

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

MICHAEL RICHARDS	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 04-1642
FRANK TENNIS, et al.	:	

MEMORANDUM

Baylson, J.

April 24, 2005

I. Introduction

On May 31, 2001, after a jury trial before the Honorable Gary S. Glazer, Michael Richards (the “Petitioner”) was convicted of first degree murder, robbery, intimidation of witnesses, and possessing instruments of crime. Judge Glazer sentenced Richards to life imprisonment for the murder charge with a concurrent 5-10 year sentence imposed on the robbery, and a consecutive 18-36 month sentence for witness intimidation.

The Petitioner filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on April 14, 2004, asserting two claims of alleged ineffective assistance of counsel. First, Petitioner alleges that his counsel was ineffective for failing to seek a limiting instruction regarding the prosecutor’s references to him as a “Jamaican drug-dealer.” Second, Petitioner claims that his counsel was ineffective for failing to request a supplemental charge regarding the use of a deadly weapon and specific intent to kill.

On April 28, 2004, this Court referred the case to Magistrate Judge Jacob P. Hart for a Report and Recommendation. On September 23, 2004, Magistrate Judge Hart filed a Report and Recommendation, recommending that the petition be denied.

II. Summary of Magistrate Judge's Report and Recommendation

Regarding the limiting instruction relating to the prosecutor's "Jamaican drug-dealer" comments, the Report and Recommendation concludes that the Superior Court's determination that the failure to request a limiting instruction did not prejudice the defense was not an unreasonable application of the law or an unreasonable determination of the facts, because, on the basis of the testimony at trial, the jury would have necessarily come to the conclusion that Richards was a drug dealer. Regarding the jury instructions regarding specific intent, the Report and Recommendation concludes that it was not objectively unreasonable for the Superior Court to conclude that Richards' counsel's performance neither fell below an objective standard of reasonableness nor prejudiced the defense. Although the instructions could have been clearer regarding the use of a deadly weapon and specific intent, the Report and Recommendation concludes that the instructions as given made it clear that the jury could only find Richards guilty of first degree murder if the jury found that Richards had a fully informed intent to kill, and therefore the failure to request a supplemental instruction did not prejudice the defense.

III. Petitioner's Objections to the R & R

The Court, upon careful and independent consideration of the record, agrees with the reasoning and conclusions of the Report and Recommendation, and therefore, to the extent that Petitioner's objections simply disagree with those conclusions and reiterate the habeas petition's claims, the Court adopts the Report and Recommendation's reasoning and conclusions.

Petitioner also objects, however, to the Magistrate Judge's failure to address cases cited by Petitioner in support of the proposition that a prosecutor's references to a criminal defendant's ethnicity or ancestry are unfair and prejudicial. The Report and Recommendation briefly

addresses the issue of the “Jamaican” aspect of the prosecutor’s several references to Petitioner as a “Jamaican drug dealer” in a footnote, stating that Petitioner suffered no prejudice from the remarks because the jury heard testimony from at least two witnesses indicating that Petitioner was Jamaican. Petitioner cites United States v. Doe, 903 F. 3d 16, 27-28 (D.C. Cir. 1990), a case involving drug charges, in which the appellate court reversed under plain error, concluding that “the prosecutor’s discourse on the activities of Jamaican drug dealers and the accompanying tie-in with [the defendants] were legally improper” and prejudicial. The prosecution in Doe focused its case on the control Jamaicans had seized over drug trafficking in the community and referred to the defendants as “people just like this,” which the court found to be an appeal to the jury’s racial or ethnic bias. In contrast, here, the prosecution did not attempt to suggest that an inference of guilt be made based on the fact that Petitioner was of the same nationality as others involved in similar crimes, and Petitioner cannot cite to such “prosecutorial remarks kindling racial or ethnic predilections.” Id. at 28.

The other cases cited by Petitioner are similar to Doe. United States v. Cabrera, 222 F.3d 590 (9th Cir. 2000)(finding that “repeated references to Cuban drug dealers had the cumulative effect of putting the city of Las Vegas’s Cuban community on trial rather than sticking to the facts of [the defendants’] drug offenses”); U.S. v. Rodriguez Cortes, 949 F.2d 532, 541 (1st Cir. 1991)(prosecutor’s comments “could be taken as an appeal to the jurors to find the defendant guilty by reason of his national origin, inviting them to believe that if a person is born in Colombia, then he must be involved in drug trafficking”).

The Third Circuit has specifically referred to Doe and Cabrera as cases “in which the government . . . drew direct links between the defendants’ race or ethnicity and the crimes with

which they were charged.” U.S. v. Hakim, 344 F.3d 324, 333 (3d Cir. 2003). Here, although the government did refer to Petitioner several times as a “Jamaican drug dealer,” the government did not draw direct links between Petitioner’s race or ethnicity and the crime with which he was charged, and “at no point during the trial did the government make an inflammatory remark relating to [the defendant’s] ethnic background or national origin.” U.S. v. Alzanki, 54 F.3d 99, 1007 (1st Cir. 1995).

IV. Conclusion

For the foregoing reasons, Petitioner’s objections will be overruled, the Magistrate Judge’s Report and Recommendations will be approved and adopted, the petition for writ of habeas corpus will be denied and dismissed with prejudice. As Petitioner has failed to make a substantial showing of the denial of any constitutional right, a certificate of appealability will not issue.

An appropriate Order follows.

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ORDER

AND NOW, this 24th day of April, 2005, upon careful and independent review of the Petition for Writ of Habeas Corpus, it is hereby ORDERED that:

1. Petitioner's objections to the Magistrate Judge's Report and Recommendation are OVERRULED;
2. The Magistrate's Report and Recommendation is APPROVED and ADOPTED;
3. The Petition for Writ of Habeas Corpus is DENIED and dismissed with prejudice; and
4. A certificate of appealability will not issue.

BY THE COURT:

/s/ Michael M. Baylson
MICHAEL M. BAYLSON, U.S.D.J.