

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

STEVEN HOLIDAY,	:	
	:	
	:	
v.	:	No. 04-827
	:	
	:	
VARNER, et al.	:	
	:	
Respondent	:	

**MEMORANDUM**

**GREEN, S.J.**

**January 19, 2005**

Presently pending is the Petition for Writ of Habeas Corpus relief, the Report and Recommendation (“Report”) of United States Magistrate Judge Arnold C. Rapoport, and Petitioner’s Objections to the Report. For the following reasons the Report will be approved and adopted.

**FACTUAL AND PROCEDURAL BACKGROUND**

The factual and procedural background of this matter are set forth at length in the Report, and will be incorporated by reference herein. The claims set forth in the petition for habeas corpus can be summarized as follows: (1) Petitioner’s trial counsel was ineffective for failing to object to the trial court’s “progression” charge - a charge Petitioner claims violated both the due process clause of the Fourteenth Amendment and the Sixth Amendments - because the charge as stated required a hung jury on the greater charge instead of permitting the jurors to consider lesser charges; (2) trial counsel was ineffective for failing to object the trial court’s reasonable doubt charge; (3) trial counsel was ineffective for his failure to request the trial court not to give a “no adverse inference” instruction to the jury; (4) appellate counsel - different from trial counsel - was ineffective for failing to, on direct appeal, raise the issues of trial counsel’s ineffectiveness. The Report recommends that Petitioner’s ineffective assistance

of trial counsel claims be denied and dismissed because they were waived. The Report concludes that the ineffectiveness of trial counsel claims were waived because Petitioner did not raise them at his first opportunity to do so when represented by new counsel on direct appeal. The Report concludes that because they were waived, Petitioner's claims of ineffectiveness of trial counsel are procedurally defaulted and cannot be considered on habeas corpus review.

The Report also recommends that Petitioner's ineffectiveness of appellate counsel claims be denied and dismissed due to procedural default. The Report concludes that the claims of ineffectiveness of appellate counsel are procedurally defaulted because appellate counsel did not comply with the pleading and briefing requirements for Petitioner's layered ineffectiveness of counsel claims.<sup>1</sup> Consequently, the Report concludes that the claims were waived and are therefore procedurally defaulted. Petitioner argues that the requirement of sufficient pleading, argument, and proof of appellate counsel's ineffectiveness in his PCRA petition are requirements that were not the law at the time he filed his PCRA petition. Petitioner also argues that the specific pleading and proof of appellate counsel's ineffectiveness is a requirement that has not been uniformly or consistently applied. Petitioner Objects to the Report's conclusion that his pleadings regarding the claims of ineffectiveness of appellate counsel were procedurally defaulted and argues that the claims should be remanded to be considered on their merits.

## **DISCUSSION**

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<sup>1</sup> Under Pennsylvania law a petitioner must present argument on each prong of an ineffective assistance of counsel claim to demonstrate that trial counsel was ineffective. If Petitioner does not support the underlying ineffectiveness of trial counsel claim, appellate counsel will not be found ineffective. Commonwealth v. McGill, 832 A.2d 1014, 1022 (Pa. 2003); Commonwealth v. Williams, 782 A.2d 517 (Pa. 2001).

Because Petitioner's Objections to the Report are largely focused on the Report's conclusion that his claims regarding appellate counsel's ineffectiveness are procedurally defaulted, the court first addresses this Objection. Petitioner filed his PCRA petition on March 12, 2001. "The PCRA Court ruled on the merits and dismissed the PCRA Petition on June 25, 2002. " (Petitioner's Objections at 2). In the interim, Commonwealth v. Williams was decided making clear that PCRA counsel was required to - in both pleadings and briefs - develop and prove the layered ineffectiveness of appellate counsel claim. Upon review of the record, this court concludes, as did the Superior Court of Pennsylvania, that PCRA counsel did not demonstrate how appellate counsel's asserted ineffectiveness impacted the outcome of Petitioner's appeal as was, and is, required under the law. The court also concludes that Petitioner's claims for ineffectiveness of trial counsel are also procedurally defaulted because he did not raise those claims at the first point at which he was no longer represented by trial counsel. Commowearth v. Miller, 6664 A.2d 1310 (Pa. 1995). Petitioner did not raise the claims on direct appeal even though he was no longer represented by trial counsel. Those claims are therefore clearly waived and procedurally defaulted. Consequently, they cannot be presented for habeas review . Petitioner's Objections will be overruled and the Report approved and adopted.

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VARNER, et al.	:	
	:	
Respondent	:	

**ORDER**

**AND NOW**, this 19<sup>th</sup> day of January 2005, upon careful and independent consideration of the Petition for Writ of Habeas Corpus and Response thereto, and after review of the Report and Recommendation of United States Magistrate Judge Arnold C. Rapoport dated September 30, 2004 and Petitioner's Objections thereto, **IT IS HEREBY ORDERED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;
2. Petitioner's Objections are **OVERRULED**.
3. The Petition for Writ fo Habeas Corpus is **DENIED** with prejudice and **DISMISSED** without an evidentiary hearing; and
4. There is no probable cause to issue a certificate of appealability.

BY THE COURT:

S/\_\_\_\_\_

Clifford Scott Green, S.J.