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

KEVIN WYATT, Petitioner, v. DAVID DIGUGLIELMO, *et al*, Respondents.	:	CIVIL ACTION NO. 04-0148

Memorandum and Order

YOHN, J. May ___, 2005

Petitioner Kevin Wyatt, a prisoner in the State Correctional Institution at Graterford, Pennsylvania, filed a *pro se* petition for writ of habeas corpus in this court pursuant to 28 U.S.C. § 2254, asserting that he received ineffective assistance of counsel at several stages of his Pennsylvania criminal prosecution for first-degree murder, robbery, and conspiracy. Petitioner asserts that his trial and direct appellate counsel[1] were ineffective for: (1) failing to seek severance of his case from those of his co-defendants and/or redaction of a co-defendant's statement that inculpated petitioner and was introduced at trial; (2) failing to request a mistrial because of the prosecution's failure to provide pretrial discovery of a letter petitioner wrote to prosecution witness Kecia Ray; (3) failing to request a mistrial based on the prosecutor's use of peremptory challenges to exclude African-Americans from the jury; and (4) failing to request a mistrial based upon alleged misconduct committed by the prosecutor in his summation. After

[1] Petitioner's trial counsel was Jack McMahon, Esq., and his appellate counsel was Barnaby Wittels, Esq.

conducting a *de novo* review of the very thorough and comprehensive Report and Recommendation of United States Magistrate Judge Charles B. Smith, and upon consideration of petitioner's objections thereto, the petition will be denied.

FACTUAL & PROCEDURAL BACKGROUND[2]

On March 10, 1992, petitioner was convicted in the Philadelphia County Court of Common Pleas of first-degree murder, two counts of robbery, and criminal conspiracy. The Pennsylvania Superior Court has summarized the facts underlying the conviction as follows:

> [Petitioner] acted together with Ray, a female, and Johnson, Bennett and Mayo, all males. After several of the party visited a jewelry store and returned, it was decided to rob the store. [Petitioner] and Bennett were to man a "getaway" car with [petitioner] at the wheel. Ray was to hold the door to the store to facilitate the exit and Johnson and Mayo were to execute the robbery, Johnson being equipped with Bennett's .38 caliber revolver. When the robbers encountered what they perceived as resistance, Mayo fired two shots which resulted in the killing. The pair left the store. Ray got on a bus, and [petitioner], Bennett, Johnson and Mayo left in the car. After his arrest, [petitioner] gave an inculpatory statement. At trial, he disavowed the statement, denied any participation in the planning or execution of the robbery attempt and stated that he, while driving alone, saw Mayo, Bennett and Johnson running and offered them a ride.

Pa. Super. Ct. Opinion of July 16, 2001, at 4. Petitioner was thereafter sentenced to life imprisonment on the murder count and imprisonment for twenty to forty years on the remaining charges.[3]

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[2] These facts are substantially the same as those contained in Magistrate Judge Smith's Report and Recommendation.

[3] Petitioner's life sentence on the murder count was vacated by the Pennsylvania Superior Court on July 16, 2001, on appeal of the denial of petitioner's collateral attack of his conviction in state court. Nothing in the record discloses that petitioner was ever retried on the murder count.

Petitioner appealed his conviction to the Pennsylvania Superior Court, asserting that: (1) he was deprived of his constitutional right to counsel when he confessed to participating in the robbery; and (2) his defense was prejudiced when the trial court permitted repetitive showing of the videotape of the murder. After remanding the action to the trial court for a factual determination of whether petitioner asserted his "non-offense specific" *Miranda-Edwards* right to counsel at the time of his arrest on unrelated charges, the Superior Court affirmed the conviction on January 8, 1997, and on August 5, 1997, the Pennsylvania Supreme Court denied petitioner's request for allowance of appeal. *Commonwealth v. Wyatt*, 699 A.2d 735 (Pa. 1997).

