

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

MELVIN SCHWARTZ : CIVIL ACTION
 :
 v. :
 :
 RAYMOND COLLERAN, et al. : NO. 04-5399

MEMORANDUM

Padova, J.

August 11, 2005

Presently before the Court is Melvin Schwartz's *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. For the reasons that follow, this matter is recommitted to the Magistrate Judge for further consideration of Petitioner's claim that his appellate counsel was ineffective for failing to appeal all of his convictions. The Petition is denied in all other respects.

I. FACTUAL AND PROCEDURAL BACKGROUND

In October 1997, the District Attorney of Delaware County filed three criminal cases (Nos. 2798-97, 2799-97, and 3632-97) charging Petitioner with rape, statutory sexual assault, involuntary deviate sexual intercourse, sexual assault, aggravated indecent assault, indecent assault, indecent exposure, endangering welfare of children, corrupting morals of children, and sexual abuse of children. The charges in Case No. 2798-97 were based on the allegations of "D.B.," who was twelve years old at the time of the incident. The charges in Case Nos. 2799-97 and 3632-97 were based on the allegations of "M.F.," who was eleven years old at the time of the incidents. The three cases were consolidated for a

bench trial before the Honorable William R. Toal, Jr., of the Delaware County Court of Common Pleas. On February 3, 1998, after a three-day trial, Judge Toal rendered his verdict. In Case No. 2798-97, Petitioner was found guilty of indecent assault, indecent exposure, and corrupting morals of children. In Case No. 2799-97, Defendant was found guilty of rape, statutory sexual assault, involuntary deviate sexual intercourse, indecent assault, indecent exposure, and corrupting morals of children. In Case No. 3632-97, Defendant was found guilty of indecent exposure, corrupting morals of children, and sexual abuse of children. On November 16, 1998, Judge Toal sentenced Petitioner to an aggregate term of 7 1/2 to 25 years imprisonment.

Petitioner filed a timely appeal to the Pennsylvania Superior Court in Case No. 2799-97, asserting five claims for relief:

1. His convictions for rape, statutory sexual assault, and involuntary deviate sexual intercourse were against the weight of the evidence;
2. The trial court erred in failing to suppress a statement given by Petitioner to the police on July 25, 1997;
3. The trial court erred in failing to grant Petitioner's post-sentence motion for discovery to determine whether he had received effective assistance of counsel;
4. Ineffective assistance of counsel based on trial counsel's failure to obtain and review potentially exculpatory evidence; and
5. The case should be remanded to the lower court for an evidentiary hearing to determine exactly what evidence, if any, was available to the defense and

to determine whether or not counsel's failure to obtain and introduce that evidence had some reasonable basis designed to effectuate his client's interest.

(Resp.'s Ex. E at 3.) On April 25, 2000, the Superior Court affirmed the judgment of sentence in Case No. 2799-97. Commonwealth v. Schwartz, No. 1696 EDA 1999, slip op. at 9 (Pa. Super. Ct. Apr. 25, 2000). On October 3, 2000, the Pennsylvania Supreme Court denied allocatur. Commonwealth v. Schwartz, 568 A.2d 974 (Pa. 2000) (table).¹

On August 29, 2001, Petitioner filed a petition pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541-9551, challenging his convictions in all three cases. Judge Toal denied the petition on May 2, 2003. Commonwealth v. Schwartz, Nos. 2798-97, 2799-97, 3632-97 (Pa. Com. Pl. May 2, 2003). On appeal to the Superior Court, Petitioner presented the following claims:

1. Ineffective assistance of trial counsel for failing to call character witnesses at trial;
2. Ineffective assistance of appellate counsel for failing

¹ Although Petitioner claims that he filed a petition for writ of *certiorari* which was denied by the United States Supreme Court on May 1, 2001, the only entry on the Supreme Court's docket is a March 19, 2001 Order denying Petitioner's motion to proceed *in forma pauperis* and giving him until April 9, 2001 to pay the required docketing fee and properly file a *certiorari* petition. Schwartz v. Pennsylvania, 532 U.S. 918 (2001). In any event, even if the Court were to determine that Petitioner's judgment became final on or about January 1, 2001, when the 90-day period for filing a *certiorari* petition expired, the instant Petition would still be timely.

