

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

ANTHONY HARPER,	:	
	:	
Petitioner	:	CIVIL ACTION
	:	
v.	:	
	:	
DONALD T. VAUGHN; ATTORNEY	:	NO. 98-728
GENERAL OF THE COMMONWEALTH	:	
OF PENNSYLVANIA; DISTRICT	:	
ATTORNEY OF PHILADELPHIA	:	
COUNTY,	:	
	:	
Respondents.	:	
	:	
	:	

DuBOIS, J.

February 21, 2002

MEMORANDUM

I. INTRODUCTION

Petitioner, Anthony Harper, is a state prisoner currently serving a life sentence for first degree murder and a consecutive sentence of ten-to-twenty years for robbery, at the State Correctional Institution, Graterford, Pennsylvania. Currently before the Court is Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

The petition was filed pro se on February 13, 1998. This Court thereafter issued a certification that the filing constituted a second or successive petition as defined in 28 U.S.C. § 2244(b)(3)(B), and, accordingly, on May 29, 1998, submitted the petition to the United States Court of Appeals for the Third Circuit. On July 28, 1998, the Third Circuit returned the petition to this Court, concluding that it did not constitute a second or successive petition.

On June 16, 2000, the Court referred the petition to United States Magistrate Judge M.

Faith Angell pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 72.1.¹ Thereafter, current counsel for petitioner entered an appearance, and, on September 5, 2000, filed a memorandum of law in support of the petition. After the parties completed briefing, Judge Angell issued a Report and Recommendation dated February 20, 2001 (Document No. 20, filed February 20, 2001) recommending that the petition be denied and dismissed without an evidentiary hearing. Petitioner filed timely objections to the Report and Recommendation in this Court, and respondent, the District Attorney of Philadelphia County, replied to those objections.²

Upon consideration of the Report and Recommendation, the petitioner's objections, respondent's reply to the objections, and all the underlying filings, the Court, for the reasons stated in this Memorandum, overrules petitioner's objections and adopts the Report and Recommendation. The Court will dismiss the petition without an evidentiary hearing.

II. BACKGROUND

The detailed factual and procedural history of this case is amply set forth in the Report and Recommendation. See Report and Recommendation at 2-3 (quoting Commonwealth v. Harper, 499 A.2d 331, 333-34 (Pa. Super. Ct. 1985)) (stating factual history); id. at 3-6 (describing procedural history, including petitioner's filing of four separate collateral attacks in Pennsylvania courts and petitioner's filing of seven habeas petitions in this court). In his February 13, 1998, pro se petition, petitioner stated four claims for relief, and, on the back of the

¹ The near two-year delay between the Third Circuit's return of the petition and this Court's referral of the petition was the result of a docketing error in the Clerk's office. After the Third Circuit ruled that the petition was not a second or successive petition, the Clerk's office inadvertently failed to reopen the case and place it on this Court's docket. That docketing error was not discovered until June 15, 2000.

² The District Attorney has litigated this case on behalf of all respondents.

standard habeas petition, listed what appeared to be fourteen additional claims for relief.

Counsel's subsequent memorandum of law narrowed the claims for relief to five.

Notwithstanding this narrowing of issues for the Court's consideration, some of petitioner's claims contain numerous sub-claims. Because the disposition of many of these claims and sub-claims raises questions of procedural default and exhaustion, to promote clarity of analysis, the Court sets forth petitioner's claims in the following outline form³:

- A. Petitioner's Fifth, Sixth, and Fourteenth Amendment rights were violated when the trial court did not suppress petitioner's allegedly involuntary confession, which confession was manufactured by police officers after the officers beat and otherwise abused petitioner.
1. Petitioner did not receive Miranda warnings before his alleged confession.
 2. Petitioner neither wrote nor signed the confession and there was no independent witness to the confession.
 3. Petitioner could not give a voluntary confession because he was 17-years-old and under the influence of drugs.
 4. Two detectives beat, intimidated and coerced petitioner in an attempt to compel a confession.
 5. Testimony given by Detective Gerrard, who interrogated petitioner, that he never beat petitioner was perjured, and there are reports from unrelated defendants alleging misconduct by Detective Gerrard in coercing confessions.
 6. The "official police finding" that petitioner was not beaten is unreliable because the detectives who beat petitioner are the same ones who interviewed petitioner while he was in a hospital after the interrogation.
 7. Trial counsel was ineffective for failing to challenge the credibility of the "official police finding" at a suppression hearing or at trial.