Petitioner then collaterally attacked his conviction in state court on September 18, 1997, pursuant to Pennsylvania's Post-Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541, *et seq.* Following appointment of counsel and submission of an amended petition, the PCRA court denied relief on June 18, 1999. Petitioner then appealed to the Pennsylvania Superior Court, asserting that his counsel was ineffective for: (1) failing to seek proper redaction of a co-defendant's statement that was introduced at trial and that implicated petitioner in the crimes and/or to seek severance of the cases; (2) failing to seek a mistrial for the prosecutor's alleged violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), for using peremptory challenges to exclude African-Americans from the jury; (3) failing to seek a mistrial for the prosecution's failure to fulfill its discovery obligation under Pa. R. Crim. P. 305; (4) failing to seek relief for alleged misconduct during the prosecutor's summation; and (5) failing to object to the trial court's jury instruction regarding first-degree murder. By way of memorandum opinion dated July 16, 2001, the Superior Court denied relief on the first four issues, but vacated petitioner's sentence for first-degree murder based on the fifth claim. Petitioner and the Commonwealth then sought review,

but the Pennsylvania Supreme Court denied petitioner's request on October 15, 2002, and the Commonwealth's request on June 3, 2003. *Commonwealth v. Wyatt*, 809 A.2d 904 (Pa. 2002); *Commonwealth v. Wyatt*, 825 A.2d 1261 (Pa. 2003).

Petitioner originally filed his *pro se* § 2254 habeas corpus petition in this court on January 14, 2004,[4] seeking relief from the remaining convictions on the following grounds: (1) ineffective assistance of trial, post-trial, and direct appeal counsel for failure to seek severance of his case from those of his co-defendants and/or redaction of his co-defendant's statement that was introduced at trial and that implicated him in the crimes; (2) ineffective assistance of trial, post-trial, and direct appeal counsel for failure to seek a mistrial based on the prosecution's failure to provide pre-trial discovery of a letter petitioner wrote to prosecution witness Kecia Ray; (3) ineffective assistance of trial, post-trial, direct appeal, and post-conviction counsel for failure to seek a mistrial because of an alleged *Batson* violation by the prosecutor for his use of peremptory challenges to exclude African-Americans from the jury; and (4) ineffective assistance of trial, post-trial, and direct appeal counsel for failure to seek a mistrial based upon misconduct in the prosecutor's summation. By order filed March 17, 2004, I referred this case to Magistrate Judge Smith for a Report and Recommendation. Respondents filed their response to the petition on June 25, and petitioner filed a traverse on July 2.

On October 19, 2004, Magistrate Judge Smith issued his Report and Recommendation, denying habeas relief. He concluded that: (1) although the introduction of the unredacted

[4] This date was more than one year from the date the Pennsylvania Supreme Court denied petitioner's petition for allocatur, but less than one year from the date the Pennsylvania Supreme Court denied the Commonwealth's petition. To the extent that this could raise an AEDPA issue regarding the statute of limitations, it has been waived by respondents because they failed to raise it.

statement of petitioner's co-defendant was violative of the Sixth Amendment right to confrontation, petitioner failed to establish ineffective assistance of counsel for failure to seek the redaction or severance of the cases; (2) petitioner's claim regarding pretrial discovery of his letter to prosecution witness Kecia Ray was procedurally defaulted, or in the alternative, without merit, because it was not "exculpatory" under *Brady v. Maryland*, 373 U.S. 83 (1963); (3) petitioner's claim of ineffective assistance regarding counsel's failure to request a mistrial because of alleged *Batson* violations by the prosecutor was without merit because no *Batson* violation took place, and because petitioner failed to show prejudice; and (4) petitioner's claim of ineffective assistance regarding counsel's failure to request a mistrial because of alleged misconduct in the prosecutor's summation was without merit because petitioner failed to show that the prosecutor's comments "fatally infected the proceedings, rendered the entire trial fundamentally unfair, and made the conviction a denial of due process." MJRR at 31 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986), *reh'g denied*, 478 U.S. 1036 (1986)).

Petitioner filed objections to the Report and Recommendation on October 29, 2004.

STANDARD OF REVIEW

Where a habeas petition has been referred to a magistrate judge for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B), this court's review of "those portions of the report or specified proposed findings or recommendations to which objection is made" is *de novo*. 28 U.S.C. § 636(b). After conducting such a review, this court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." *Id.*

TIMELINESS

The present petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-132, 110 Stat. 1214.[5] Under AEDPA, a state prisoner seeking federal habeas relief must file his habeas petition within one year of the date on which his judgment of conviction became final. 28 U.S.C. § 2244(d)(1). Because petitioner's habeas petition was filed prior to the expiration of the one year statute of limitations, it is timely under § 2244(d)(1).[6]

AEDPA STANDARDS

Under 28 U.S.C. § 2254, federal courts are empowered to grant habeas corpus relief to a prisoner "in custody pursuant to the judgment of a State court" where his custody violates the Constitution of the United States. 28 U.S.C. § 2254(a). Because the present petition is governed by AEDPA, petitioner is entitled to habeas relief only where the state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law," or "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. § 2254(d)(1).