to fully brief the weight and sufficiency of the evidence claims raised on direct review;

3. Ineffective assistance of trial counsel for failing to file a motion to compel and preserve discovery of a police report, the investigating detective's rough notes, a computer hard drive containing the original police report, and the taped statements of one of the victims;
4. Ineffective assistance of trial counsel for failing to fully investigate and file a motion to suppress a videotape seized from Petitioner's home;
5. Ineffective assistance of appellate counsel for failing to file a timely appeal of all of the charges for which Petitioner was convicted; and
6. Ineffective assistance of appellate counsel for failing to preserve claims 1, 3, and 4 on direct review.

(Resp.'s Mem. Ex. I at 4, 41.) On August 27, 2004, the Superior Court affirmed the PCRA court's denial of collateral relief. Commonwealth v. Schwartz, No. 1697 EDA 2003 (Pa. Super. Ct. Aug. 27, 2004). Petitioner did not seek further review in the Pennsylvania Supreme Court.

On November 19, 2004, Petitioner filed a *pro se* Petition for Habeas Corpus pursuant to 28 U.S.C. § 2254.² In his Petition, Petitioner asserts the following numbered claims:

1. Petitioner's conviction was obtained by the use of a coerced confession - he was taken into custody and questioned without Miranda warnings;
2. Petitioner's conviction was obtained in violation of the privilege against self-incrimination;

² Because Petitioner did not file on the forms approved by the Court, the Clerk of Court provided the proper forms to him. He subsequently refiled his Petition on December 20, 2004, using the proper forms.

3. Petitioner's conviction was obtained by use of evidence obtained pursuant to an unlawful arrest;
4. Petitioner's conviction was obtained by use of evidence seized pursuant to an unconstitutional search of his home;
5. The prosecution failed to disclose favorable evidence;
6. There was insufficient evidence to support the verdicts;
7. The prosecutor suborned perjury;
8. The government refused to disclose a victim's psychiatric report;
9. Prosecutorial misconduct;
10. Trial judge bias;
11. The trial court imposed an excessive bail which denied petitioner the opportunity to prepare a defense;
12. Ineffective assistance of trial counsel for (a) failing to call character witnesses; (b) failing to obtain psychiatric and agency reports; (c) failing to impeach witnesses regarding false testimony; (d) failing to obtain sound recordings, police reports, and a computer hard drive; (e) failing to object to the unlawful search and the tainted evidence; (f) failing to object to prosecutorial misconduct; (g) failing to object to judicial bias; (h) ineffective assistance of appellate counsel for failing to preserve these claims; and
13. Ineffective assistance of appellate counsel for failing to appeal all of his convictions.³

The Court referred this case to Magistrate Judge Jacob P. Hart for a Report and Recommendation pursuant to 28 U.S.C. § 636. On June 9, 2005, the Magistrate Judge filed a Report and Recommendation recommending that the Petition for Writ of Habeas Corpus be denied

³ By separate Order entered this date, the Court granted Petitioner's motion to amend his Petition to include Claim 13.

in all respects, without an evidentiary hearing. Petitioner thereafter filed timely Objections to the Report and Recommendation.

II. LEGAL STANDARD

Where a habeas petition has been referred to a magistrate judge for a Report and Recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made . . . [The Court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b).

III. DISCUSSION

A. Procedural Default

A petitioner seeking a writ of habeas corpus in federal court must first exhaust the available state-court remedies by fairly presenting all the claims that he attempts to raise in his habeas corpus petition to each level of the state courts.⁴ Lines v.

