

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

<b>TERRELL FAULCON</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	<b>NO. 04-1738</b>
	:	
<b>JOHN PALAKOVICH, <u>et al.</u></b>	:	

**MEMORANDUM AND ORDER**

**Kauffman, J.**

**August 11, 2005**

Now before the Court is the pro se Petition of Terrell Faulcon (“Petitioner”) for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner is currently incarcerated in the State Correctional Institution at Smithfield, Pennsylvania (“SCI-Smithfield”). For the reasons that follow, the Petition will be denied.

**I. PROCEDURAL HISTORY**

On September 25, 1996, following a jury trial presided over by the Honorable Jane C. Greenspan of the Court of Common Pleas of Philadelphia, Petitioner was convicted of first-degree murder, conspiracy and possession of an instrument of crime. Judge Greenspan sentenced Petitioner to a term of life imprisonment on the murder charge, together with consecutive terms of five to ten years on the conspiracy charge and two to five years on the weapons charge. As set forth by the trial court, the general facts underlying the conviction are as follows:

Troy Gilliam worked for defendant Terrell Faulcon selling narcotics. Defendant Faulcon suspected that Mr. Gilliam had been stealing money and drugs from him ... In response to this allegation, defendant Faulcon conspired with defendant Jew Kenneth Wilson and Michael Gray to have Mr. Gilliam killed ... On November 23, 1993, defendant Faulcon personally delivered a gun to Mr. Gray. That gun was later to be used by defendant preparation [sic] for the following events ... Upon being paged by Troy Gilliam and Ervin Boyd, Mr. Gray drove to their

location. From there, the three proceeded to a bar at 16th and Columbia Streets in Philadelphia where they drank in celebration of Mr. Boyd's recent release from prison ... Shortly thereafter, defendant Faulcon paged Mr. Gray and instructed him to pick-up defendant Wilson. Accompanied by Mr. Gilliam and Mr. Boyd, Mr. Gray drove to the corner of 16th and Jefferson where they met defendant Wilson. Mr. Gray secretly passed the gun to defendant Wilson as he got into the car. All of the men then dropped Mr. Boyd at Mr. Boyd's girlfriend's residence ... Mr. Wilson and Mr. Gray then proceeded to carry out the conspiracy to kill Mr. Gilliam. Mr. Gray drove to the 1800 block of Harlan Street in Philadelphia, and stopped the car. The men got out to inspect an abandoned car ... As Mr. Gilliam observed the abandoned car, defendant Wilson came from behind, grabbed him around the neck, and shot Mr. Gilliam in the head twice. Leaving Mr. Gilliam in the street, defendant Wilson and Mr. Gray drove away. On November 24, 1993, Troy Gilliam was pronounced dead at Hahnemann University Hospital ... The medical examination revealed that the two gunshot wounds, one to the back of his head and the other to the left side of his head, were the direct cause of death ... Ten days after the killing, Michael Gray surrendered himself to the police. Later he entered a plea of guilty to murder in the third degree, PIC, and conspiracy. In exchange for that plea, Mr. Gray agreed to testify against defendants Terrell Faulcon and Jew Kenneth Wilson ... Mr. Gray testified that he himself arranged for the murder to take place, that Mr. Wilson shot Troy Gilliam, and that Mr. Faulcon instigated and assisted the entire event.

Opinion of Court of Common Pleas of Philadelphia (1997), at pp. 2-3.

Petitioner appealed his conviction to the Pennsylvania Superior Court alleging: (1) the weight of the evidence did not support his conviction due to the credibility of various witnesses; (2) ineffective assistance of counsel for failing to file a brief resulting in the dismissal of his initial appeal; (3) ineffective assistance of counsel for failing to call alibi witnesses on his behalf; (4) ineffective assistance of counsel for failing to obtain a forensic pathologist; and (5) prosecutorial misconduct during closing arguments. On September 27, 1997, the Superior Court dismissed the appeal for failure to file a brief. Upon appointment of new counsel, however, the trial court, on March 3, 1999, reinstated Petitioner's appellate rights nunc pro tunc. The Superior Court subsequently affirmed the judgment of sentence on April 6, 2000. Commonwealth v.