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[5] AEDPA governs § 2254 habeas petitions filed on or after April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 321, 327 (1997).

[6] Petitioner's conviction became final on August 5, 1997, when the Pennsylvania Supreme Court denied his request for allowance of appeal. The one year statute of limitations began to run on August 6, 1997, and continued running until petitioner filed his PCRA petition on September 18, 1997, at which time forty-three days had elapsed. Petitioner's statute of limitations was then tolled, during the pendency of his state collateral attack, until June 3, 2003, when the Pennsylvania Supreme Court denied the Commonwealth's request for allowance of appeal after petitioner had prevailed on one of his claims in the Pennsylvania Superior Court. *But see supra* note 4. Between June 3, 2003 and January 14, 2004, when petitioner filed the pending petition, approximately 225 days had elapsed. The instant habeas petition is, therefore, timely under AEDPA's one-year statute of limitations.

A state court decision may be "contrary to" clearly established federal law in one of two ways. First, a state court decision is contrary to clearly established precedent where "the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases." *Williams v. Taylor*, 529 U.S. 362, 405 (2000). Second, a state court decision will be "contrary to" clearly established precedent "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [the] precedent." *Id.* at 406. A state court decision involves an "unreasonable application" of federal law, on the other hand, where it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407-08.

Habeas relief will also be granted where a state court decision is "based on an unreasonable determination of the facts." Under AEDPA, however, factual determinations made by the state court are accorded a presumption of correctness: "a federal court must presume that the factual findings of both state trial and appellate courts are correct, a presumption that can only be overcome on the basis of clear and convincing evidence to the contrary." *Stevens v. Delaware Corr. Ctr.*, 295 F.3d 361, 368 (3d Cir. 2002) (citing 28 U.S.C. § 2254(e)(1)). Thus, to prevail under this "unreasonable determination" prong, petitioner must demonstrate that the state court's determination of the facts was objectively unreasonable in light of the evidence available; mere disagreement with the state court – or even a showing of erroneous factfinding by the state court – will be insuffucient to warrant relief, provided that the state court acted reasonably. *See Weaver v. Bowersox*, 241 F.3d 1024, 1030 (8th Cir. 2001) (citing *Williams*, 529 U.S. at 409); *Torres v. Prunty*, 223 F.3d 1103, 1107-08 (9th Cir. 2000) (citing same).

INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD

Because each of petitioner's claims involves allegations that his counsel was ineffective, it is helpful to set out the standards applicable to such claims. To state a claim for ineffective assistance of counsel under the Sixth Amendment, petitioner must show that counsel was deficient and that this deficient performance prejudiced petitioner. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The standard of effectiveness entailing constitutionally adequate representation is governed by a two-pronged test:

> First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable.

Id. To avoid painstaking review of counsel's performance in the face of every claim of ineffectiveness, *Strickland* encourages courts to resolve questions of effectiveness on grounds of prejudice whenever possible. *Id.* at 697; *see also McNeil v. Cuyler*, 782 F.2d 443, 449 (3d Cir. 1986). Thus, I should first determine if petitioner experienced prejudice – that is, if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694.

DISCUSSION

Petitioner sets forth four claims in this § 2254 habeas action: (1) ineffective assistance of counsel for failure to seek severance of his case from those of his co-defendants and/or redaction of his co-defendant's statement that was introduced at trial and that implicated petitioner in the crimes; (2) ineffective assistance of counsel for failure to seek a mistrial based on the

prosecution's failure to provide pre-trial discovery of a letter petitioner wrote to prosecution witness Kecia Ray; (3) ineffective assistance of counsel for failure to seek a mistrial because of an alleged *Batson* violation by the prosecutor for his use of peremptory challenges to exclude African-Americans from the jury;[7] and (4) ineffective assistance of counsel for failure to seek a mistrial because of alleged misconduct in the prosecutor's summation. I will deal with each of these claims in turn.

