

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

PATRICK TOUSSAINT, : CIVIL ACTION
Petitioner, :
 :
v. :
 :
EDWARD KLEM, et al., :
Respondents. : No. 03-0927

MEMORANDUM AND ORDER

J. M. KELLY, J.

MARCH 31, 2004

Presently before the Court are the Report and Recommendation of United States Magistrate Judge Peter B. Scuderi and objections thereto filed by pro se Petitioner Patrick Toussaint ("Petitioner"), who is currently incarcerated at the Mahanoy State Correctional Institute in Pennsylvania. On December 6, 1996, a jury in the Court of Common Pleas of Philadelphia County (the "Court of Common Pleas") convicted Petitioner of three counts of rape, involuntary deviate sexual intercourse, and kidnapping. On May 15, 1997, Petitioner was sentenced to an aggregate term of seven-to twenty-years of imprisonment for these convictions.

On October 24, 2002, Petitioner filed a Petition for a Writ of Habeas Corpus (the "Petition") with this Court, pursuant to 28 U.S.C. § 2254.¹ In accordance with 28 U.S.C. § 636 and Local

¹ Petitioner signed and presumably handed the instant Petition to prison officials on October 24, 2002. While the Petition was filed on behalf of Petitioner on February 19, 2003 in the United States District Court for the Middle District of Pennsylvania, the Petition was transferred to this Court and considered received for filing November 4, 2002. However, pursuant to the

Rule of Civil Procedure 72.1, this Court referred the Petition for a Report and Recommendation to Magistrate Judge Scuderi, who, on August 26, 2003, recommended that this Court deny the Petition because Petitioner's claims are procedurally defaulted or otherwise without merit. On September 8, 2003, Petitioner filed his objections to the Report and Recommendation with this Court.

For the following reasons, Petitioner's objections are **OVERRULED**, Magistrate Judge Scuderi's Report and Recommendation is **ACCEPTED** and **ADOPTED** as supplemented by this memorandum, and Petitioner's Petition for a Writ of Habeas Corpus is **DENIED**.

I. BACKGROUND

A. **Factual History**

During two separate snow storms, Petitioner, an employed taxicab driver, offered both of his victims a ride in his personal automobile.² Taxicabs were not in operation due to the inclement weather. Both victims, during each of their respective encounters with Petitioner, accepted his offer of a ride. Upon entering his automobile, each victim introduced herself to Petitioner by name, but Petitioner nevertheless chose to refer to

prison mailbox rule, this Court will construe the filing date as October 24, 2002, the date the Petitioner hand-delivered the Petition to prison officials. Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998).

² Both victims described the car as small and red.

each of the women, on each occasion, as "Boo." Each of the victims had requested that Petitioner drive her to a specific destination, and with each of the victims, Petitioner proceeded to take her elsewhere.

The first victim, K.H., entered Petitioner's car at 5:30 p.m. on January 9, 1996. Instead of driving K.H. to her mother's home, as she had requested, Petitioner drove her to his apartment. Upon arrival at his apartment complex, Petitioner parked his taxicab in such a way that K.H.'s exit was barricaded by a snow bank. With K.H. confined in his car, Petitioner retrieved a beer from his apartment, returned to the car, drank the beer, and then began to drive around again. K.H. pled with Petitioner to drive her home, but this request resulted in Petitioner angrily screaming and banging his fists on the steering wheel. Petitioner drove K.H. to Fairmount Park, again parking next to a snow bank that prevented any attempt of flight, and raped K.H. After Petitioner left Fairmount Park, he returned to his apartment and brought K.H. inside. At this point, K.H. attempted to flee, but Petitioner grabbed her, threatened to kill her, and then raped her a second time before taking her home.

Petitioner's second victim, M.D., entered Petitioner's car at 11:45 a.m. on February 6, 1996. Instead of driving M.D. to her mother's place of work, as she had requested, Petitioner drove her to his apartment. Upon arrival, Petitioner invited

M.D. into his apartment and she voluntarily accepted his invitation. Once inside, Petitioner threatened to kill M.D. if she did not have sex with him, and then raped her. After engaging in repeated, sexual assaults on M.D., Petitioner drove her to the Chester Transportation Center.