Faulcon, 758 A.2d 719 (Pa. Super. Ct. 2000) (Table). On September 11, 2000, Petitioner sought permission to file a nunc pro tunc petition for allowance of appeal, which the Pennsylvania Supreme Court denied on November 21, 2000.

On April 9, 2001, pursuant to Pennsylvania's Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541, et seq., and following the appointment of counsel, Petitioner submitted an amended petition raising the following claims: (1) ineffective assistance of trial counsel for failure to object to the prosecution's summation inviting the jury to find guilt from disbelief of defendant's alibi and for failing to move for a mistrial; (2) ineffective assistance of trial counsel for failing to object to the court's final jury instructions; (3) ineffective assistance of appellate counsel for failure to preserve the two aforementioned claims; and (4) that trial counsel was indiscriminately appointed after defendant complained about his representation. The PCRA court denied relief on June 17, 2002 and the Superior Court affirmed on June 18, 2003.

Commonwealth v. Faulcon, 830 A.2d 1044 (Pa. Super. Ct. 2003) (Table). On March 30, 2004, the Pennsylvania Supreme Court denied Petitioner's request for allowance of appeal.

Commonwealth v. Faulcon, 847 A.2d 1279 (Pa. 2004) (Table).

Petitioner seeks relief from his conviction based on the following claims:

1. Trial counsel was ineffective because he failed to object to the prosecutor's summation that invited the jury to find his client guilty based on its disbelief of his alibi and appellate counsel was ineffective for failing to raise this argument on direct appeal;
2. Trial counsel was ineffective for failing to object to the court's final instructions which omitted any discussion of alibi testimony;

3. Trial counsel was ineffective for failing to object to the court's final instructions which defined reasonable doubt in two different manners;
4. The trial court committed structural error when it reappointed counsel to represent Petitioner after Petitioner and his mother voiced significant complaints against such counsel;
5. The evidence was insufficient to establish beyond a reasonable doubt each and every element of first-degree murder, criminal conspiracy and possession of an instrument of crime based upon the testimony of coconspirator Michael Gray;
6. The testimony of several members of decedent's immediate family was insufficient to establish beyond a reasonable doubt the crimes for which Petitioner was convicted;
7. The evidence was insufficient to sustain the jury's verdict where the testimony of the Commonwealth's forensic pathologist was directly contradictory to Michael Gray's testimony;
8. The evidence was insufficient to sustain the guilty verdict where the detective to whom Michael Gray and Jew Kenneth Wilson gave statements concerning Troy Gilliam's death admitted that he lied when he stated that there was no eyewitness who saw Michael Gray shoot Troy Gilliam;
9. Trial counsel was ineffective for failing to call alibi witnesses on behalf of Petitioner;
10. Trial counsel was ineffective for failing to procure a defense forensic pathologist to confirm that Troy Gilliam was shot from the front, thereby discrediting Michael

Gray's testimony;

11. Petitioner was denied his right to a fair and impartial trial as a result of the prosecutor's numerous expressions of his personal belief and opinion throughout the trial.

The Court designated United States Magistrate Judge Charles B. Smith to submit a Report and Recommendation. See 28 U.S.C. § 636(b)(1)(B); Local R. Civ. P. 72.1(I)(b). Because Petitioner has objected to the Magistrate Judge's Report and Recommendation, the Court must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). Having reviewed the Report and Recommendation and Petitioner's Objections thereto, the Court will approve and adopt the Report and Recommendation.