³ Hereinafter, the Court will refer to petitioner's claims or sub-claims by shorthand reference to this outline, e.g., "Claim A.1" will refer to petitioner's Miranda claim.

- B. Petitioner's Fourth and Fourteenth Amendment rights were denied when police officers entered his home without a warrant and obtained "fruit of the poisonous tree" evidence which the court then refused to suppress.
- C. Petitioner's Sixth and Fourteenth Amendment rights were violated when counsel allowed the suppression hearing and trial to proceed while petitioner was under the influence of drugs and was otherwise unable to assist in his defense.
- D. Petitioner's Sixth Amendment rights to effective assistance of counsel were violated due to trial counsel's illness, inattentiveness, and lack of preparation.
 - 1. Counsel was seriously ill during pretrial and trial proceedings.
 - 2. Counsel interviewed petitioner for only ten minutes before trial.
 - 3. Counsel failed to call two doctors who would have corroborated petitioner's claim that police beat and abused him during interrogation.
 - 4. Counsel failed to advise a key defense witness to follow a sequestration order which resulted in the trial court precluding important parts of that witness's testimony.
- E. Petitioner was denied due process of law and counsel was ineffective for failing to request a mistrial after a key Commonwealth eyewitness testified that he saw the petitioner in handcuffs as petitioner was brought into the courtroom, and, after seeing petitioner, the eyewitness testified that he knew petitioner was the murderer.

In the Report and Recommendation, Judge Angell found that petitioner had procedurally defaulted on the following claims, as identified in the above outline: A.1, A.6, A.7, C., D.1, D.2, and E. Judge Angell found petitioner to have properly exhausted his available state-court remedies for the remainder of the claims, A.2, A.3, A.4, A.5, B., D.3, and D.4. Accordingly, Judge Angell considered those claims on the merits. She rejected each one.

Petitioner objects to the Report and Recommendation on what amounts to three separate

grounds.⁴ First, petitioner asserts that the Court should consider several of the claims procedurally defaulted, specifically Claims A.1, A.6., A.7, D.1, and D.2, because failure to consider such claims would constitute a fundamental miscarriage of justice. Second, petitioner asserts that Claims C and E were not procedurally defaulted, but were in fact fairly presented in state-court collateral proceedings. Third, petitioner argues that Judge Angell’s evaluation of Claims A.2, A.3, A.4, and A.5 on the merits was improper in that Judge Angell incorrectly deferred to state-court findings of fact that undermine those claims. As a final, catchall, objection to the Report and Recommendation, petitioner asks the Court to consider all other arguments made in petitioner’s memoranda of law.

III. DISCUSSION

The Court will consider in turn each of petitioner’s three stated grounds for objection, as well as petitioner’s catchall objection to the entirety of the Report and Recommendation. The Court’s standard of review in evaluating the Report and Recommendation is de novo. 28 U.S.C. § 636(b).

A. Consideration of Procedurally Defaulted Claims in Cases of Actual Innocence

Petitioner argues that, notwithstanding the procedural default of Claims A.1, A.6., A.7, D.1, and D.2, the Court should consider those claims on the merits on the ground that the alleged constitutional violations have “probably resulted in the conviction of one who is actually

⁴ Although petitioner’s submission appears to fall short of the requirements of Local Civil Rule 72.1.IV(b) (requiring petitioner to “specifically identify the portions of the proposed...report to which objection is made and the basis for such objections”), the Court reads petitioner’s filing to raise the three specific claims enumerated in the text.

innocent.” Murray v. Carrier, 477 U.S. 478, 496 (1986).