Both victims, K.H. and M.D., reported their assaults to the authorities and each positively identified Petitioner³ as their attacker.

B. Procedural History

Petitioner was arrested and charged with two counts of rape and kidnapping of K.H., and one count of rape and involuntary deviate sexual intercourse with regard to M.D. On July, 10, 1996, Judge Carolyn Engel Temin granted the Commonwealth's motion to consolidate these two cases in the Court of Common Pleas. Petitioner moved to sever the two indictments, but his motion was denied. On December 6, 1996, after a jury trial before Judge D. Webster Keogh, Petitioner was convicted of all charges. Judge Keogh sentenced Petitioner to an aggregate term of seven-to twenty-years imprisonment. Petitioner timely filed post-sentence motions, and on September 29, 1997, Judge Keogh denied these

³ K.H. positively identified Petitioner at a line-up and at trial. M.D. positively identified Petitioner from a photo spread and later at trial.

motions.⁴

On October 7, 1997, after the denial of his post-sentence motions, Petitioner appealed his conviction to the Superior Court of Pennsylvania, claiming only that his case was improperly consolidated. The Superior Court affirmed his conviction in Commonwealth v. Toussaint, 736 A.2d 15 (Pa. Super. Ct. 1998). Petitioner then filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, and the Supreme Court provided final judgment in his case with its Order denying allocatur in Commonwealth v. Toussaint, 794 A.2d 361 (Pa. 1999).

Following this denial, Petitioner sought collateral state relief under Pennsylvania's Post-Conviction Relief Act ("PCRA") on January 13, 2000 by filing a pro se petition in the PCRA court, which would be presided over by Judge Koegh. Petitioner claimed for the first time that he was denied effective assistance of his trial and direct appellate counsel and, again, that the improper consolidation of his two indictments denied him a fair trial. Specifically, Petitioner claimed that his trial counsel failed to challenge the Commonwealth's testimony or have his employer testify as a character witness for Petitioner at trial. Petitioner also asserted that his appellate counsel erred

⁴ The post-sentence motions raised two issues with the Court of Common Pleas: (1) the Court erred in denying Petitioner's motion to sever the two cases, and (2) the evidence was insufficient to support the convictions.

by not raising trial counsel's ineffectiveness.

After filing his pro se PCRA petition, Petitioner was appointed PCRA counsel, who subsequently filed a no-merit letter containing a request to withdraw pursuant to Commonwealth v. Finley, 550 A.2d 213, 215 (Pa. Super. Ct. 1988). Following an independent review on the merits of all of Petitioner's claims, on May 31, 2001, Judge Keogh dismissed Petitioner's PCRA petition and allowed Petitioner's PCRA counsel to withdraw.⁵

Petitioner appealed Judge Keogh's dismissal of his PCRA petition to the Superior Court of Pennsylvania listing improper consolidation and ineffective assistance of counsel on his "statement of issues to be raised on appeal."⁶ The Superior Court ruled only on Petitioner's consolidation claim because the Court said that while Petitioner listed four issues in his "Statement of Questions Involved," the other issues raised were not addressed in the argument section of his brief.⁷ The

⁵ Judge Keogh issued an opinion on Dec. 21, 2001, concluding that the PCRA petition was properly denied.

⁶ The "statement of issues to be raised on appeal" is a section on the Superior Court Docketing Statement, a form used to administer scheduling of arguments and cases on appeal, that Petitioner completed after filing notice of his appeal. See Pa. R. App. P. 3571.

⁷ As the Superior Court's opinion does not list the other three issues that Petitioner raised in his "Statement of Questions Involved" for his PCRA appellate brief, this Court will construe, for instructive purposes only, that Petitioner's claim for ineffective assistance of counsel was one of the issues omitted because Petitioner listed ineffective assistance in the

Superior Court held that Petitioner's consolidation claim was "not a cognizable [PCRA] claim" because it was "fully and finally litigated in Petitioner's direct appeal." Commonwealth v. Toussaint, No. Civ. A. 1774 EDA 2001 (Pa. Super. Ct. Feb. 12, 2003).