## **II. PROCEDURAL DEFAULT**

28 U.S.C. § 2254 limits habeas relief to those petitioners who have first "exhausted the remedies available in the courts of the States." 28 U.S.C. § 2254(b)(1)(a). A petitioner has exhausted his state remedies only when all avenues for review of his claim in state court have been foreclosed. 28 U.S.C. § 2254(b)(3). Courts, however, have added an additional condition for post-conviction relief: the habeas court must "ask not only whether a prisoner has exhausted his state remedies, but also whether he has properly exhausted those remedies, i.e., whether he has fairly presented his claims to the state courts[.]" O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999) (emphasis in original). A petitioner "properly exhausts" his state court remedies only when he gives "the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." Id. at 845

(emphasis added). Exhaustion has not been properly achieved when the state court denies relief on independent and adequate procedural grounds without reaching the merits of the constitutional claim. This improper exhaustion constitutes a procedural default, which acts as a bar against federal habeas relief. Bronshstein v. Horn, 404 F.3d 700, 707 (3d Cir. 2005) (quoting Coleman v. Thompson, 501 U.S. 722, 729 (1991)) (“The procedural default doctrine precludes a federal habeas court from ‘reviewing a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.’”). Magistrate Judge Smith found that claims 1, 5, 6, 7, 8, 9, 10, and 11 are procedurally defaulted and therefore not eligible for habeas relief.

*A. Claim One*

Petitioner first argued that he was denied effective assistance of counsel because his attorney failed to object to certain portions of the prosecutor’s closing argument in his PCRA Petition. The PCRA court, however, declined to reach the claim on the merits; instead, it found that the claim was procedurally barred under 42 Pa.C.S.A. § 9543(a)(3). PCRA Opinion at 4-5 (2002).

Section 9543(a)(3) precludes PCRA review of any claim that has already been litigated. 42 Pa.C.S.A. § 9543(a)(3). The PCRA court found that Petitioner’s ineffective assistance of counsel argument was such a claim, as Petitioner had already objected to the prosecutor’s summation on direct appeal.<sup>1</sup> Accordingly, the court concluded that the claim could not serve as a basis for relief.

---

<sup>1</sup> On direct appeal, Petitioner argued that he was denied a fair trial, because the Commonwealth had characterized his defense as a fabrication. Commonwealth v. Faulcon, 758 A.2d 719 at 10-11 (Pa. Super. Ct. 2000) (Table).

Petitioner contends that the PCRA court was mistaken in finding that his ineffective assistance of counsel claim had already been litigated. Unlike the claim on direct appeal, he argues, which focused on a single phrase from the summation, the PCRA claim concerned an entire portion of the prosecutor's closing and the unfair inference that it encouraged the jury to draw. See Memorandum of Law in Support of Petitioner's Habeas Corpus Contentions ("Petitioner's Memorandum").

However, Petitioner's PCRA claim was nothing more than a recasting of the argument he made on direct appeal. See Commonwealth v. Bond, 819 A.2d 33, 39 (Pa.Super. 2002) ("[I]t is well-settled that a PCRA petitioner cannot obtain review of claims that were previously litigated by presenting new theories of relief[.]") The PCRA court was therefore correct to find that it was procedurally barred from considering Petitioner's claim. Because that procedural bar was an independent and adequate state ground for denying Petitioner's ineffective assistance of counsel claim, the claim is not eligible for federal habeas review. Laird v. Horn, 159 F. Supp.2d 58, 76 (E.D. Pa. 2001) (holding that a claim previously litigated on state grounds and thus not reviewable during PCRA proceedings is procedurally defaulted).

#### *B. Claims Five through Eleven*

As noted above, Petitioner first filed the equivalent of claims five through eleven on direct appeal in the Superior Court, where they were denied on the merits. Petitioner filed a petition for allowance of appeal to the Supreme Court of Pennsylvania on September 11, 2000, several months after the filing deadline had expired. Accordingly, on November 21, 2000, the

Pennsylvania Supreme Court denied the petition.<sup>2</sup>

The Pennsylvania Supreme Court based its denial of claims five through eleven on an independent and adequate state procedural ground. The claims were therefore not properly exhausted and must be considered procedurally defaulted.<sup>3</sup> Bronshstein, 404 F.3d at 707.