To establish the probability of actual innocence referenced in Carrier, “petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.” Schlup v. Delo, 513 U.S. 298, 327 (1995); see also Whitney v. Horn, No. 00-9003, 2002 WL 181342, at *16 (3d Cir. Feb. 5, 2002) (explaining Schlup standard); Glass v. Vaughn, 65 F.3d 13, 16 (3d Cir. 1995) (same). Petitioner must also “support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial.” Schlup, 513 U.S. at 324. In evaluating petitioner’s assertions of actual innocence, the Court considers all relevant evidence, regardless of whether it “was either excluded or unavailable at trial.” Id. at 328.⁵ It is not, however, this Court’s “independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do.” Id. at 329. The Court must ask, then, whether “in light of the new

⁵ For this reason, petitioner’s citation to Coss v. District Attorney of Lackawanna County, 204 F.3d 453 (3d Cir. 2000), rev’d and remanded, 532 U.S. 394 (2001), is misplaced. Petitioner points to language in Coss concerning a trial lawyer’s error that “had a pervasive effect, altering the entire evidentiary picture at trial,” Coss, 204 F.3d at 463, and urges the Court to conduct a broad inquiry in evaluating petitioner’s actual innocence claim evaluating all of the evidence. As the citations in the text to Schlup show, however, the actual innocence inquiry already requires such a wide-ranging approach.

Moreover, it is important to note that the quoted language comes from the Coss decision’s actual prejudice inquiry for an ineffective assistance of counsel claim under Strickland v. Washington, 466 U.S. 668 (1984). In Schlup, the Supreme Court explicitly stated that the actual innocence inquiry is distinct from the actual prejudice inquiry: a petitioner raising an actual innocence claim is “required to make a stronger showing than that needed to establish prejudice.” Schlup, 513 U.S. at 327.

evidence, no juror, acting reasonably, would have voted to find [petitioner] guilty beyond a reasonable doubt.” Id.

Petitioner’s objections do not specifically identify which pieces of evidence are “new” such that they may be considered in evaluating the actual innocence claim. The Court, however, identifies three such pieces of evidence: (1) evidence that the same detective who allegedly coerced petitioner into giving a confession, Detective Gerrard, also coerced defendants or witnesses on at least five separate occasions, see Pet.’s Mem. of Law at 16⁶; (2) testimony from two doctors who examined petitioner after his interrogation that allegedly would have corroborated petitioner’s claims that he was beaten, see id. at 29; and (3) testimony as to certain exculpatory facts from a witness, Marcel Harper, whose testimony was limited by the trial court in light of the witness’ failure to comply with a sequestration order, see id. at 31.

Petitioner argues that the first two pieces of evidence would have called the voluntariness of his confession into question. For these pieces of evidence to establish actual innocence under Schlup, petitioner would essentially have to establish two successive inferences: first, that had the jury heard this evidence, no rational juror would have concluded that petitioner voluntarily confessed, and, second, that had the jury disregarded petitioner’s confession, no rational juror would have voted to convict petitioner. The Court concludes that petitioner fails on both counts.

Evidence that Detective Gerrard allegedly coerced witnesses or defendants at other times provides little help to petitioner. Initially, the Court notes that such evidence might not have

⁶ Because petitioner’s memorandum of law is not paginated, all references to page numbers in that document are based on the Court’s own numbering, with page one representing the page with the case caption and document title.

been admissible under Fed. R. Evid. 404(b).⁷ However, assuming, arguendo, that the evidence was presented to the jury, it does not compel a conclusion that no rational juror would find petitioner to have confessed. On the contrary, just as the suppression court which heard petitioner's first attempt to suppress the confession found, based on Detective Gerrard's testimony describing the circumstances of the confession, that "[n]o force, threats or promises were used or made," Suppression Hearing Record, Resps.' Mem. of Law, Ex. A at ¶ 13, a rational jury still could have found that petitioner voluntarily confessed.

With respect to the proffered testimony of the two doctors, there was evidence presented at trial that petitioner was injured after entering police custody. The doctors' testimony as to the extent of the injuries would, therefore, be cumulative. As petitioner admits, trial counsel introduced evidence showing that petitioner was prescribed pain medication and complained of tenderness, bruises, and abrasions. See Pet.'s Mem. of Law at 29. This evidence may not demonstrate the severity of petitioner's injuries as would the proffered in-court testimony of the doctors, which, petitioner alleges, would have showed that he maintained a ruptured spleen, but it put the jury on notice of the fact that petitioner was somehow injured after he was arrested. With this evidence in its possession, the jury still voted to convict. The Court concludes that the added evidence now cited by petitioner would not have prevented any rational juror from finding