On October 24, 2002, Petitioner filed the instant Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 with this Court. Petitioner appears to assert that: (1) the state court improperly consolidated the two aforementioned indictments against him; (2) he was denied effective assistance of trial and appellate counsel; (3) the district attorney denied him access to certain reports and evidence during and after trial; and (4) he was never advised of his immigration status at trial. The District Attorney of Philadelphia ("Respondent") responded that Petitioner's first claim of improper consolidation is without merit and all other claims are procedurally defaulted.

On August 26, 2003, after a thorough review of the Petition's merits, Magistrate Judge Scuderi issued a Report and Recommendation agreeing with Respondent that Petitioner's first claim of improper consolidation was meritless. Judge Scuderi also agreed that Petitioner's remaining claims were procedurally defaulted. On September 8, 2003, Petitioner filed objections to

"statement of issues to be raised on appeal" portion of the Docketing Statement.

Magistrate Judge Scuderi's Report and Recommendation, which this Court will address below.

II. DISCUSSION

This Court reviews de novo those portions of the Magistrate Judge's Report and Recommendation to which specific objections have been made. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Petitioner objects, although it is not entirely clear from his repetitive submission, to the Report's finding that Petitioner's two indictments were properly consolidated, and that his other three remaining claims were procedurally defaulted. Petitioner's remaining claims were as follows: (1) that his trial and appellate counsel were ineffective; (2) that Respondent withheld evidence; and (3) that he was never advised of his immigration status during trial.

A. **Exhaustion**

Absent exceptional circumstances, a federal court, guided by principles of federalism and comity, will not entertain the claims of a habeas petition unless the petitioner has exhausted all available state remedies. 28 U.S.C. § 2254 (b)(1); O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999); Lambrix v Singletary, 520 U.S. 518, 523 (1997). This exhaustion requirement is not met unless the petitioner has given the state

court the initial opportunity to pass upon and correct alleged violations of the petitioner's constitutional rights.

O'Sullivan, 526 U.S. at 844-45. The petitioner can meet this exhaustion requirement if he allows "the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the established appellate review process." Id. at 845. Exhaustion does not require that the highest state court rule on the merits of a petitioner's claim, but only that the court be given the opportunity to do so. Swanger v. Zimmerman, 750 F.2d 291, 295 (3d Cir. 1984). For example, if the petitioner's direct appeal from the trial court's judgment on a constitutional issue is unsuccessful, he may then petition for a writ of appeal on that issue to the state's highest court, and if, like in this case, the highest state court denies allocatur, then that constitutional issue will be deemed exhausted for federal habeas review purposes.

The claim presented for federal habeas review must first be "fairly presented" to the state courts to be considered exhausted, and the burden of proving exhaustion of all state remedies rests on the habeas petitioner. Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997). If a petitioner has not "fairly presented" his or her claims to the state courts, but no state avenue remains available for such purpose, such unexhausted claims may be deemed exhausted, even if the state courts have not

had the opportunity to examine the merits. See Gray v. Netherland, 518 U.S. 152, 161 (1996). Federal habeas review of the merits of such claims is nevertheless precluded if the “prisoner has defaulted his federal claims in state court pursuant to independent and adequate state procedural rule” Coleman v. Thompson, 501 U.S. 722, 750 (1991).

Upon this Court’s review of the record, it is clear that Petitioner never presented his claims to the state courts alleging ineffective assistance of counsel, withholding of evidence, or failure of being advised of his immigration status. On direct appeal, Petitioner challenged only the consolidation of his cases. Commonwealth v. Toussaint, No. Civ. A. 4228 Phil. 1997, 136 A.2d 15 (Pa. Super. Ct. 1997). Then, on state collateral review, Petitioner’s appeal of the PCRA court’s denial of his PCRA petition, at best, raised a claim for ineffective assistance of trial and appellate counsel and other matters, but only actually argued in his appellate brief that the consolidation of his two indictments was in error. This Court fully agrees with Judge Scuderi’s Report and Recommendation that consolidation is the only exhausted claim.