I. Petitioner's Claim of Ineffective Assistance of Counsel for Failure to Seek Severance and/or Redaction of a Co-Defendant's Statement[8]

After being charged with first-degree murder, robbery, and conspiracy, petitioner was tried together with Paul Johnson ("Johnson") and Tony Bennett ("Bennett"), both of whom were accused of having been involved in the jewelry store robbery. Following his arrest, Bennett gave a statement to the police that was introduced at the joint trial and that implicated petitioner in the charged crimes. Petitioner's first claim is that his counsel was ineffective for failing to move for severance of his case from those of Johnson and Bennett, because his defense (that he never made any agreement to be part of the robbery) was in conflict with Bennett's (that petitioner was part of the agreement).

As to the severance issue, in light of the Third Circuit's well-established view that "judicial economy favors a joint trial where defendants are jointly indicted, and where defendants

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[7] Petitioner alleges ineffective assistance of PCRA counsel with respect to the *Batson* issue. However, a defendant has no federal constitutional right to counsel when pursuing a state collateral attack on his conviction, and thus this issue is not cognizable on federal habeas review. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

[8] Magistrate Judge Smith's Report and Recommendation concludes that this claim does not suffer from procedural default. MPRR at 7-10. Respondents have not filed objections to this conclusion. I agree with Magistrate Judge Smith as well.

are charged with a single conspiracy," I am loathe to find that counsel's failure to seek severance was an error so serious that he was not functioning as the counsel guaranteed by the constitution. *United States v. Sandini*, 888 F.2d 300, 305 (3d Cir. 1989) (citing *United States v. Simmons*, 679 F.2d 1042, 1051 (3d Cir. 1982), *cert. denied*, 462 U.S. 1134 (1983); *United States v. Dickens*, 695 F.2d 765, 778-79 (3d Cir. 1983), *cert. denied*, 460 U.S. 1092 (1983)). As Magistrate Judge Smith stated in his Report and Recommendation, "[a]ll defendants, in this case, were charged with the identical crimes on the identical facts, thereby justifying a consolidated trial." MJRR at 10.

Petitioner also contends that "trial counsel had the obligation to challenge all attempts at redaction that fall short of the *Bruton* standards, and appellate and PCRA counsel were obligated to re-examine all co-defendant confession cases and raise the appropriate claims for relief," and that this alleged substandard conduct by his counsel "so seriously undermined any confidence in the outcome as to render the trial fundamentally unfair." Pet. Objections at 8-9. In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held that a defendant's Sixth Amendment right "to be confronted with the witnesses against him" is violated when a confession of a co-defendant, which implicates the defendant, is admitted at trial, and the co-defendant is not subjected to cross examination. U.S. Const. amend. VI; *Bruton*, 391 U.S. at 127-28. The *Bruton* Court reasoned that where the defendant and the confessing co-defendant are tried together, "the risk that the jury will not, or cannot, follow [the trial court's limiting] instructions [regarding the jury's use of the confession against only the co-defendant] is so great, and the consequences so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton*, 391 U.S. at 135.

The Supreme Court has since limited *Bruton*'s holding by introducing the possibility of redaction. In *Richardson v. Marsh*, 481 U.S. 200 (1987), the Court held that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Id.* at 211. In *Gray v. Maryland*, 523 U.S. 185 (1998), however, the Supreme Court cautioned against "statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." *Id.* at 196. The *Gray* Court concluded that "nicknames and specific descriptions fall inside, not outside, *Bruton*'s protection." *Id.* at 195.

As for the present case, I could not improve upon Magistrate Judge Smith's detailed analysis of the application of both *Bruton* and *Strickland* (MJRR at 10-18), which analysis I incorporate into this memorandum. First, I agree that a *Bruton* violation did occur when Bennett's statement, implicating "Flave," was allowed to be read into evidence after a prosecution witness had already testified that petitioner and "Flave" were one and the same person. However, the issue in this habeas action is not whether a *Bruton* violation occurred, but whether petitioner's counsel was constitutionally ineffective for failing to seek redaction of the references to petitioner in Bennett's statement before it was read into evidence, thus avoiding the *Bruton* problem. Pursuant to *Strickland*'s suggestion, the court will analyze the prejudice prong of the ineffectiveness inquiry first, in an effort to avoid giving a grade to counsel's performance

and to "ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Strickland*, 466 U.S. at 697.[9]