⁷ Fed. R. Evid. 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action conformity therewith." The rule further provides, however, that such evidence may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

petitioner to have given a voluntary confession.⁸

Even had the jury heard this evidence and then found that petitioner did not voluntarily confess, there was still sufficient evidence whereby a rational jury could have voted to convict petitioner. As explained by the Superior Court in denying petitioner's second post-conviction petition: the murderer was seen by witnesses fleeing on a red ten-speed bicycle, and a red ten-speed bicycle was subsequently found in petitioner's home; a witness identified petitioner as having been within one-and-a-half blocks of the crime scene before the murder occurred; and the pistol positively identified as that which shot a spent shell casing at the murder scene was recovered only after a police officer observed it being tossed from a second-floor window of petitioner's home. See Commonwealth v. Harper, 499 A.2d at 333-34. Even if the jury determined based on the new evidence that petitioner did not voluntarily confess, the Court does not find any reason to conclude that no rational juror, under those circumstances, would have voted to convict petitioner. On the contrary, there was sufficient evidence – even without the voluntary confession – to convict petitioner.

This conclusion renders petitioner's third proposed piece of new evidence equally unhelpful. Petitioner argues that absent trial counsel's allegedly unconstitutional ineffectiveness

⁸ The underscored language in the two preceding paragraphs serves the purpose of emphasizing the extremely high standard that petitioner must meet in order to establish an actual innocence claim. The proffered evidence of petitioner's injuries is supportive of petitioner's claim that his confession was coerced. However, there are plausible explanations for how petitioner sustained his injuries – e.g., in some post-interrogation altercation – and the Commonwealth presented evidence showing that petitioner was unharmed shortly after his confession. See Court of Common Pleas March 14, 1977, Opinion, Resps.' Mem. of Law, Ex. B at 12 (explaining that Commonwealth had introduced photos of defendant taken after his confession which photos showed petitioner's "normal physical condition"). Suffice it to say that, with all the evidence of the circumstances of the confession, petitioner has failed to demonstrate that no rational juror would have voted to convict upon receiving the new evidence.

in not instructing a defense witness, Marcel Harper, to leave the courtroom pursuant to a sequestration order, the trial court would not have limited that witness' testimony.⁹ Marcel Harper was permitted to testify in a limited manner; as Judge Angell concluded, the trial court only prevented him from testifying as to four facts, none of which are of assistance as to petitioner's actual innocence claim.

First, the witness' unheard testimony that petitioner could read and write, and, accordingly, would have signed his confession, is contradicted by petitioner's own admission in a brief submitted to the Supreme Court of Pennsylvania that he could neither read nor write. Petitioner's Brief in Support of Direct Appeal, Resps.' Mem of Law, Ex. C at 8. Second, the witness' testimony that petitioner did not own a gray pull-over sweatshirt – an item of clothing that other witnesses said the murderer was wearing – does not meet the necessary standard. The witness' knowledge as to the clothing petitioner owned certainly could have been called into question, and, moreover, the mere fact that petitioner might not have owned such a sweatshirt does not necessarily mean that he was not wearing one on the day of the murder. Third, the witness' testimony that the second-floor window, out of which someone tossed the murder weapon, was always open is irrelevant on the issue of petitioner's innocence. Finally, the fact that no one tossed a gun out of the window in the witness' presence would not at all prevent the jury from concluding that petitioner did in fact toss the gun out of the window outside of the witness' presence.

The Court therefore concludes that the missing testimony from Marcel Harper, like the

⁹ This claim, referenced in the above outline as Claim D.3, was not procedurally defaulted. Nevertheless, the Court considers it as part of petitioner's actual innocence claim because it must consider all evidence unavailable at trial. See Schlup, 513 U.S. at 328.

two pieces of evidence with respect to the voluntary nature of petitioner's confession, does not establish that no rational juror could have voted to convict petitioner. Accordingly, the Court will not consider petitioner's procedurally defaulted claims: A1, A.6, A.7, D.1, and D.2.