⁴ On May 9, 2000, the Pennsylvania Supreme Court issued an order stating that, in all appeals involving criminal convictions or PCRA matters, "a litigant shall not be required to petition for rehearing or for allowance of appeal following an adverse decision by the Superior Court in order to be deemed to have exhausted all available state remedies respecting a claim of error." In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, No. 218 (May 9, 2000). Courts in this Circuit have subsequently determined that "a habeas claim need not be appealed to the state Supreme Court in order to be preserved because Order 218 'makes discretionary review [by the Pennsylvania Supreme Court] unavailable for the purpose of the exhaustion requirement in § 2254.'" Wilson v. Vaughn, 304 F. Supp. 2d 652, 658 (E.D. Pa. 2000

Larkins, 208 F.3d 153, 159 (3d Cir. 2000). To “fairly present” a claim, a petitioner must present a federal claim’s factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted. McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999). Thus, “[b]oth the legal theory and the facts underpinning the federal claim must have been presented to the state courts, and the same method of legal analysis must be available to the state court as will be employed in the federal court.” Evans v. Court of Common Pleas, Delaware County, Pennsylvania 959 F.2d 1227, 1231 (3d Cir. 1992). The burden of establishing that a habeas claim was fairly presented in state court falls upon the petitioner. Lines, 208 F.3d at 159. If a petitioner fails to fairly present his claim to the state courts and is now procedurally barred from doing so, the claim is procedurally defaulted. Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991).

Not only must a petitioner fairly present the substance of his claim to be eligible for federal habeas review, but also he must do so in compliance with state court procedures; if a petitioner presents his federal claim to the state court, but the state court rejects the claim on procedural grounds that are independent of federal law and adequate to support the judgment, the claim is

(quoting Mattis v. Vaughn, 128 F. Supp. 2d 249, 261 (E.D. Pa. 2001)).

defaulted. Id. at 729-30. State law procedural grounds are considered adequate if they are "firmly established and regularly followed." Ford v. Georgia, 498 U.S. 411, 423-24 (1991).

Petitioner failed to properly present the following numbered claims to the state courts on either direct or collateral appeal: 3 (confession obtained pursuant to unlawful arrest), 5 (prosecutor failed to disclose exculpatory evidence),⁵ 7 (prosecutor suborned perjury), 8 (government failed to disclose a victim's psychiatric report), 9 (other prosecutorial misconduct),⁶ 10 (trial judge was biased), 11 (excessive bail), 12b (counsel failed to obtain

⁵ Claim 5 is a Brady claim. See Brady v. Maryland, 373 U.S. 83 (1963) (holding that a prosecutor must disclose exculpatory evidence to the defense). Although Petitioner raised claims pertaining to exculpatory evidence in state court, those claims were not Brady claims, and they did not address the prosecutor's culpability for failing to disclose evidence. Rather, Petitioner's state-court claims were for ineffective assistance of counsel, alleging that his counsel failed to obtain potentially exculpatory evidence. The state courts never addressed a Brady issue, directly or indirectly, because they were never put "on notice" that a Brady claim was being asserted. See McCandless, 172 F.3d at 261. Although Petitioner now frames his access to exculpatory evidence as a Brady issue, the "same method of legal analysis" was not available to the state courts. See Evans, 959 F.2d at 1231. Thus, Petitioner's Brady claim was not properly presented to the state courts.

⁶ As best the Court can discern, in Claim 9, Petitioner restates several of the issues presented in Claim 5, alleging a Brady violation for failing to disclose favorable information, and in Claim 7, alleging that the prosecutor suborned perjury. In addition, he presents several new theories of prosecutorial misconduct: falsely claiming that a video established involuntary deviate sexual intercourse, arguing for excessive bail, resorting to prejudicial publicity, allowing contradictory and inconsistent statements, and relying on hearsay.

victim's psychiatric and agency reports), 12c (counsel failed to impeach witnesses regarding false testimony),⁷ 12f (counsel failed to object to prosecutorial misconduct), and 12g (counsel failed to object to judicial bias). Although Petitioner raised many of these claims in the PCRA court, none of the claims were presented to the Superior Court on collateral appeal. Because the statute of limitations now prevents Petitioner from raising these claims in state court, see 42 Pa. Cons. Stat. Ann. § 9545(b)(1) (petition for PCRA relief must be filed within one year of the date the conviction becomes final),⁸ the Magistrate Judge concluded that the claims are procedurally defaulted.

