

Having conducted an independent de novo review of the Petition, the Government's Response, the Report, and Petitioner's Objections, I adopt Judge Wells' Report, overrule Petitioner's Objections, and deny the Petition.

The facts of the case are fully set forth in Magistrate Judge Wells' Report and the Court will not restate them here.¹

I. STANDARDS

Where a habeas petition has been referred to a magistrate judge for a Report and Recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.... [The Court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b) (1994).

The instant Petition was filed pursuant to § 2254 which allows federal courts to grant habeas corpus relief to prisoners "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." 28 U.S.C.A. § 2254(a) (West 1999).

A. Exhaustion

¹The Court notes that Petitioner objects to Judge Wells' characterization of the facts of his case. The facts to which his Objections are directed had no effect or influence on the Court's decision or the legal outcome of his Petition.

Under Section 2254, a writ of habeas corpus may not be granted unless the applicant has exhausted all remedies available in state court. 28 U.S.C.A. § 2254(b)(1)(A) (West 1999). "The exhaustion requirement ensures that state courts have the first opportunity to review federal constitutional challenges to state convictions and preserves the role of state courts in protecting federally guaranteed rights." Caswell v. Ryan, 953 F.2d 853, 857 (3d Cir.), cert. denied, 504 U.S. 944 (1992).

To exhaust the available state court remedies, a petitioner must fairly present all the claims that he will make in his habeas corpus petition to the state courts. Henderson v. Frank, 155 F.3d 159, 164 (3d Cir. 1998). The petitioner must have raised the claim in front of the highest available state court, including courts sitting in discretionary appeals. O'Sullivan v. Boerckel, 119 S.Ct. 1728, 1734 (1999). Where a petitioner has the right under state law to raise the question presented by any available procedure, he will not be deemed to have exhausted the available state court remedies. 28 U.S.C.A. § 2254(c) (West 1999). However, a petitioner who has raised an issue on direct appeal need not raise it again in state post-conviction proceedings. Evans v. Court of Common Pleas, Delaware County, Pa., 959 F.2d 1227, 1230 (3d Cir. 1992).

To satisfy the requirement of fair presentation, a petitioner's state court pleadings and briefs must demonstrate

that he has presented the legal theory and supporting facts asserted in the federal habeas petition in such a manner that the claims raised in the state courts are "substantially equivalent" to those asserted in federal court. Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996). In essence, the prisoner must have made the same method of legal analysis available to both the state and federal courts. Evans, 959 F.2d at 1231. Factors that federal courts may use to determine whether a claim has been fairly presented to a state court include the petitioner's "(a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claims in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation." Evans, 959 F.2d at 1231; Rodriquez v. Love, No. CIV. A. 94-7674, 1995 WL 752417, at *3 (E.D.Pa. Dec. 15, 1995).

B. Procedural Default

If state avenues of relief, including post-conviction proceedings, have been exhausted, but the petitioner has failed to raise the alleged grounds for error, the claim is procedurally defaulted and may not be raised in federal court. Coleman v. Thompson, 501 U.S. 722, 729-30 (1991); Sistrunk v. Vaughn, 96 F.3d 666, 673 (3d Cir. 1996). Upon a finding of procedural

default, review of a federal habeas petition is barred unless the petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or can show that failure to consider the claims will result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 749-50.

To demonstrate cause for the default, the petitioner must show that some objective factor external to the defense impeded or prevented his ability to comply with state procedural rules. Caswell, 953 F.2d at 862. A fundamental miscarriage of justice occurs when the petitioner has a colorable claim of actual innocence for the crime of which he was convicted or the sentence imposed. Schlup v. Delo, 513 U.S. 298, 314-15 (1995); Hull v. Freeman, 991 F.2d 86, 91 n.3 (3d Cir. 1993). A petitioner demonstrates a colorable claim of actual innocence by showing a fair probability that, in light of all the evidence, including that claimed to have been illegally admitted and that claimed to have been wrongly excluded or that which became available only after trial, the trier of fact would have entertained a reasonable doubt of his guilt. Sawyer v. Whitley, 505 U.S. 333, 339 n.5 (1992).

C. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996

("AEDPA"), P.L. 104-132, 110 Stat. 1214, applies to this case.² AEDPA made numerous changes to Title 28, Chapter 153 of the United States Code, 28 U.S.C. §§ 2241-2255, the chapter governing federal habeas petitions. Section 2254(d)(1), as amended by AEDPA, provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d)(1) (West 1999). Any determinations of factual issues made by a State court must be presumed correct, unless the petitioner provides clear and convincing evidence in rebuttal. 28 U.S.C.A. § 2254(e)(1) (West 1999).

²Petitioner objects to the application of the AEDPA standards to his case "because [his] criminal case has been pending in State Courts since 1992, prior to the enactment of the 1996 AEDPA." (Pet'r Objections at 4.) The United States Supreme Court has held that the AEDPA amendments to 28 U.S.C. §§ 2244 and 2253-2255 apply to habeas petitions filed after the effective date of the Act, namely April 24, 1996. Lindh v. Murphy, 521 U.S. 320, 327 (1997). The dates of a habeas petitioner's crimes and convictions do not affect the applicability of the AEDPA standards. Young v. United States, 124 F.3d 794, 798 (7th Cir. 1997). Wheeler filed his Petition on September 28, 1998, well after AEDPA went into effect. Therefore, the AEDPA amendments apply to his Petition.

To apply AEDPA standards to pure questions of law or mixed questions of law and fact, federal habeas courts must first determine whether the state court decision regarding each claim was "contrary to" Supreme Court precedent. Matteo v. Superintendent S.C.I. Albion, 171 F.3d 877, 891 (3d Cir. 1999). Only if relevant Supreme Court precedent requires an outcome contrary to that reached by the state court may the district court grant habeas relief. Id. In the absence of such a showing, habeas relief is only appropriate if the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent. Id. at 890. Habeas courts may also consider the decisions of lower federal courts when evaluating whether the state court's application of the law was reasonable. Id. Mere disagreement with a state court's conclusions is insufficient to warrant habeas relief. Id. at 891.

II. PETITIONER'S OBJECTIONS

Petitioner objects to several aspects of Judge Wells' Report. Wheeler initially contests the Report's conclusion that two of his claims are procedurally defaulted. He further disagrees with Judge Wells' recommendation that the remaining claims do not justify habeas relief because they do not involve trial error of constitutional magnitude. For the following reasons, the Court overrules Petitioner's Objections.

A. Procedurally Defaulted Claims

After reviewing the pleadings and briefs from Petitioner's state court proceedings, Magistrate Judge Wells concluded that two claims were procedurally defaulted, namely Petitioner's claim that (1) the verdict is contrary to law, and (2) Petitioner's federal due process and equal protection rights were violated by the trial court's suppression of the audio portion of the videotape of the murder-robbery of which Petitioner was convicted. In his Objections, Petitioner contends that neither claim was procedurally defaulted, but rather that both issues were asserted as federal claims at every stage of his state court litigation. The Court disagrees.

1. Verdict Contrary to Law

Wheeler asserts as his fourth ground for habeas relief that his verdict was contrary to law. He first raised this issue in his post-trial motion. That court, however, rejected his claim. Commonwealth v. Wheeler, No. 1810,12,15,17, at 10 (Pa. Ct. of Common Pleas Dec. 6, 1993). Petitioner then failed to reassert this claim on direct appeal to either the Pennsylvania Superior Court or Pennsylvania Supreme Court. See Commonwealth v. Wheeler, No. 2789 Philadelphia 1993, at 2 (Pa. Super. Ct. Jul. 18, 1994); (Pet. for Allowance of Appeal at 1-2.) Petitioner Wheeler then raised the issue again in a pro se Motion under the Pennsylvania Post-Conviction Relief Act ("PCRA"), 42 Pa. Cons.

Stat. Ann. § 9541, et seq., on October 2, 1995. Commonwealth v. Wheeler, January Term, 1992, No. 1778-1810 2/4, at 2 (Pa. Ct. of Common Pleas July 3, 1996). The PCRA court similarly denied his claim. Id. at 4. He again failed to raise the issue on appeal to the Pennsylvania Superior or Supreme Courts. See Commonwealth v. Wheeler, No. 02414 Philadelphia 1996, at 1-2 (Pa. Super. Ct. May 30, 1997).