B. Fair Presentation of Claims C and E to the Pennsylvania Courts

Petitioner next objects to Judge Angell's finding that Claims C and E were procedurally defaulted, arguing that these claims were in fact litigated before the Pennsylvania courts. To obtain federal review of a claim in a habeas corpus proceeding, the petitioner must have "fairly presented" that claim in prior state court proceedings. Lines v. Larkins, 208 F.3d 153, 162 (3d Cir. 2000). In this case, any claim not yet presented to the Pennsylvania courts, where the failure to present a claim does not meet a narrow exception, is procedurally defaulted. This conclusion is based on the Pennsylvania law which provides, with some narrow exceptions, a one-year statute of limitations for post-conviction proceedings. See 42 Pa. C.S.A. § 9545(b). For petitioner, the statutory period has expired. Because the Court concludes that petitioner did not fairly present either Claim C or Claim E in the Pennsylvania courts, those claims are procedurally defaulted.

With respect to Claim C, petitioner argues that he claimed relief based on this same claim in his 1980 post-conviction proceeding. In Claim C, petitioner argues that trial counsel was unconstitutionally ineffective in allowing a suppression hearing and petitioner's trial to proceed while petitioner was under the influence of drugs and unable to assist in his defense. The Court agrees with Judge Angell that this claim was not raised in the 1980 proceedings. Additionally, the Court notes that the Pennsylvania courts have already recognized petitioner's default on this same claim. In a second post-conviction proceeding, the Court of Common Pleas explained that

petitioner sought relief based on, inter alia, “[i]neffective assistance of counsel in that: a) Trial counsel allowed suppression hearing to proceed although Defendant was under the influence of drugs.” Court of Common Pleas April 19, 1994, Opinion, Resps.’ Mem. of Law, Ex. G at 3. The court did not consider the merits of that claim, though, because “[a]ll claims of ineffective assistance of counsel concerning suppression matters” had been waived by petitioner’s failure to raise them in the 1980 post-conviction proceeding. Id. at 7-8. Petitioner’s citations to the documents underlying that 1980 proceeding are simply incorrect.

Petitioner’s argument with respect to Claim E is similarly without merit. In the current proceedings, petitioner argues that his counsel was ineffective when he allowed a witness to testify as follows: the witness and his son observed petitioner in handcuffs being escorted into court by a sheriff; the witness surmised from a combination of his own observation and his son’s description of the murderer that petitioner was in fact the murderer; and the witness testified to this conclusion as well as the basis for that conclusion. Petitioner asserts that his trial counsel was constitutionally ineffective in failing to move for a mistrial on these grounds, and, moreover, that he presented this claim to the Pennsylvania courts in his 1980 petition.

The closest claim to this one in the 1980 petition is an assertion that “[t]rial counsel was ineffective in bringing out on cross-examination repeatedly to the Jury that Petitioner was in custody and in handcuffs when being brought to the courtroom during the trial.” Pet.’s Amended Petition Under Post Conviction Hearing Act, Resps.’ Mem. of Law, Ex. D at ¶ 7(d). The Court concludes that alleged ineffectiveness in counsel’s references to handcuffs and custody is not at all similar to the claim asserted now, that counsel should have moved for a mistrial based on a witness’ testimony. Additionally, the Court finds no record support whatsoever for petitioner’s

additional argument that the current claim was raised in a nunc pro tunc appeal to the Superior Court.

Based on the Court's finding that neither Claim C nor Claim E was raised in the state proceedings, the Court agrees with Judge Angell's conclusion that these claims were procedurally defaulted.

C. The Merits of Petitioner's Involuntary Confession Claim

Petitioner next objects to Judge Angell's rejection of his claims that his confession was involuntary, Claims A.2, A.3, A.4, and A.5. It is not exactly clear what grounds petitioner asserts for this objection. Petitioner states:

[W]ith regard to the claim that Petitioner's confession was involuntary in that it was done while Petitioner was under the influence of drugs, this does not, as the Magistrate opines, raise a "credibility" issue that the Federal Court must defer to the state courts on. Rather, this goes to the weight and sufficiency of the evidence.

Pet.'s Objections at 5. The Court reads this objection as arguing that Judge Angell gave too much deference to the Pennsylvania courts' determination that petitioner's confession was voluntary.