B. Procedural Default

1. Claims Not Raised in State Court

As Petitioner failed to raise on direct review any claims of

ineffective assistance of counsel or that involve evidence and immigration status information allegedly withheld from him, Petitioner has not exhausted these claims. However, an attempt to exhaust these claims now would be futile because the PCRA's statute of limitations, within which Petitioner has one year to file any and all PCRA petitions, has run. See 42 Pa. Cons. Stat. § 9545(b)(1). Since Pennsylvania's statute of limitations procedurally bars any attempt at further relief, Petitioner's claims of ineffective assistance of counsel, withholding of evidence and failure to be advised of his immigration status are, accordingly, procedurally defaulted. See Coleman v. Thompson, 501 U.S. 722, 731-32 (1991); Engle v. Isaac, 456 U.S. 107, 125-26 n.28 (1982).

2. Claims Not Argued in PCRA Court

Petitioner's claims raised in his PCRA court appellate brief, like his claim of ineffective assistance of counsel,⁸ are also procedurally defaulted because his failure to argue them functionally waived the issues on state collateral appeal. See

⁸ As explained above, we presume, for instructional purposes only, that ineffective assistance of counsel was one of three issues that Petitioner raised in his PCRA appeal, but did not brief. Our analysis of Petitioner's ineffective assistance claim would equally apply to his other claims for withholding of evidence and failure to be advised of his immigration status should they turn out to be the remaining two claims raised, but not argued, on his appeal of the PCRA court's dismissal of his PCRA petition.

42 Pa. Cons. Stat. Ann. § 9544(b). "If the petitioner mentions an issue, but fails to develop any argument with respect to the issue in his brief, the issue may also be deemed waived." Ramos v. Kyler, No. Civ. A. 03-2051, 2003 U.S. Dist LEXIS 23387, at *16 (E.D. Pa. Nov. 17, 2003) (citing Commonwealth v. Genovese, 675 A.2d 331, 334 (Pa. Super. Ct. 1996); Commonwealth v. Long, 753, A.2d 272, 279 (Pa. Super. Ct. 2000); Commonwealth v. Maris, 629 A.2d 1014, 1016-17 (Pa. Super. Ct. 1993); Pa. R. App. P. 2111; Commonwealth v. Rivera, 685 A.2d 1011 (Pa. Super Ct. 1996)). Despite petitioner's pro se status, he is not exempt from the requirement to "properly raise and develop appealable claims." Id. at *17 (citing Commonwealth v. White, 674 A.2d 253, 257 n.6 (Pa. Super. Ct. 1996)). Once a claim is deemed waived in the state court, it becomes procedurally defaulted and is therefore not reviewable by a federal court. Id. (citing Werts v. Vaughn, 228 F.3d 178, 192 n.9 (3d Cir. 2000), cert. denied, 523 U.S. 980 (2001)).

In Petitioner's PCRA appeal, the Superior Court of Pennsylvania explicitly denied review of all but one of Petitioner's claims because Petitioner failed to develop any argument in his brief with respect to the denied claims. Commonwealth v. Toussaint, No. Civ. A. 1774 EDA 2001 (Pa. Super. Ct. Feb. 12, 2003). Although petitioner may have initially presented his ineffective assistance claim in his "Statement of

Questions Involved" to be raised on appeal of the dismissal of his PCRA petition, he did not mention it in his argument, and therefore waived this claim. See Toussaint, No. Civ. A. 1774 EDA 2001. In accordance with Ramos, we find that Petitioner waived these claims, which Petitioner raised, but did not argue, and that this procedural default precludes our review of those claims. See Ramos, 2003 U.S. Dist. at *16-17.

3. Cause, Prejudice and Fundamental Miscarriage of Justice

While Petitioner procedurally defaulted on three of his claims, federal habeas review of such procedurally-defaulted claims is nevertheless permitted if a petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims would result in a fundamental miscarriage of justice. Edwards v. Carpenter, 529 U.S. 446, 451 (2000). To show cause, first, Petitioner must demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Coleman, 510 U.S. at 753; Murray v. Carrier, 477 U.S. 478, 488 (1987); Werts v. Vaughn, 228 F.3d 178, 192-93 (3d Cir. 2000). Second, Petitioner must show that prejudice resulted by demonstrating that the errors at trial "worked to his actual and substantial disadvantage, infecting his entire trial with error of

constitutional dimensions.'" Werts, 228 F.3d at 193 (quoting Murray, 477 U.S. at 494). Otherwise, to establish the fundamental miscarriage of justice exception to the procedural default rule, the petitioner must demonstrate "actual innocence." Schlup v. Delo, 513 U.S. 298, 324 (1995); Calderon v. Thompson, 523 U.S. 538, 559 (1998) (stating that a claim of actual innocence must be based on "reliable evidence not presented at trial" to show that "it is more likely than not that no reasonable juror would have convicted him in light of new evidence").

