the entire instruction:

Now, a reasonable doubt must be a doubt that is a real one, must not be one that is imagined just to avoid carrying out an unpleasant duty. Now, to summarize that, you may not find the defendant guilty based on the mere suspicion of guilt. The Commonwealth has the burden to prove that defendant is guilty beyond a reasonable doubt.

Tr., 12/19/88, at 119. Young is distinguishable from the instant case. In Young, the

Supreme Court of Pennsylvania held that the charge was plainly erroneous:

The trial judge only told the jury that reasonable doubt was not 'a merely possible doubt,' and that the Commonwealth did not have 'to remove every possible doubt.' He also told the jury that if a conclusion of both guilt and of innocence could be reached, the jury must acquit appellant. Aside from this stark narrative, the trial court gave the jury no guidance on the meaning of 'beyond a reasonable doubt.'

Young, 317 A.2d at 261. The court added that the Commonwealth did not argue that the trial judge gave any further instruction on reasonable doubt or charged the jury in accordance with Commonwealth v. Donough, 103 A.2d 694 (Pa. 1954), a case which contained a charge upon which the Supreme Court of Pennsylvania had "repeatedly placed [its] imprimatur." Id. at 261 n.6. Thus, the Supreme Court reversed the trial court where the trial court had given the jury no guidance on the meaning of "beyond a reasonable doubt." Id.

Here, as the petitioner concedes, the trial court fully and accurately instructed the jury on the reasonable doubt charge. In fact, the trial judge followed the standard Pennsylvania jury charge on reasonable doubt. See PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 7.01 (1995) (including, "[s]o, to summarize, you may not find the defendant guilty based on a mere suspicion of guilt" at the end of the charge). Trial counsel's failure to object to an instruction that accurately informed the jury of the law in no way amounts to ineffective assistance of counsel.

CONCLUSION

The petitioner has failed to show that there was a reasonable probability that he suffered any prejudice as a result of the judge's instructions. Because the judge

correctly instructed the jury on the elements of homicide and reasonable doubt, this court must conclude that any objection made by counsel would have been overruled and upheld on appeal or collateral attack. See Strickland, 466 U.S. at 694-95 (when reviewing a claim for ineffective assistance of counsel, courts should assume that judges and juries will act according to the law). Moreover, even if the judge supplemented his instruction or granted any objection counsel may have raised, the petitioner has failed to show that there was "a reasonable probability" that these errors affected the result of the trial. As such, the petitioner has not met his burden of showing that he was denied effective assistance of counsel.

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

LEONARD BLACKWELL

v.

DAVID LARKINS, et al.

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CIVIL ACTION

No. 97-CV-1999

ORDER

AND NOW, this day of July 1998, upon consideration of the petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 and the petitioner's brief in support of the petition, the response to the habeas petition, the petitioner's objections to the report and recommendation and the respondents' responses thereto, and after review of the magistrate judge's report and recommendation, it is hereby ORDERED that:

1. The petition for writ of habeas corpus is DENIED with prejudice and;
2. There is no substantial showing sufficient to issue a certificate of appealability.¹⁰

William H. Yohn, Jr., J.

¹⁰ For the reasons stated in the opinion, the petitioner has not "made a substantial showing . . . [that he was] deni[ed] a constitutional right." 28 U.S.C. § 2253. Thus, I will not issue a certificate of appealability. See § 2253.