Second, despite petitioner's assertions of prejudice, I agree with Magistrate Judge Smith that "petitioner stands hard-pressed to argue that he suffered prejudice," and that one "cannot say that counsel's omission so seriously undermined our confidence in the outcome as to render the trial fundamentally unfair," mainly because of the bulk of the remaining evidence against petitioner. MJRR at 16-18. Ray's testimony and petitioner's own statement to the police directly implicated petitioner in the robbery. *Id.* at 16-17. Also, as Magistrate Judge Smith points out, "petitioner conceded before the jury that he was aware, when he picked up two of his co-defendants, 'that it was likely, even probable, that they had committed a crime.'" *Id.* at 17. Even if the Bennett statement had been redacted, the jury could easily have inferred from petitioner's testimony that he was the person to whom Bennett was referring. In light of this overwhelming evidence against petitioner (particularly with reference to robbery and conspiracy, the remaining charges against petitioner), I conclude that even if petitioner's counsel's performance regarding the redaction issue was deficient, such deficiency did not cause sufficient prejudice to petitioner to render the trial fundamentally unfair.[10]

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[9] With reference to the deficiency prong, as Magistrate Judge Smith has stated, petitioner's trial counsel, "an experienced and well-known criminal lawyer," discussed the redaction issue with the court and other defense counsel on the record and elected not to seek redaction, thereby suggesting a reasoned analysis. MJRR at 15-16. Petitioner has conceded that the Bennett statement assisted him because it evidenced petitioner's limited involvement in a possible first-degree murder even though it implicated him in the robbery.

[10] As for petitioner's claim of ineffective assistance of direct appellate counsel, because trial counsel was not ineffective with regard to the *Bruton* issue, it was not error for appellate counsel to have failed to raise that same issue.

II. Petitioner's Claim of Ineffective Assistance of Counsel for Failure to Request a Mistrial for the Prosecution's Failure to Provide Pretrial Discovery of Petitioner's Letter to Prosecution Witness Kecia Ray

Petitioner contends that the prosecution never provided him in discovery with a letter that he wrote to prosecution witness Kecia Ray, wherein he stated that he had no involvement with the charged crimes and that he was in the parking lot cleaning his car when the robbery was planned. This letter contradicted his trial testimony, and petitioner was cross-examined about it. Petitioner now contends that his counsel was ineffective for failing to request a mistrial based on the prosecution's failure to produce the letter, because this failure to produce violated petitioner's rights under *Brady v. Maryland*, 373 U.S. 83 (1963).[11] Petitioner also contends that he suffered "substantial and severe prejudice" from the alleged ineffectiveness, because he was not prepared to meet and challenge this evidence at trial. Petitioner claims that had he known of the prosecution's intention to cross examine him about the letter, petitioner would have moved to exclude reference to it, or at least prepare a meaningful rebuttal to the cross examination.

Before reaching the merits of petitioner's claim, I must decide whether the claim was exhausted in the state proceedings, because "the substance of a federal habeas corpus claim must

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[11] In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Petitioner argues that under *Brady*, the prosecution should have produced his letter to Ray during discovery because it was exculpatory, and that his counsel was ineffective for not moving for a mistrial when the letter was not produced and was nonetheless used against him at trial.

first be presented to the state courts" before a federal court may grant relief. *Picard v. Connor*, 404 U.S. 270, 278 (1971). In *Picard*, the Supreme Court held that "[o]nly if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies." *Id.* at 276. "If, however, state procedural rules bar a petitioner from seeking further relief in state courts, 'the exhaustion requirement is satisfied because there is an absence of available State corrective process.'" *Lines v. Larkins*, 208 F.3d 153, 160 (3d Cir. 2000) (quoting *McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999) (quotation omitted)). "Even so, this does not mean that a federal court may, without more, proceed to the merits. Rather, claims deemed exhausted because of a state procedural bar are procedurally defaulted, and federal courts may not consider the merits unless the petitioner establishes 'cause and prejudice' or a 'fundamental miscarriage of justice' to excuse the default." *Lines*, 208 F.3d at 160 (quotation omitted). "The 'cause' required to excuse a procedural default must result from circumstances that are external to the petitioner, something that cannot fairly be attributed to him." *Id.* at 166 (citations omitted).