The question of whether a confession is voluntary is one subject to "independent federal consideration." Miller v. Fenton, 474 U.S. 104, 112 (1985). Nevertheless, in conducting this independent federal review, if a state court has issued determinations on "subsidiary factual questions," a federal court owes deference to those findings. Id.; see also McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999) (citing Miller, 474 U.S. at 105) (explaining Miller to require habeas court's deference to state-court determinations on "subsidiary factual questions")

in independently deciding the “ultimate legal question of confession’s constitutional voluntariness”). The degree of deference owed to the state-court findings on subsidiary factual questions is defined by the habeas corpus statute; the Court may not grant the petition unless the state court’s adjudication “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.” 28 U.S.C. § 2254(d)(2). The state court’s factual determination is “presumed to be correct.” 28 U.S.C. § 2254(e)(1). For petitioner to prevail, he must “rebut[] the presumption of correctness by clear and convincing evidence.” Id.

Petitioner litigated the voluntary confession issue at a pre-trial suppression hearing. After that hearing, the court issued findings of facts underlying that same court’s legal conclusion that the confession was voluntarily given. The court found that petitioner informed the interrogating detectives that he could not read or write; that an interrogating detective read his notes of petitioner’s statement to petitioner; that petitioner manifested an awareness of his rights when giving the confession; that he was not under the influence of alcohol or narcotics at the time he gave his confession; that police detectives did not use force or threats; and that petitioner, appearing at the suppression hearing, was alert, understood English, and did not have difficulty expressing himself. See Suppression Hearing Record, Resps.’ Mem. of Law, Ex. A at ¶¶ 11-14.

The Court concludes that each of these findings go to “subsidiary factual questions” in the voluntariness inquiry. A federal court conducting habeas review therefore owes these findings the deference prescribed by statute; specifically, the Court may only reject these findings upon petitioner’s showing of clear and convincing evidence that they were incorrect. Aside from merely asserting claims that directly contradict these findings, petitioner has not produced clear

and convincing evidence to rebut the statutory presumption of validity. Accordingly, the Court's analysis of petitioner's confession must rely on the state court's determination of these "subsidiary factual questions." Given these findings, the Court cannot conclude that petitioner's confession was involuntary. Thus, to the extent that petitioner objects to Judge Angell's Report and Recommendation on the ground that there was insufficient evidence to support a finding of an involuntary confession, the Court overrules that objection.

D. Remainder of Petitioner's Claims

Although petitioner does not explicitly object to any other of Judge Angell's findings, the Court reads his catchall objection to the Report and Recommendation to cover those not already discussed in this analysis, specifically, Judge Angell's rejection on the merits of petitioner's Claims B, D.3, and D.4.

As to Claim B, petitioner's claim that the police entry into his home and seizure of evidence violated petitioner's Fourth Amendment rights, Judge Angell concluded that claim was precluded by the Supreme Court's decision in Stone v. Powell, 428 U.S. 465, 494 (1976). In Stone, the Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Id. (footnote omitted); see also Hector v. Watt, 235 F.3d 154, 158 (3d Cir. 2000) (explaining Stone as having "rejected relief under habeas corpus for Fourth Amendment violations"). Judge Angell concluded that, in light of petitioner's opportunity to litigate his Fourth Amendment claim in his direct appeal, see Commonwealth v. Harper, 403 A.2d 536, 542-43 (Pa. 1979) (considering and rejecting petitioner's Fourth Amendment claim), the current

claim cannot be reviewed in a habeas proceeding. The Court agrees with Judge Angell's conclusion, and, to the extent that petitioner objects to this conclusion, that objection is overruled.

With respect to Claims D.3 and D.4, that counsel was unconstitutionally ineffective in both failing to call two doctors to testify as to petitioner's physical condition after his interrogation and in failing to advise a defense witness, Marcel Harper, to abide by a sequestration order, Judge Angell found that the Superior Court's consideration of these two claims was not sufficiently unreasonable to justify habeas relief.

A habeas petition may not be granted unless a state court's adjudication of a claim "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." 28 U.S.C. § 2254(d)(1). Under federal law, the standard for evaluating claims alleging ineffective assistance was set forth in Strickland v. Washington, 466 U.S. 668 (1984). Strickland instructs that a convicted defendant must demonstrate that his counsel's performance (1) "fell below an objective standard of reasonableness," id. at 688, and (2) that counsel's deficient performance prejudiced the defense. Id. at 692. The question, then, is whether the court that reviewed petitioner's ineffectiveness claim, the Superior Court, analyzed petitioner's claims in a manner unreasonable under Strickland.