Petitioner has not presented any evidence demonstrating cause for his procedural default. Specifically, Petitioner failed to put forth evidence that provides an explanation for either his delay in raising these claims beyond the PCRA's one-year statute of limitations or his decision not to argue them in his PCRA appeal. Without first showing cause, this Court cannot and need not address the prejudice requirement. Engle v. Isaac, 456 U.S. 107, 134 n.43 (1982).

Further, the Petition contains conclusory allegations against Respondent and trial witnesses, accompanied only by excerpts of his trial transcripts. It appears that Petitioner is trying now, on federal habeas review, to re-litigate his case with the same facts and evidence that were before the jury at his trial. Petitioner, however, has not presented any evidence not

already presented at trial to support his claims of innocence for this Court to conclude that a fundamental miscarriage of justice has resulted. Thus, under either the "cause and prejudice" or the "miscarriage of justice" standard, Petitioner's procedurally defaulted claims are not subject to federal habeas review.

C. Consolidation

Petitioner's only exhausted claim is that the trial court improperly denied his motion to sever the two cases against him for trial. Petitioner appears to claim that the consolidation of the two cases was so prejudicial that it rendered his trial unfair in violation of his federal due process rights. Petitioner objects to the Report and Recommendation's finding that his claim of improper consolidation was meritless.

Although Petitioner's consolidation claim was fully litigated in state court and passes the procedural requirements for exhaustion, it does not pass this Court's jurisdictional requirement that his claim involve a matter of federal constitutional law. See Estelle v. McGuire, 502 U.S. 62, 67 (1991); Johnson v. Rosemyer, 117 F.3d 104, 109-10 (3d Cir. 1997). "Even if the state courts [make] a mistake of state law which prejudices [a petitioner], ... to obtain habeas corpus relief [a petitioner] must demonstrate that the mistake deprived him of a right which he enjoyed under the Constitution, laws, or treaties

of the United States.” Johnson, 117 F.3d at 110.

Petitioner alleges that the consolidation was unfair and prejudicial to his trial, which tenuously implicates the Due Process Clause of the Federal Constitution. Despite this tenuous implication, however, consolidation of offenses, and decisions on motions to sever charges, are state law questions. Jones v. Brierly, 276 F. Supp. 567, 571 (E.D. Pa. 1967). “Errors of state law cannot be repackaged as federal errors simply by citing the Due Process Clause.” Johnson, 117 F.3d at 110.

In Ashe v. United States, the most recent United States Supreme Court case to consider the propriety of consolidating separate indictments for trial, the Court held that a state court’s consolidation of two indictments for trial at one time was not a violation of any federal constitutional right. 270 U.S. 424, 425-26 (1926). The Supreme Court held that consolidation of indictments for trial is part of the state’s administration of criminal law not to be interrupted by federal habeas attack. Id. at 426. The only attack that could be made upon a state court’s consolidation decision was whether the state had the “constitutional power” to present two indictments in one trial. Id. at 425. The Supreme Court answered that question affirmatively while repeating that “there was not a shadow of a ground for interference with this sentence by habeas corpus.” Id. at 426. In accord with the Ashe ruling, our Court also

determined long ago that "the action of the trial court in consolidating indictments is not open to attack on a habeas corpus proceeding." Sliva v. Pennsylvania, 196 F. Supp. 51, 53 (E.D. Pa. 1961).⁹

A review of Third Circuit precedent on this issue of state court consolidation supports our finding that this issue is not cognizable for federal habeas review. See Green v. Rundle, 452 F.2d 232, 236 (3d Cir. 1971) (holding that failure of trial counsel objecting to consolidation constituted waiver); Dixon v. Cavell, 284 F. Supp. 535, 538 (E.D. Pa. 1968) (finding no prejudice in joinder of multiple defendants); Jones v. Brierly, 276 F. Supp. 567, 571 (E.D. Pa. 1967) (stating consolidation was an issue of "state law and procedure rather than . . . federal constitutional issues and justiciable only on direct appeal rather than on federal habeas corpus proceedings"). But see, Tillman v. Koehane, No. Civ. A. 87-500, 1988 U.S. Dist LEXIS 17314, at *5 (D.N.J. Aug. 5, 1988) (reviewing consolidation claim on the merits against fundamentally unfair due process standard); Levy v. Parker, 478 F.2d 772, 811-13 (3d Cir. 1973) (finding no prejudice in consolidation of charges in Court Martial proceeding), rev'd on other grounds, Parker v. Levy, 417 U.S. 733 (1974). The absence of any federal habeas ruling on