While the Pennsylvania Superior Court (in reviewing the denial of the PCRA petition) stated that "[t]he discovery theory of [petitioner] is that the letter was subject to mandatory discovery under Pa. R. Crim. P. 305(B)(1)(b)," nowhere in its opinion does a discussion of *Brady* appear. Pa. Super. Ct. Opinion at 7. In addition, nowhere in petitioner's amended PCRA petition or accompanying memorandum, which were both prepared by counsel, is *Brady* even mentioned. R. 22a-31a. Thus, the court concludes that petitioner: (1) did not present this *Brady*

claim in his state proceedings;[12] and (2) "cannot now return to the Pennsylvania courts" because "any current attempt by petitioner to file a second PCRA petition raising these claims would unequivocally be deemed untimely."[13] MJRR at 20. Thus, petitioner's ineffective assistance claim based on the *Brady* issue is procedurally defaulted. Therefore, in order to have this court consider the merits of this claim, petitioner would have to show "cause and prejudice" or "a fundamental miscarriage of justice" to excuse his default. Petitioner does not allege that he was in any way prevented by external circumstances from raising the *Brady* issue in state court. In fact, he offers no explanation at all for why he did not previously raise the issue. Petitioner has thus failed to establish the "cause" in "cause and prejudice."

In addition, petitioner has not shown a "fundamental miscarriage of justice" that would excuse his default. Proving a "fundamental miscarriage of justice" generally requires a showing of actual innocence. *See Slutzker v. Johnson*, 2004 U.S. App. LEXIS 27093 (3d Cir. December 29, 2004), at *19 n.7. Because petitioner has not presented any new evidence that would cause the court to conclude that he can meet the stringent standard for proving actual innocence, the ineffectiveness claim based on the alleged *Brady* violation becomes procedurally defaulted for purposes of habeas review in this court.[14]

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[12] The claim that petitioner did present in his state proceedings was that the Commonwealth violated the Pennsylvania discovery rules by not providing him with the letter. State law claims are not cognizable on federal habeas corpus review. *See Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (stating that "federal habeas corpus relief does not lie for errors of state law") (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)).

[13] "PCRA petitions, including second or subsequent petitions, must be filed within one year of final judgment." *Commonwealth v. Jones*, 815 A.2d 598, 609 (Pa. 2002). Because it is now well over one year since the final judgment in petitioner's case, a new PCRA petition would be deemed untimely.

[14] Even if this claim were not procedurally defaulted, it is still meritless. *See* MJRR at 20-22. The letter was not *Brady* material because it was not "exculpatory," as "petitioner

III. Petitioner's Claim of Ineffective Assistance of Counsel for Failure to Request a Mistrial Based on the Prosecutor's Alleged Violations of *Batson v. Kentucky*

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson*, 476 U.S. at 89. The *Batson* Court laid out a three-step process for use by trial courts in determining whether racial discrimination in peremptory challenges has occurred. *Id.* at 94. First, defense counsel must make a prima facie showing of purposeful racial discrimination by the prosecution, by showing that he is a member of a "cognizable racial group" and then raising "an inference that the prosecutor used [the peremptory challenge] to exclude the veniremen from the petit jury on account of their race." *Id.* at 94, 96. Once a prima facie showing of purposeful racial discrimination is accomplished, the burden then shifts to the prosecution to give a race-neutral explanation for the contested challenges. *Id.* at 97. Once that explanation is given, the trial judge then makes a determination of whether the defendant has established purposeful discrimination. *Id.*

Supplementing the *Batson* decision, the Third Circuit has set forth a non-exhaustive five-factor test for use by trial courts in determining whether a prima facie showing of discrimination has been made. *United States v. Clemons*, 843 F.2d 741, 748 (3d Cir. 1988). "These factors

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concedes that [it] was damaging, as the prosecutor used it to demonstrate that petitioner's trial testimony was inconsistent and that petitioner attempted to tamper with a witness." MJRR at 22. Moreover, petitioner wrote the letter himself, so he knew of its existence and content. Finally, trial counsel was not ineffective, because he did object to the letter's admission. The objection was overruled, and it would have been useless to pursue the issue further by requesting a mistrial.

include: how many members of the "cognizable racial group" . . . are in the venire panel; the nature of the crime; the race of the defendant and victim; a pattern of strikes against black [or other cognizable racial group] jurors in a particular venire; and a prosecutor's questions and statements during the selection process." *Jones v. Ryan*, 987 F.2d 960, 970-71 (3d Cir. 1993) (citing *Clemons*, 843 F.2d at 748).