Petitioner contends that the above claims are not procedurally defaulted because he included them in a supplemental *pro se* brief that he filed with the Superior Court on direct review. Because a counseled brief had already been filed on his behalf, however, the Superior Court declined to consider the claims raised in his *pro se* brief. Schwartz, No. 1696 EDA 1999, slip op. at 9. In support of its decision, the Superior Court cited Commonwealth v. Ellis, 581

⁷ In this claim for ineffective assistance of counsel, Petitioner fails to identify the specific instances of false testimony to which he is referring. If, as the Court suspects, this claim is related to the alleged perjury raised in Claim 7, Petitioner failed to properly present such a claim before the state courts.

⁸ Petitioner has not alleged, nor would the state court likely find, that any of the three exceptions to the PCRA statute of limitations apply in this instance. See 42 Pa. Cons. Stat. Ann. § 9545(b)(1).

A.2d 595, 600 (Pa. Super. Ct. 1990), aff'd, 626 A.2d 1137 (Pa. 1993), for the proposition that “[the Superior Court] will accept for filing *pro se* appellate briefs, but we will not review a *pro se* brief if a counseled brief has been filed, either before, simultaneously with, or after the *pro se* [brief], due to the judicial confusion and delay that ensues.” Schwartz, No. 1696 EDA 1999, slip op. at 9. The Superior Court’s decision in Ellis was affirmed by the Pennsylvania Supreme Court, which expressly approved the Superior Court’s practice of rejecting *pro se* briefs from represented parties. See Commonwealth v. Ellis, 626 A.2d 1137, 1141 (Pa. 1993) (holding that a represented litigant is not permitted to “confuse and overburden the court by his own *pro se* filings of briefs at the same time his counsel is filing briefs on his behalf”).⁹ The Pennsylvania Supreme Court’s pronouncements in Ellis are firmly established and have been regularly followed by Pennsylvania courts in non-capital cases. See Commonwealth v. Pursell, 724 A.2d 293, 301-02 (Pa. 1999); Commonwealth v. Rogers, 645 A.2d 223, 224 (Pa. 1994); Commonwealth v. Meehan, 628 A.2d 1151, 1157 n.9 (Pa. Super. Ct. 1993). As the Superior Court relied

⁹ Ellis noted that “[a] represented appellant may petition to terminate his [counsel’s] representation; he may, acting pursuant to the rules of criminal procedure, proceed on his own behalf.” Id. at 1141. There is no indication that Petitioner sought to terminate his appellate counsel’s representation and proceed on his own behalf. Rather, Petitioner simply desired to serve as his own co-counsel by supplementing the claims raised in the brief filed by his appellate counsel. As Ellis makes clear, however, Petitioner enjoys no right to hybrid representation.

on an independent and adequate state procedural ground in declining to consider Petitioner's supplemental *pro se* brief, the claims raised therein are procedurally defaulted.

Where a state prisoner's claims are procedurally defaulted, federal habeas review is barred "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750. A demonstration of cause sufficient to survive dismissal "must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded [his] efforts to comply with the state's procedural rule." Caswell v. Ryan, 953 F.2d 853, 862 (3d Cir. 1992) (citation omitted).

Petitioner argues that the above claims were defaulted because appellate counsel failed to incorporate them in the brief he filed on Petitioner's behalf. Although counsel's ineffectiveness in failing to properly preserve a claim for review in state court may suffice as cause to excuse the procedural default, see Murray v. Carrier, 477 U.S. 478, 488-89 (1986), the ineffectiveness claim itself must not have been procedurally defaulted by the habeas petitioner. Edwards v. Carpenter, 529 U.S. 446, 453 (2000). In this case, Petitioner never argued on his state collateral appeal that his direct appellate counsel was ineffective for refusing to

raise his defaulted claims,¹⁰ and any such ineffectiveness claim is now procedurally defaulted.¹¹

Petitioner also argues that his claims were procedurally defaulted because the Superior Court misleadingly instructed him to reformat his initial supplemental *pro se* submission, only to later reject his re-formatted submission because it resembled a *pro se* brief. There is no indication that Petitioner's submission would have been acceptable in its original format. Whether the original submission was regarded as a "brief" or otherwise - Petitioner characterizes it as a *pro se* "amendment" to the counseled brief, (*id.*) - it is clear that Petitioner had no right to "hybrid representation" by both himself and his counsel. Ellis, 626 A.2d at 1140. The Superior Court's purported filing instructions, therefore, cannot be blamed for Petitioner's failure to properly present his claims in the state courts. Thus, Petitioner has