### *C. Excuse for Procedural Default*

The bar against reviewing habeas claims that have been procedurally defaulted has two exceptions: a federal habeas court may review such claims when the 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 will result in a fundamental miscarriage of justice.” Coleman, 501 U.S. 750. Petitioner contends that his procedural default of claims five through eleven qualifies for the first exception, since his counsel’s failure to timely file the petition for allowance of appeal establishes cause and prejudice.

---

<sup>2</sup> The Pennsylvania Supreme Court denied Petitioner’s request for allowance of appeal without explanation. However, an unexplained denial of a petition for review filed after the deadline has expired is interpreted to rest on state grounds, making claims included in the petition procedurally barred for purposes of habeas review. Caswell v. Ryan, 953 F.2d 853, 860, (3d Cir. 1992), cert. denied, 504 U.S. 944 (1992).

<sup>3</sup> Petitioner also argues that in the event that the Court finds that he has not properly exhausted his claims, the claims should be denied without prejudice to give Petitioner a chance to pursue them in state court. He contends that state court review of his claims is still available, in support of which he cites Commonwealth v. Liebel, 573 Pa. 375 (Pa. 2003). In Liebel, the Pennsylvania Supreme Court held that a defendant has a rule-based (as opposed to constitutional) right to effective assistance of counsel when filing a petition for allowance of appeal to the Pennsylvania Supreme Court, and that a defendant who can demonstrate a violation of that right is entitled to reinstatement of his allocatur rights. However, any attempt by Petitioner file a claim under Liebel would be untimely, and therefore futile. See 42 Pa.C.S. § 9545 (b)(2) (providing that a defendant who wishes to pursue PCRA relief based on a newly announced right must do so “within 60 days of the date the claim could have been presented.”).

Petitioner's attempt to evade procedural default fails for two reasons. First, any error his attorney may have committed in not timely filing his petition for allowance of appeal is not sufficient to establish "cause" for a procedural default. To satisfy the "cause" requirement, an attorney error must rise to the level of a constitutional violation of the right to effective assistance of counsel. Murray v. Carrier, 477 U.S. 478, 488 (1978). However, such a violation can occur only in those proceedings where a defendant has a constitutional right to counsel. Coleman, 501 U.S. at 752 (holding that "a petitioner cannot claim constitutionally ineffective assistance of counsel" in a proceeding for which there is no constitutional right to an attorney). In this case, Petitioner lacked a constitutional right to counsel on his discretionary appeal to the Supreme Court of Pennsylvania. Ross v. Moffitt, 417 U.S. 600, 615 (1974). Accordingly, even if Petitioner were able to demonstrate that his counsel is to blame for the untimely filing of the petition for allowance of appeal, he would not be able to establish "cause."

Moreover, Petitioner failed to raise his counsel's error on post-conviction review. As a result, Petitioner's argument that there was cause for his original default is itself defaulted, and therefore cannot enter into this Court's review. Murray, 477 U.S. at 489 (holding that exhaustion requires "that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.>").

Thus, the Court finds that Petitioner is unable to demonstrate cause for his procedural default of claims five through eleven. Accordingly, those claims, along with claim one, are not subject to federal habeas review.

### **III. MERITS**

Claims two, three, and four will be considered on the merits.

### *A. Legal Standard*

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 28 U.S.C. § 2241 et seq., which imposes substantive limitations on the collateral relief available in federal court. Section 2254(d) provides that:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) 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; or (2) 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) (emphasis added). A state court ruling is “contrary to” clearly established Supreme Court precedent “if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases,” or “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 [its] precedent.” Williams v. Taylor, 529 U.S. 362, 405-06 (2000). A state court decision is an “unreasonable application” of Supreme Court precedent if it “identifies the correct governing legal rule from [the Supreme] Court's cases, but unreasonably applies it to the facts of the particular state prisoner's case.”<sup>4</sup> Id. at 407. When making the “unreasonable application” inquiry, the federal habeas court should ask “whether the state court's application of