During the voir dire portion of petitioner's trial, the prosecutor struck five African-Americans and eight Caucasians from the jury venire, while petitioner's counsel struck nine Caucasians and one African-American. At one point, petitioner's counsel objected to the prosecutor's use of his peremptory challenges, arguing that the prosecutor was excluding African-Americans from the jury in violation of *Batson*, that he satisfied the first step of the *Batson* analysis, and that the prosecution was thus required to give a race-neutral explanation for its peremptory challenges. The trial judge, Justice Juanita Kidd Stout, declined to require the prosecutor to state his reasons for the challenges, finding that defense counsel's objection was being used to intimidate the prosecutor. In the present action, petitioner contends that his trial counsel's failure to then request a mistrial based on the prosecution's alleged *Batson* violation rendered him constitutionally ineffective, because petitioner has "established that intentional discrimination occurred with respect to five prospective jurors." Pet. Objections at 20. In addition, petitioner argues that his appellate counsel was ineffective for failing to raise trial counsel's failure to request a mistrial on appeal.

Despite petitioner's protestations regarding the existence of a *Batson* violation, his claim here is that his counsel was ineffective for failing to request a mistrial, not that the trial court committed error in denying trial counsel's attempt to raise a *Batson* issue. I conclude that this ineffectiveness claim has no merit, and I adopt the reasoning and analysis of Magistrate Judge

Smith in this regard. *See* MJRR at 24-29. It is clear to the court that because counsel did raise an objection seeking a race-neutral explanation for the prosecutor's use of peremptory challenges, and the trial judge ruled on that objection in the prosecution's favor, a subsequent request for a mistrial would not have changed anything. A trial judge who has denied a *Batson* challenge is not likely to grant a mistrial because she denied the challenge. Thus, I conclude that petitioner has failed to establish that his trial counsel's performance was deficient for failing to request a mistrial on the *Batson* issue.

In addition, a claim on appeal that trial counsel should have requested a mistrial would have failed, because such a request by trial counsel would have been a useless act. Therefore I conclude that petitioner's ineffective assistance of appellate counsel claim is without merit.

IV. Petitioner's Claim of Ineffective Assistance of Counsel for Failure to Request a Mistrial Based on Alleged Misconduct by the Prosecutor in Summation

Petitioner's final claim for habeas relief is that even though his counsel objected at trial, trial counsel was ineffective for failing to request a mistrial based on alleged misconduct by the prosecutor in his summation, and appellate counsel was ineffective for failing to raise the mistrial issue on appeal. Specifically, petitioner alleges that the prosecutor: (1) improperly commented on petitioner's credibility; (2) improperly vouched for the credibility of a prosecution witness; and (3) attempted to inflame the passions of the jury by making excessive reference to the victim and the victim's clothing.

The comments regarding petitioner's credibility that petitioner now claims were improper are as follows: (1) "This man who doesn't want to be convicted of first degree murder, he got on the stand and when I was thinking about him I said he is the trusting man of many tales;" (2)

"Silent trusting man of many tales. Tales, many tales. At least five that we know of;" (3) "So the man of many tales has told at least five versions. The kite version clearly doesn't fly so he figured he would try another one;" and (4) "He doesn't want to admit he knew there was going to be a robbery. He said something like it means to take something, no force. Nor force, yes. That is that young man who possibly wouldn't know the truth if it bit him on the posterior." R. 73a-78a. Petitioner asserts that these comments infringed upon the exclusive province of the jury to determine credibility.

The comments regarding the credibility of prosecution witness Kecia Ray that petitioner now argues were improper are as follows:

> Shed not a tear for Kecia Ray. Weep not for her, had she not entered the plea agreement so she could tell you what went on in the restaurant. There were only five people. She was picked. You say why, why, why, why. At a later time you come back and I will tell you why. I can't tell you why now but the more time you spend thinking about that, the less time you will spend thinking about the evidence establishing the guilt of those defendants.

R. 79a. Petitioner asserts that these comments were improper, because they amount to vouching for the credibility of a witness while relying on facts outside the record.