Petitioner's failure to raise this claim to any appellate state court either on direct appeal or in post-conviction relief proceedings renders the claim procedurally barred. See O'Sullivan, 119 S.Ct. at 1734. Pennsylvania law establishes a one-year statute of limitations period for the filing of state post-conviction relief petitions. 42 Pa. Cons. Stat. Ann. § 9545(b)(1) (West 1999). Even if Petitioner could circumvent the limitations period, the PCRA court still would not consider this claim since such relief may only be granted as to issues that were not raisable at trial or on direct appeal. 42 Pa. Cons. Stat. Ann. §§ 9543(a)(3), 9544(b) (West 1999).

For this reasons, the Court overrules Petitioner's objection and adopts the Report as to Ground Four.

2. Denial of Due Process and Equal Protection Rights by the Suppression of the Audio Portion of a Videotape

Petitioner asserts as his sixth ground for relief that the trial court violated his rights to due process and equal

protection by suppressing the audio portion of a videotape that was admitted into evidence. During the trial, the Government played for the jury a videotape of the murder-robbery incident that formed the basis of the charges against Wheeler and his co-defendants. Upon a motion by defense counsel, the trial court refused to allow the jury to hear the audio portion of the videotape. Wheeler contends that the audio was improperly suppressed because it contains allegedly exculpatory evidence.

During the course of the robbery, James Parker, a bystander present during the incident, told the store owner, "I think you better give up the cash." Petitioner Wheeler asserts that by uttering that this statement, Parker became an accomplice to the crimes. Thus, according to Wheeler, Parker's trial testimony regarding the incident constituted perjury and the Government's elicitation of Parker's testimony at trial violated his rights to due process and equal protection of the law.

Magistrate Judge Wells concluded that this claim is procedurally barred. Petitioner first raised the issue of the impropriety of the trial court's suppression of the audio portion of the videotape in his PCRA petition filed in October 1995. See Wheeler, January Term, 1992, No. 1778-1810,2/4, at 2 (Pa. Ct. of Common Pleas July 3, 1996). However, Petitioner framed the issue

as one of state law, not as a federal constitutional claim.³

Judge Savitt of the Philadelphia Court of Common Pleas found that the trial court's suppression of the audio portion of the videotape was not improper based on state evidentiary law.⁴

Similarly, the Pennsylvania Superior Court in upholding the PCRA court's disposition of Wheeler's petition relied upon the same reasoning. Wheeler, No. 02414 Philadelphia 1996, at 2 (Pa. Super. Ct. May 30, 1997).

³The PCRA court's opinion describes Petitioner's claim as follows:

Petitioner's first claim is that the court erred in suppressing the audio portion of the video tape of the incident because it contained material allegedly favorable to him. Specifically, petitioner argues that James Parker, a Commonwealth witness, was heard on the tape advising the victim to give up the cash and that this shows that Parker was an accomplice. Thus, petitioner argues that had the audio portion been admitted, he would have been entitled to a polluted source charge with respect to Parker's testimony.

Wheeler, January Term, 1992, No. 1778-1810,2/4, at 2 (Pa. Ct. of Common Pleas July 3, 1996).

⁴Judge Savitt's opinion states:

With respect to the video tape, the audio portion of which was suppressed pursuant to a motion by defense counsel, the test employed by the court was whether the probative value of the audio tape outweighed the prejudice to the defendants. Commonwealth v. Groff, 356 Pa.Super. 477, 514 A.2d 1382 (1986); Commonwealth v. Shain, 324 Pa.Super. 456, 471 A.2d 1246 (1984). The suppression of the audio portion of the tape was based on the court's finding that the prejudice of the sounds of the incident including violent and abusive language and the sound of the shots far outweighed its probative value. Thus, petitioner was helped by the suppression of the tape and was not prejudiced by it.

Wheeler, January Term, 1992, No. 1778-1810,2/4, at 2 (Pa. Ct. of Common Pleas July 3, 1996).

If Petitioner did not raise the federal due process and equal protection theory to the state court, then this claim would now be procedurally barred. See Doctor, 96 F.3d at 678; Evans, 959 F.2d at 1231. Pennsylvania law provides for statutory time limitations on filing PCRA petitions with state courts, and restricts the availability of post-conviction relief to issues not raisable at trial or on direct appeal. See 42 Pa. Cons. Stat. Ann. §§ 9543(a)(3), 9544(b), 9545(b)(1) (West 1999).