---

<sup>4</sup> Petitioner contends that AEDPA does not apply in this case because none of “Petitioner’s constitutional claims were examined in light of federal law as established by the Supreme Court of the United States.” Petitioner’s Objections at 8. That is a misapprehension of the law. AEDPA explicitly sets out a standard of review for claims to which state courts have applied the incorrect constitutional test: the district court must ask whether the test the state court applied “resulted in a decision that was “contrary to” clearly established federal law. See Williams, 529 U.S. at 405.

clearly established federal law was objectively unreasonable." Id. at 409.

AEDPA also requires deference to state court factual findings: "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

*B. Claim Two*

Petitioner's second claim – that his trial counsel was ineffective for failing to object to the court's decision not to give an alibi instruction – was previously adjudicated and denied on PCRA review. Thus, to obtain relief, Petitioner must demonstrate either that the state court's ruling was "contrary to or involved an unreasonable application of, clearly established Federal law[.]" 28 U.S.C. § 2254(d).

A petitioner asserting a Sixth Amendment ineffective assistance of counsel claim must establish: (1) that his trial counsel's performance fell below an "objective standard of reasonableness;" and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984). The legal test the state courts applied in analyzing Petitioner's ineffective assistance claim is virtually identical to the Strickland test. See Werts v. Vaughn, 228 F.3d 178, 204 (3d Cir. 2004) (finding that the Pennsylvania standard is "not contrary to" the Strickland test). The question before the Court is therefore whether the state courts' application of that test was "objectively unreasonable."

The PCRA court's denial of the equivalent of claim two was ultimately based on its finding that "no evidence of alibi was presented to the jury in this case." PCRA Opinion, at 5

(June 17, 2002).<sup>5</sup> Since the jury heard no alibi evidence, the court concluded that Petitioner was unable to show that his counsel's decision not to insist on an alibi instruction was unreasonable. Williams, 529 U.S. at 409. Accordingly, the court found, no Sixth Amendment violation had occurred.

Petitioner has failed to demonstrate that the PCRA court unreasonably applied federal law. He has neither addressed the PCRA court's finding that no alibi evidence was presented nor its conclusion that trial counsel was not ineffective for failing to request an alibi instruction in the absence of such evidence. Accordingly, claim two must be denied.

### *C. Claim Three*

Petitioner's third claim is that his trial counsel was ineffective for failing to object to a jury instruction that invited the jury to choose between two different definitions of reasonable doubt. The charge was as follows: "A reasonable doubt is a doubt that would cause a reasonably careful and sensible person to pause, hesitate, or refrain from acting upon a matter of the highest importance in his or her own affairs." Tr. 9/24/96 pp. 133-134 (emphasis added). Petitioner contends that the terms "pause" and "hesitate" are more favorable to the accused than "refrain," and that consequently the trial court communicated conflicting standards to the jury. Trial counsel's failure to object to the instruction, Petitioner argues, therefore constitutes ineffective assistance of counsel.

As with claim two, the PCRA court has already adjudicated claim three and based its

---

<sup>5</sup> The PCRA court found that the alleged alibi witness, Kenneth Murray, "provided testimony that challenged how defendant supplied the handgun used in the crime, but that testimony did not indicate where defendant was at the time the killing occurred." PCRA Opinion, at 6 (June 17, 2002).

analysis on the equivalent of the Strickland test. The question before the Court is therefore whether the PCRA court reasonably applied Strickland. In its analysis of Petitioner's claim, the PCRA court explained that the Pennsylvania Supreme Court has approved both versions. Commonwealth v. Faulcon, Crim. 0800 at 6 (Pa. C. June 17, 2002) (citing Commonwealth v. Young, 456 Pa. 102 (1974)). The PCRA court then went on to conclude that Petitioner's counsel could not be faulted for not objecting to an instruction based on two accepted definitions of probable cause. Id.