The comments that petitioner now contends were calculated to inflame the passions and prejudices of the jurors, distract them from the real issues in the case, and appeal to their sympathies for the victim are as follows:

> Do I want to prejudice you by that? Surely not. Insofar as I do say they are wrong, I know what is in my heart and soul. And the reason is I want you to be reasonable, thinking common sense feelings. If I wanted to prejudice you, I would have this stench of death in the courtroom. I would unwrap these clothes that have been in this bag, three or four plastic bags with the blood on them and the stench of death would have permeated this courtroom, but I

> didn't do that. I brought these clothes in because the doctor was here. If the doctor wanted to compare the bullet holes, the defense wanted to compare the bullet hole, they could. I haven't done that because I don't want to prejudice you. I want you to be fair, objective jurors.

R. 80a-81a. The prosecutor also stated that "[W]e will never know what had been going through her mind. She is not going to come in here and tell us. You can imagine the terror and the fright and the horror. What do I do?" R. 81aa.

Petitioner claims that his counsel should have doggedly pursued relief based on these comments by the prosecutor, which petitioner contends were improper under the rules announced in several Pennsylvania cases. Pet. Traverse at 19-24. Petitioner raises this claim under the familiar rubric of an ineffective assistance of counsel claim. "Effectiveness, however, is specific to the legal context in which the counsel operates. A lawyer can be ineffective in many ways: She might fail to make a pertinent federal-law argument, or she might fail to make a pertinent state-law argument." *Ford v. Norris*, 364 F.3d 916, 918 (8th Cir. 2004). Thus, a claim that a lawyer was ineffective for not objecting to certain statements made by opposing counsel is not necessarily a federal challenge to the statements. The statements could be objectionable because they violated federal law or they could be objectionable because they violated state law. Where the claim is based on a violation of state law, the claim is governed by the state law, and a federal habeas petitioner cannot prevail on such an ineffectiveness claim when the state appellate court, in reviewing the case, has already concluded that the prosecutor's statements were proper under state law. A district court exercising habeas jurisdiction may not overrule the state appellate court on a matter of state law. *See id.* at 918-19.

Here, the Pennsylvania Superior Court, on appeal of the denial of the PCRA petition, concluded under state law "that the prosecutor's arguments were within the proper bounds of fair

comment on the evidence and, given the freedom to engage in a reasonable amount of rhetorical flair, were fair inferences and conclusions which would in no event merit a mistrial in the context of this" case. Pa. Super. Ct. Opinion at 11. I am bound by the state court's determination of state law, and that determination cannot be the basis for federal habeas relief. Therefore, to the extent that petitioner relies on a violation of state law, the petition will be denied.

In addition, to the extent that petitioner contends that his counsel was ineffective for failing to pursue relief because the prosecutor's comments were in violation of the federal constitution, I conclude that this argument is without merit, and I adopt Magistrate Judge Smith's reasoning as to this issue. *See* MJRR at 30-37.

Finally, because I have concluded that petitioner's trial counsel was not ineffective for failing to pursue relief through a mistrial motion based on the alleged prosecutorial misconduct, petitioner's appellate counsel could not have been ineffective for failing to pursue the mistrial issue on appeal.

CONCLUSION

For all of the above stated reasons, petitioner's objections are overruled, Magistrate Judge Smith's Report and Recommendation is adopted, and the § 2254 petition will be denied.

An appropriate order follows.

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

KEVIN WYATT, Petitioner,	:	CIVIL ACTION
v.	:	NO. 04-0148
DAVID DIGUGLIELMO, Respondent.	:	

Order

And now, this _____ day of May 2005, upon careful and independent consideration of the petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, respondents' response thereto, petitioner's traverse, the Report and Recommendation of United States Magistrate Judge Charles B. Smith, and petitioner's objections thereto, it is hereby ORDERED that:

1. Petitioner's objections are OVERRULED.
2. The Report and Recommendation of United States Magistrate Judge Charles B. Smith is APPROVED and ADOPTED.
3. The petition for writ of habeas corpus is DENIED.
4. The petitioner having failed to make a substantial showing of the denial of a constitutional right, there is no ground to issue a certificate of appealability, *see* 28 U.S.C. § 2253(c).
5. The Clerk shall CLOSE this case statistically.

_____

William H. Yohn, Jr., Judge