However, the Court recognizes that it is unnecessary for each state court to actually discuss an issue in order for a petitioner to demonstrate fair presentation. Swanger v. Zimmerman, 750 F.2d 291, 295 (3d Cir. 1984). Rather, exhaustion simply requires that the issue be presented to each state court in a manner which gives it an opportunity to rule on the claim. Id. Petitioner, despite the state court's characterization of his claim, in his Objections contends that the issue was raised as a federal due process and equal protection violation to all of the PCRA courts. (Pet'r Objections at 3.) Even assuming that Petitioner's contention is true, the Court concludes that this claim provides no basis for habeas corpus relief.

The writ of habeas corpus does not serve to remedy all error in state trials, but rather to protect against fundamental defects that inherently result in a complete miscarriage of justice. United States v. DeLuca, 889 F.2d 503, 506 (3d Cir.

1989)(internal citations omitted). Consequently, state court evidentiary errors are not cognizable in federal habeas corpus proceedings unless the error deprives a defendant of fundamental fairness in his criminal trial. Kontakis v. Beyer, 19 F.3d 110, 120 (3d Cir. 1994); Bisaccia v. Attorney General of N.J., 623 F.2d 307, 312 (3d Cir. 1980)(internal citations omitted).

Fundamental fairness implicates those fundamental conceptions of justice that underlie this country's civil and political institutions and the community's sense of fair play and decency. Dowling v. United States, 493 U.S. 342, 352-53 (1990). To deprive a criminal defendant of fundamental fairness, the erroneously excluded evidence must be material in the sense that it constitutes a crucial, critical, or highly significant factor. Jameson v. Wainwright, 719 F.2d 1125, 1127 (11th Cir. 1983), cert. denied, 466 U.S. 975 (1984); Robinson v. Vaughn, No. CIV. A. 95-2525, 1995 WL 572177, at *3 (E.D.Pa. Sept. 26, 1995).

The suppression of the audio portion of the videotape allegedly containing Parker's statement advising the victim to "give up the cash" did not deprive Wheeler of fundamental fairness in his criminal trial. First of all, Wheeler's trial counsel agreed to the suppression of the audio portion because of the tape's prejudicial nature and inclusion of gunshot sounds and violent language. (Gov. Response at 24; N.T. 11/18/92, at 179-181.) Furthermore, the record reveals no evidence that Parker

was anything but an innocent bystander. Even if this statement had existed and did in fact indicate Parker's participation in the murder-robbery, that fact would only have served to implicate Parker and would not have established Wheeler's innocence to the crimes of which he was charged, nor would it have helped his defense. For these reasons, the Court concludes that the exclusion of the audio portion of the videotape did not constitute fundamental unfairness in violation of Petitioner's due process rights, and overrules Petitioner's objection.

B. Trial Court's Denial of the Jury's Request to Rehear the Testimony of Matthew Lee

The Petition states as the first ground for habeas relief that the trial court erred when it refused the jury's request to hear selected portions of witness testimony. During its deliberations, the jury requested to hear the part of the trial testimony of Matthew Lee, the victim's son, in which he described the incident from the point at which the victim and co-defendant Jesse Bond began to physically struggle until the time at which Bond actually shot the victim. The trial court refused to read back excerpts of Lee's testimony out of context, but did offer to read back Lee's testimony in its entirety. Upon defense counsel's objection to reading all of Lee's testimony to the jury, the trial court denied the jury's request and did not read back any of Lee's testimony. (N.T. 12/3/92 at 9-20.) Although the Petition and supporting brief frames this question as simple

trial error, Wheeler in his Objections argues that it is a federal constitutional claim raised under the due process clause of the Fourteenth Amendment. (Pet. ¶ 12(a); Pet'r Br. at 1-12; Pet'r Objections at 2.)

Magistrate Judge Wells concluded that due to Petitioner's failure to raise his constitutional theory in state court, he is not entitled to habeas relief on this ground. The Report further determined that the trial judge's decision did not render his trial fundamentally unfair. The Court agrees with Judge Wells' conclusions.