That analysis is not "objectively unreasonable." Williams, 529 U.S. at 409. To the contrary, there was good reason for not raising an objection. The prejudice to Petitioner was minimal, since both definitions of reasonable doubt were known to be valid. See also Victor v. Nebraska, 511 U.S. 1, 5 (1994) ([T]he Constitution does not require that any particular form of words be used in advising the jury of the government's version of proof," as long as "the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt."); Starkes v. Marks, 524 F. Supp. 37, 40 (E.D. Pa. 1981) ("Although there may be a semantic difference between the terms 'restrain' and 'hesitate' when viewed in isolation, it cannot be said, however, that there is a substantial difference between the two charges when each term is viewed in the context of the overall charge.").

Because the PCRA court reasonably applied the Strickland test, claim three will be denied.

#### *D. Claim Four*

Claim four focuses on an alleged conflict between Petitioner and his counsel. Petitioner originally retained attorney Anthony D. Jackson, but then became "sorely dissatisfied" with his

preparation of the defense and complained in writing to the trial court. Petitioner, at that point, had become indigent and was thus entitled to court-appointed counsel. Instead of searching for new counsel, the trial court reappointed Attorney Jackson as Petitioner's court-assigned counsel. Petitioner argues that a conflict of interest existed, which prevented trial counsel from rendering effective assistance.

Claim four also has been previously adjudicated on the merits. The Superior Court considered its equivalent at length on the appeal from Petitioner's PCRA petition. Commonwealth v. Faulcon, 830 A.2d 1044 (Pa. Super.2003) (Table). The Court must therefore determine whether the state court's ruling was "contrary to or involved an unreasonable application of, clearly established Federal law[.]" 28 U.S.C. § 2254(d). Where a Sixth Amendment claim rests upon an alleged conflict of interest, the defendant must "show some actual conflict of interest that adversely affected his counsel's performance in order to prevail." United States v. Kole, 164 F.3d 164, 175 (3d Cir. 1998) (quoting United States v. Preston, 910 F.2d 81, 88 (3d Cir. 1990)).

The Court finds that the Superior Court's denial of Petitioner's claim is not "contrary to clearly established federal law." At most, Petitioner has alleged that he and his mother were dissatisfied with his attorney's work, and that there was not a good working relationship, which does not give rise to a Sixth Amendment violation. See Morris v. Slappy, 461 U.S. 1, 14 (1983) (The Sixth Amendment does not guarantee the right to "a 'meaningful relationship' between an accused and his counsel."); United States v. Mutuc, 349 F.3d 930, 934 (7th Cir. 2003) ("The irreconcilable differences between [attorney and defendant] do not support a finding of ineffective assistance of counsel. The Sixth Amendment does not guarantee a friendly and happy

attorney-client relationship.”). Moreover, Petitioner has failed to offer any evidence or even allege that his attorney had any divided loyalties that would have prevented him from adequately representing Petitioner’s interests. Thus, the Superior Court’s conclusion that Petitioner’s relationship with his attorney did not amount to a Sixth Amendment violation was consistent with clearly established federal law. Claim four will accordingly be denied.

#### **IV. CONCLUSION**

Because Petitioner’s claims are either procedurally defaulted or without merit, his petition for a Writ of Habeas Corpus will be denied.

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

<b>TERRELL FAULCON</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	<b>NO. 04-cv-1738</b>
	:	
<b>JOHN PALAKOVICH, <u>et al.</u></b>	:	

**ORDER**

**AND NOW**, this 11th day of August, 2005, upon consideration of the Report and Recommendation of United States Magistrate Judge Charles B. Smith (docket no. 12) and Petitioner's Objections thereto (docket no. 14), and after de novo review of the pleadings and record in this case, it is **ORDERED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;
2. The Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, is **DENIED** and **DISMISSED**;
3. Because there is no probable cause to issue a certificate of appealability, no certificate of appealability shall issue.

**BY THE COURT:**

s/Bruce W. Kauffman  
**BRUCE W. KAUFFMAN, J.**