¹⁰Rather, Petitioner asserted that his direct appellate counsel was ineffective for 1) failing to properly brief his weight and sufficiency of the evidence claims, 2) failing to file a timely appeal of all the charges for which he was convicted, and 3) failing to preserve the following claims of ineffective assistance of trial counsel: failure to present character witnesses; failure to compel production of police reports, a detective's computer hard drive, and a recording of M.F.'s statement to the police; and failure to investigate and file a motion to suppress a videotape seized from Petitioner's home. (Resp.'s Mem. Ex. I at 4, 41.)

¹¹Ineffective assistance of PCRA counsel for failing to raise Petitioner's defaulted ineffective assistance of direct appellate counsel claims cannot serve as cause for procedural default because there is no Sixth Amendment right to counsel on a PCRA appeal. Cristin v. Brennan, 281 F.3d 404, 420 (3d Cir. 2002).

failed to establish any cause for his procedural default.

To excuse procedural default on the basis of a fundamental miscarriage of justice, a habeas petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. 478, 496 (1986). To establish the requisite probability, the petitioner must show that, in light of new evidence, it is more likely than not that no reasonable juror would have convicted him. Schlup v. Delo, 513 U.S. 298, 329 (1995). Petitioner must "support his allegation of constitutional error with new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts or critical physical evidence - that was not presented at trial." Id. at 324. Petitioner does not offer any reliable new evidence that would prevent a reasonable juror from convicting him. Moreover, as discussed below, the evidence presented at trial was entirely sufficient to support the guilty verdicts. The Court concludes, therefore, that Petitioner has failed to demonstrate a fundamental miscarriage of justice sufficient to overcome the procedural default of Claims 3, 5, 7, 8, 9, 10, 11, 12b, 12c, 12f, and 12g. Accordingly, the Court is barred from considering the merits of these claims.

B. Petitioner's Remaining Claims

The Court has considered the merits of Petitioner's remaining claims. The instant Petition was filed pursuant to 28 U.S.C. §

2254, which allows federal courts to grant habeas corpus relief to prisoners "in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a). Since it was filed after April 24, 1996, the Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-132, 110 Stat. 1214. See Lindh v. Murphy, 521 U.S. 320, 326-27 (1997). Section 2254(d)(1), as amended by AEDPA, provides:

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.A. § 2254(d)(1).

Under the AEDPA, a state court's legal determinations may only be tested against "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.A. § 2254(d)(1). This phrase refers to the "holdings, as opposed to the dicta" of the United States Supreme Court's decisions as of the

time of the relevant state court decision. Williams v. Taylor, 529 U.S. 362, 412 (2000). Courts look to principles outlined in Teague v. Lane, 489 U.S. 288 (1989), to determine whether a rule of law is clearly established for habeas purposes. Williams, 529 U.S. at 379-80, 412. “[W]hatever would qualify as an old rule under [the Court’s] Teague jurisprudence will constitute clearly established Federal law,” except that the source of that clearly established law is restricted to the United States Supreme Court. Id. at 412.

To apply the AEDPA standards to pure questions of law or mixed questions of law and fact, federal habeas courts initially must determine whether the state court decision regarding each claim was contrary to clearly established Supreme Court precedent. Werts v. Vaughn, 228 F.3d 178, 197 (3d Cir. 2000). A state court decision may be contrary to clearly established federal law as determined by the United States Supreme Court in two ways. Williams, 529 U.S. at 405. First, a state court decision is contrary to Supreme Court precedent where the court applies a rule that contradicts the governing law set forth in United States Supreme Court cases. Id. Alternatively, a state court decision is contrary to Supreme Court precedent where the state court confronts a case with facts that are materially indistinguishable from a relevant United States Supreme Court precedent and arrives at an opposite result. Id. at 406. If relevant United States Supreme Court precedent requires an outcome contrary to that reached by the state court, then the court

may grant habeas relief at this juncture. Matteo v. Superintendent S.C.I. Albion, 171 F.3d 877, 890 (3d Cir. 1999).