⁹ This precedent has carried into other districts and been further approved. See e.g., Lewis v. Peyton, 291 F. Supp. 753, 756 (W.D. Va. 1968).

consolidation in the Third Circuit in thirty years of habeas review lends reasonable support for our determination that, as held in Sliva, consolidation at the state court trial level is not a proper issue for federal habeas attack.

When reviewing the trial court's determination of its own state law of joinder,¹⁰ this Court is bound by the state court's interpretations of state law. Estelle, 502 U.S. at 67-68. A federal court sitting in habeas review will not "reexamine state court determinations on state law questions." Id. It is not the province of the federal habeas court to determine if the state court improperly construed the state law with respect to the consolidation; it is only to determine if the state court had the constitutional power to consolidate. See Ashe, 270 U.S. at 425. Accordingly, we find that the Pennsylvania state court had the power to consolidate Petitioner's indictments, thus, precluding federal habeas review.¹¹ Id. at 426.

¹⁰ Pennsylvania Rule of Criminal Procedure 582 presents the following standards for joinder:

(A) STANDARDS

(1) Offenses charged in separate indictments or informations may be tried together if:

(a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion

Pa. R. Crim. P. 582(a)(1).

¹¹ Even if Petitioner's consolidation claim was reviewable on the merits, this Court would, for the same reasons, agree with

IV. CONCLUSION

As three of Petitioner's four claims are procedurally defaulted, and the fourth is a state law issue not subject to attack on federal habeas review, this Court need not reach the merits of Petitioner's claims for collateral relief. Accordingly, Petitioner's Petition for Writ of Habeas Corpus is hereby **DENIED**.

the Report and Recommendation that the consolidation claim lacks merit. A writ of habeas corpus will not be granted unless the state court decided a question of federal constitutional law in opposition to clearly established United States Supreme Court precedent, unreasonably and incorrectly applied the correct Supreme Court law, or "decide[d] a case differently than [the Supreme] Court has in a factual scenario that is materially indistinguishable." Hameen v. State of Delaware, 212 F.3d 226, 235 (3d Cir. 2000) (citing Williams v. Taylor, 529 U.S. 362, 389-90 (2000)); 28 U.S.C. § 2254(d)(1). Therefore, Petitioner is required to establish that the state court's joinder of the cases was in opposition to clearly established federal constitutional law and was not objectively reasonable in light of the evidence presented.

Even if joinder was in opposition to federal constitutional law, the issue still lacks merit on habeas review if it does not rise to a violation of due process that is so unduly prejudicial as to render the entire trial fundamentally unfair. See Payne v. Tennessee, 501 U.S. 808, 825 (1991). For reasons expounded by Magistrate Judge Scuderi in his Report and Recommendation, we agree that the state court's consolidation was not unduly prejudicial as the offenses were sufficiently similar, the consolidation did not confuse the jury, and the jury was properly instructed on the separate indictments.

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ORDER

AND NOW, this day of March, 2004, upon careful and independent consideration of Magistrate Judge Scuderi's Report and Recommendation and Petitioner's objections to the Magistrate Judge's Report and Recommendation, it is **ORDERED** that:

1. Petitioner's Objections to the Magistrate Judge's Report and Recommendation are **OVERRULED**;
2. The Report and Recommendation of Magistrate Judge Scuderi is **APPROVED** and **ADOPTED** as supplemented by this memorandum;
3. The Petition for Writ of Habeas Corpus is **DENIED**; and
4. Because Petitioner has failed to make a substantial showing of the denial of a constitutional right, there is no basis for the issuance of a certificate of appealability. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

BY THE COURT:

JAMES MCGIRR KELLY, J.