While this claim was raised at each stage of Wheeler's state court PCRA proceedings, it was framed as an issue of state law, not as an issue of federal due process. See Wheeler, January Term, 1992 No. 1778-1810,2/4, at 2-3 (Pa. Super. Ct. July 3, 1996). Indeed, as noted supra, Petitioner first mentioned his federal constitutional theory of relief in his Objections to the Magistrate Judge's Report. His failure to plead a federal claim is especially pronounced since Petitioner specifically did raise a constitutional due process argument in regards to a different claim. See Duncan v. Henry, 513 U.S. 364, 366 (1995). Thus, because Petitioner failed to present the state court with his federal constitutional theory, Judge Wells' conclusion that he now is not entitled to relief on this ground is correct. See Duncan, 513 U.S. at 366.

For this reason, the Court overrules Petitioner's Objections and denies habeas relief on Ground One.

C. Trial Court's Conspiracy Recharge

As his second ground for habeas relief, Wheeler asserts that the trial court erred when it re-instructed the jury on the charge of conspiracy. During its deliberations, the jury sent a note to the judge and requested that he redefine the term 'conspiracy.' Upon learning of the jury's request, the Government asked that the court also reinstruct the jury on accomplice liability, while one of Wheeler's co-defendants wanted a recharge on 'mere presence'⁵. The trial court in compromise offered to instruct the jury that a defendant's mere presence at a scene of a crime is insufficient to convict in the context of accomplice liability. Both sides, however, rejected that offer. As a result, the trial court recalled the jury and repeated only his original conspiracy charge. In his Petition to this Court, Wheeler claims that this refusal to reinstruct the jury on the issue of 'mere presence' constituted constitutional error.

Magistrate Judge Wells recommended that this claim does not constitute a constitutional violation since under Pennsylvania state law, failure to give a separate mere presence charge is

⁵The 'mere presence' charge instructs the jury that a defendant cannot be convicted of a crime where the only evidence to connect him with the crime is his mere presence at or near the scene of the crime. Commonwealth v. La, 640 A.2d 1336, 1344 (Pa. Super. Ct. 1994).

permissible where the jury is otherwise instructed on the elements of the crime. This Court agrees and adopts Judge Wells' determination. Although jury instructions in state trials are normally matters of state law, such instructions are reviewable on habeas where they violate specific constitutional standards imposed on the states by the due process clause of the Fourteenth Amendment. Hallowell v. Keve, 555 F.2d 103, 106 (3d Cir. 1977). The Petition does not identify the specific constitutional infirmity in the court's failure to include the mere presence instruction. The test in such a case, therefore, is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. Cupp v. Naughton, 414 U.S. 141, 147 (1973). In determining the effect of an instruction on the validity of a conviction, a single instruction may not be judged in artificial isolation, but must be viewed in the context of the overall charge. Id. at 146. In Wheeler's case, the trial court's conspiracy recharge covered each essential element of the crime. Thus, the state PCRA court did not act contrary to or unreasonably apply Supreme Court precedent in approving of the trial court's omission of the mere presence charge.

In his Objections to Judge Wells' Report, Petitioner further argues that the conspiracy recharge violated his federal due process rights by relieving the prosecution of its burden to

prove guilt beyond a reasonable doubt on every element of the crime of conspiracy. (See also Pet'r Br. ¶ 14.) In instructing the jury on the definition of conspiracy, the trial court allegedly stated: "In this case, it is alleged that the shooting of the victim was the overt act." Petitioner claims that this statement essentially directed the jury to find that an overt act in furtherance of the alleged conspiracy between him and his co-defendants had been committed. The Court disagrees with Petitioner's argument.

The United States Supreme Court has stated that due process requires that in criminal trials the prosecution prove every element of the crimes alleged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). Neither the trial court's instructions nor the state courts' decisions upholding the instructions contravened or unreasonably applied this precedent. The trial court did not direct the jury to find anything as fact, but merely apprized it of the Government's position that the overt act was the shooting of the victim. The jury remained free to accept or reject the Government's allegation. For this reason, the Court overrules the Petitioner's objection and denies habeas relief on this ground.