If the state court decision is not contrary to precedent, the court must evaluate whether the state court decision was based on an unreasonable application of Supreme Court precedent. Id. A state court decision can involve an "unreasonable application" of Supreme Court precedent if the state court identifies the correct governing legal rule but unreasonably applies it to the facts of the particular state prisoner's case. Williams, 529 U.S. at 407. A state court determination also may be set aside under this standard if the court unreasonably refuses to extend the governing legal principle to a context in which the principle should control or unreasonably extends the principle to a new context where it should not apply. Ramdass v. Angelone, 530 U.S. 156, 166 (2000); Williams, 529 U.S. at 407.

To grant a habeas corpus writ under the unreasonable application prong, the federal court must determine that the state court's application of clearly established federal law was objectively unreasonable. Williams, 529 U.S. at 409; Werts, 228 F.3d at 197. A federal court cannot grant habeas corpus simply by concluding in its independent judgment that the state court applied clearly established federal law erroneously or incorrectly; mere disagreement with a state court's conclusions is insufficient to justify relief. Williams, 529 U.S. at 411; Matteo, 171 F.3d at

891. In determining whether the state court's application of the Supreme Court precedent is objectively unreasonable, habeas courts may consider the decisions of inferior federal courts. Matteo, 171 F.3d at 890.

Section 2254 further mandates heightened deference to state court factual determinations by imposing a presumption of correctness. 28 U.S.C.A. § 2254(e)(1). The presumption of correctness is rebuttable only through clear and convincing evidence. Id. Clear and convincing evidence is evidence that is "so clear, direct, weighty and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." United States Fire Ins. Co. v. Royal Ins. Co., 759 F.2d 306, 309 (3d Cir. 1985).

The district court may only grant relief on a habeas claim involving state court factual findings where the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C.A. § 2254 (d)(2); see Weaver v. Bowersox, 241 F.3d 1024, 1030 (8th Cir. 2001); Watson v. Artuz, No. 99Civ.1364(SAS), 1999 WL 1075973, at *3 (S.D.N.Y. Nov. 30, 1999) (listing cases). The district court must conclude that the state court's determination of the facts was objectively unreasonable in light of the evidence available to the state court. Weaver, 241 F.3d at 1030 (citing Williams, 529 U.S. at 409); Torres v. Prunty, 223 F.3d 1103, 1107-

08 (9th Cir. 2000); see also Watson, 1999 WL 1075973, at *3. Mere disagreement with the state court's determination, or even erroneous factfinding, is insufficient to grant relief if the court acted reasonably. Weaver, 241 F.3d at 1030.

1. Confession

Although alleged separately, Claims 1 and 2 challenge the introduction at trial of an incriminatory statement that Petitioner made to the police detectives. Petitioner argues that his statement should have been suppressed by the trial court in accordance with Miranda v. Arizona, 384 U.S. 436 (1966).

During Petitioner's trial, the trial court conducted a suppression hearing regarding his statement to the police detectives. The trial court found that Petitioner was not in custody when he made the admissions and signed the incriminating statement, and, in any event, had been given the Miranda warnings. (1/28/98 N.T. at 111). In his direct appeal, Petitioner claimed that the trial court had erred by failing to suppress the inculpatory statement. The Superior Court affirmed the trial court's conclusion that, at the time Petitioner gave the statement, he was not in custody, and that he had been Mirandized. Schwartz, No. 1696 EDA 1999, slip op. at 5-6.

In Yarborough v. Alvarado, 541 U.S. 652 (2004), the Supreme Court discussed the issue of custodial interrogations in the context of a habeas corpus petition. After reviewing the clearly

established law, the Court held that Miranda warnings are required when a person is "taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 661 (quoting Miranda, 384 U.S. at 444). Custody is to be determined "based on how a reasonable person in the suspect's situation would perceive his circumstances." Id. at 662. The Court instructed that "[c]ourts must examine 'all of the circumstances surrounding the interrogation' and determine 'how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.'" Id. at 663 (quoting Stansbury v. California, 511 U.S. 318, 323 (1994)). The Court applied the following test:

Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.