In considering petitioner's claims, the Superior Court set forth the framework for its analysis as follows:

When reviewing the effectiveness of counsel, we determine first whether the underlying claim has merit. If it does, we then inquire whether counsel's handling of the matter at issue had some

reasonable basis designed to effectuate his or her client's interests. Counsel is not ineffective unless there was no reasonable basis for the action, nor is counsel ineffective for not taking baseless or meritless action. Finally, a finding of ineffectiveness requires a showing that the course of action pursued by counsel was prejudicial to the defendant

Commonwealth v. Harper, 499 A.2d at 335. Although, this standard is worded slightly different than the Strickland standard, it essentially calls for the same analysis.

In application of this analysis, the Superior Court rejected petitioner's claims on the ground that, even if he could successfully show counsel's conduct to be objectively unreasonable, he could not show that conduct to have prejudiced his defense. Considering the testimony of the two doctors, the Superior Court found no prejudice because the proffered testimony would have been "redundant and of little probative value." Id. at 336. As to the sequestration order, that court again found no prejudice in light of the fact that, notwithstanding the limitation of the witness' testimony, most of the evidence trial counsel intended to present was in fact elicited during direct and cross examination. Id.

Judge Angell concluded that the Superior Court's analysis could not be labeled as contrary to, or be seen as involving an unreasonable application of, federal standards. To show that it was, petitioner would be required to meet a very high standard. Under the "contrary to" clause of 28 U.S.C. § 2254(d)(1), "a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 413 (2000); see also Werts v. Vaughn, 228 F.3d 178, 196 (3d Cir. 2000). Under the "unreasonable application" clause of 28

U.S.C. § 2254(d)(1), “a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” Williams, 529 U.S. at 413; see also Werts, 228 F.3d at 196.

The Court agrees with Judge Angell’s conclusion that petitioner did not meet the applicable standard with respect to his ineffective assistance of counsel claims. Accordingly, to the extent that petitioner objects to Judge Angell’s rejection of his Claims D.3 and D.4 on the merits, the Court overrules that objection.

IV. CONCLUSION

For the foregoing reasons,¹⁰ the Court overrules petitioner’s objections to Judge Angell’s Report and Recommendation. The Court therefore approves and adopts the Report and Recommendation. Because petitioner has not established a substantial denial of a constitutional right, the Court will not issue a certificate of appealability.

An appropriate Order follows.

¹⁰ Respondents argue that a number of petitioner’s claims should be rejected because they were newly added to the petition in counsel’s memorandum of law which was filed after the one-year statute of limitations period under 28 U.S.C. § 2244(d)(1) had run. Although the original petition was filed within the statutory period, respondents take the position that under United States v. Duffus, 174 F.3d 333, 337-38 (3d Cir. 1999), petitioner should not be able to add new claims to his petition via a post-statutory period counseled memorandum of law. Given the Court’s disposition of the petition, however, the Court will not decide the issue.

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

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GENERAL OF THE COMMONWEALTH	:	
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	:	
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ORDER

AND NOW, this 21st day of February, 2002, upon consideration of United States Magistrate Judge M. Faith Angell's Report and Recommendation dated February 20, 2001 (Document No. 20, filed February 20, 2001), Petitioner's Objections to the Magistrate's Report and Recommendation (Document No. 21, filed March 7, 2001; Document No. 22, filed March 8, 2001),¹ Response to Petitioner's Objections (Document No. 23, filed March 16, 2001), and all other related filings, **IT IS ORDERED** as follows:

1. Petitioner's Objections to the Report and Recommendation are **OVERRULED**;
2. The Report and Recommendation dated February 20, 2001, is **APPROVED** and **ADOPTED** consistent with the foregoing Memorandum;
3. The Petition for Writ of Habeas Corpus is **DENIED** and **DISMISSED** without an evidentiary hearing; and

¹ Petitioner filed a duplicate set of Objections.

4. Because petitioner has failed to make a substantial showing of the denial of a constitutional right, there is no basis for issuing a certificate of appealability.

BY THE COURT:

JAN E. DuBOIS, J.