D. Insufficient Evidence to Sustain Conviction

Petitioner asserts as an additional ground supporting habeas relief that the evidence was insufficient to support his

convictions for second degree murder, first degree robbery, criminal conspiracy, and possession of an instrument of crime. (Pet'r Br. at 12.) This claim was exhausted in the state courts, having been raised in his initial PCRA petition and appealed through the Pennsylvania Supreme Court. The PCRA lower court held that the evidence was sufficient to sustain his conviction, and the Pennsylvania Superior Court affirmed this determination on appeal. See Wheeler, January Term 1992 No. 1778-1810, 2/4, at 4 (Pa. Ct. of Common Pleas July 3, 1996), aff'd, No. 02414 Philadelphia 1996, at 2 (Pa. Super. Ct. May 30, 1997).

Magistrate Judge Wells concluded in her Report that the state courts' resolution of this claim was not contrary to or an unreasonable application of federal law and recommended that the claim be denied. Petitioner objects to this conclusion.⁶ (Pet'r

⁶Petitioner's Objections state in part:

First, at trial Petitioner was convicted of Murder in the Second Degree (but it was not proven that Petitioner killed or shot anyone), Robbery in the First Degree (but it was not proven that Petitioner robbed anyone. He did not ask anyone for anything or take anything from anyone. Nor did he threaten anyone in any kind of way), Possession of Instrument of Crime (but it was not proven that Petitioner touched or possessed a gun or any type of weapon prior to, during or after the commission of this crime), and criminal conspiracy (but it was not proven that Petitioner agreed to rob or kill anyone. Nor was it proven that Petitioner was an active participant in the commission of this crime. The Overt Act needed for such (by Petitioner) is totally missing). None of the elements making up these crimes have been proven beyond a reasonable doubt by the Commonwealth and, therefore, violates the Due Process and Equal Protection of the

Objections ¶ 11.) The Court agrees with and adopts Judge Wells' determination and overrules Petitioner's objection.

To assess a claim that the evidence is insufficient to sustain a conviction under the federal constitution, the Court considers whether, viewing the evidence in the light most favorable to the prosecution, any rational finder of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); Orban v. Vaughn, 123 F.3d 727, 731-33 (3d Cir. 1997). In conducting this inquiry, the habeas court looks to the evidence that the state considers adequate to meet the elements of the crime. Jackson v. Byrd, 105 F.3d 145, 149 (3d Cir. 1997), cert. denied, 520 U.S. 1268 (1997). Furthermore, the habeas court "faced with a record of historical facts that supports conflicting inferences must presume - even if it does not affirmatively appear in the record - that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Jackson, 443 U.S. at 326.

In his Objections, Petitioner seeks to revisit conflicting evidence and reargue inferences that are favorable to him. Given that on habeas review the court must presume that the jury resolved conflicting evidence in the favor of the prosecution, Jackson, 443 U.S. at 326, and may only overturn state court

findings of fact upon clear and convincing evidence, 28 U.S.C.A. § 2254(e)(1) (West 1999), this Court agrees with the Report's conclusions and overrules the Objection as to this ground for relief.

III. Conclusion

For the foregoing reasons, the Court overrules Petitioner's Objections. Having approved and adopted Magistrate Judge Wells' Report and Recommendation after independent consideration, the Court denies the Petition.

An appropriate order follows.

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

AARON CHRISTOPHER WHEELER,	:	CIVIL ACTION
Petitioner	:	
	:	
v.	:	
	:	
	:	
JOSEPH CHESNY, et al.,	:	
Respondents	:	NO. 98-5131

O R D E R

AND NOW, this day of January, 2000, upon careful and independent consideration of the Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 (Doc. No. 1) and Respondent's Answer and Memorandum of Law to Petition for Writ of Habeas Corpus (Doc. No. 19), Petitioner's Response thereto (Doc. No. 20), and after review of the Report and Recommendation of United States Magistrate Judge Carol Sandra Moore Wells (Doc. No. 21), and consideration of Petitioner's objections to the Report and Recommendation (Doc. No. 22), and for the reasons set forth

in the accompanying memorandum, **IT IS HEREBY ORDERED** that:

1. Petitioner's objections are **OVERRULED**;
2. The Report and Recommendation of Judge Wells is **APPROVED** and **ADOPTED**;
3. The Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 is **DISMISSED**;
4. Since the Petitioner has failed make a substantial showing of the denial of a constitutional right, the Court declines to issue a certificate of appealability under 28 U.S.C. § 2253(c)(2); and
5. The Clerk shall **CLOSE** this case statistically.

BY THE COURT:

John R. Padova, J.