Id. at 663 (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995)).

In this case, Petitioner was approached by two plain-clothes detectives on a public street. (1/23/98 N.T. at 34-35). Petitioner voluntarily agreed to speak with the officers and sat with them in an unmarked police vehicle. (1/23/98 N.T. at 35, 37). Petitioner sat in the back seat, while the officers were in the front, and the doors were not locked. (1/23/98 N.T. at 37-39). He was told that he was not under arrest, that he did not have to

speak with them, and was free to leave at any time. (1/23/98 N.T. at 39). All of these facts weigh heavily in favor of a finding that Petitioner was not in custody and that he would have felt free to terminate the interview and leave. Thus, the state courts' refusal to suppress Petitioner's confession was not an unreasonable application of federal law.¹² Accordingly, the Court declines to grant habeas relief with respect to Claims 1 and 2.

2. Search and seizure

In Claim 4, Petitioner alleges that the search of his home, which yielded an incriminating videotape that was introduced into evidence at trial, was not supported by probable cause. Petitioner argues that the videotape should have been suppressed under the Fourth Amendment. "[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Stone v. Powell, 428 U.S. 465, 494 (1976). Although Petitioner did not seek suppression of the videotape in the trial court, his failure to do so "was not brought about by any restriction of the opportunity by the state courts." Hubbard v. Jeffes, 653 F.2d 99, 103 (3d Cir. 1981).

¹² Even if Petitioner had been in custody at the time he made his incriminating statement to the police detectives, the state courts' factual finding that Petitioner received his Miranda warnings prior to making his statement is fully supported by the record.

Accordingly, the Court declines to grant habeas relief with respect to Claim 4.

3. Sufficiency of the evidence

In Claim 6, Petitioner seeks relief on the ground that there was insufficient evidence to support the verdicts against him. On habeas review, a petitioner is entitled to relief on this ground only if the federal court finds that "upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 324 (1979). In making this determination, the court must view the evidence in the light most favorable to the prosecution. Id. at 319. The court must apply this standard "with explicit reference to the substantive elements of the criminal offense as defined by state law." Id. at 324 n.16.

Petitioner contests the sufficiency of evidence supporting his convictions of rape, statutory sexual assault, and involuntary deviate sexual intercourse.¹³ Under Pennsylvania law, rape is defined in pertinent part as "sexual intercourse with a complainant

¹³ Although Petitioner does not explicitly specify that he is challenging these three convictions in his Petition, these are the three convictions he challenged in state court on grounds of insufficient evidence. (See Resp.'s Mem. Ex. D at 1.) The arguments in both his Petition and Objections likewise pertain only to these convictions. (See Petition Doc. 2 at 12-16; Objection at 8-9.) Petitioner's own admissions at trial are sufficient to support the other convictions for endangering the welfare of children, sexual abuse of children, indecent assault, indecent exposure, and corruption of minors.

. . . who is less than 13 years of age." 18 Pa. Cons. Stat. Ann. § 3121. Sexual intercourse is defined to include oral sex. See § 3101. Statutory sexual assault is defined in pertinent part as "sexual intercourse with a complainant under the age of 16 years" when the offender is "four or more years older than the complainant." § 3122.1. Involuntary deviate sexual intercourse is defined in relevant part as "deviate sexual intercourse with a complainant . . . who is less than 13 years of age." § 3123. Deviate sexual intercourse includes oral sex. See § 3101.

Attacking the credibility of the testimonial and documentary evidence presented by the prosecution at trial, Petitioner contends that there was insufficient evidence that M.F. performed oral sex on him. The state courts uniformly concluded that the evidence was more than sufficient to sustain a finding that M.F. performed oral sex on him. The PCRA court found as follows:

There was more than sufficient testimony to establish the elements of each of the three enumerated offenses. The defendant admits that the minor victim, M.F. touched his penis. He admits that he filmed the minor victim in various stages of undress and performing various sexual acts. M.F. testified that the defendant asked her to place her mouth on his penis and to suck it and she agreed to do so. The defendant admitted to Detective John Easton that M.F. performed sexual intercourse by mouth upon him on the night in question. There is ample credible testimony when viewed in the light most favorable to the verdict winner to establish the defendant engaged in oral sex with minor victim, M.F., who was less than 13 years of age and the defendant was 57 years of age in Aston Township, Delaware

County on July 22, 1997. Inconsistencies as to whether the act in question occurred in an Acme parking lot or Shop-n-Bag parking lot cannot form the basis to award a new trial or grant the defendant's claim of insufficient evidence.

(Schwartz, Nos. 2798-97, 2799-97, 3632-97 at 9.)

In rejecting Petitioner's sufficiency of evidence claim, the state courts properly declined to reassess the credibility determinations made by the trial court in finding Petitioner guilty of rape, statutory sexual assault, and involuntary deviate sexual intercourse, and instead made findings that are fully supported by the record evidence when viewed in the light most favorable to the trial court's verdict. Accordingly, the Court concludes that the state courts' determination that Petitioner's convictions for rape, statutory sexual assault, and involuntary deviate sexual intercourse were supported by sufficient evidence was not an unreasonable application of Jackson or its progeny. Accordingly, the Court declines to grant habeas relief with respect to Claim 6.

4. Ineffective assistance of counsel

Petitioner asserts several claims of ineffective assistance of counsel. In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that criminal defendants have a Sixth Amendment right to "reasonably effective" legal assistance, id. at 687, and set forth a two-prong test for determining ineffective assistance of counsel. A defendant first must show that counsel's performance was so deficient that it fell below an

objective standard of reasonableness under prevailing professional norms. Strickland, 466 U.S. at 688. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. at 687. "In evaluating counsel's performance, [the Court is] 'highly deferential' and 'indulge[s] a strong presumption' that, under the circumstances, counsel's challenged actions 'might be considered sound . . . strategy,'" Buehl v. Vaughn, 166 F.3d 163, 169 (3d Cir. 1999) (quoting Strickland, 466 U.S. at 689). "Because counsel is afforded a wide range within which to make decisions without fear of judicial second-guessing, . . . it is 'only the rare claim of ineffectiveness of counsel that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance.'" Id. (citing United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989)).

If a defendant shows that counsel's performance was deficient, he then must show that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. Defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

a. Failure to call character witnesses

In Claim 12a, Petitioner contends that his trial counsel was ineffective for failing to present character testimony at trial. On collateral review, the Superior Court found that counsel was not ineffective because it was sound trial strategy to withhold character testimony until the sentencing phase of the trial:

At the post-verdict evidentiary hearing that preceded appellant's sentencing, counsel raised this precise issue and offered the testimony of the various character witnesses. Each witness stated that he/she would have been available at trial and each testified to appellant's good character. At the PCRA evidentiary hearing, trial counsel admitted that appellant initially suggested calling about ten witnesses during the guilt phase of trial to testify to his good character and reputation. Counsel explained that he discussed the matter with appellant and recommended that it would be better to call the witnesses at sentencing.

Counsel's reasoning was based on the fact that appellant's defense was to admit to some of the lesser offenses of which he was charged because the evidence of such conduct, including a videotape appellant made with one of the victims, was overwhelming. According to counsel, the fact that the trial was before a judge with extensive experience led him to conclude that the character evidence would not be useful in disproving the more serious acts, but rather would be helpful at time of sentencing. Counsel's strategy was to focus on the details of what occurred between appellant and the victims, in the hope that appellant might escape conviction on the serious charges. According to counsel, appellant agreed to pursue this type of strategy.

The trial court, both at the time of the

post-verdict hearing and again following the PCRA hearing, found that trial counsel's course of action had a reasonable basis designed to advance appellant's interests. We agree. Counsel understood that appellant would be found guilty of some of the charges by reason of his own admissions. Counsel did not believe that the character witnesses' testimony would affect the determination of guilty with respect to the more serious charges. Indeed, when the witnesses ultimately testified, all of them admitted on cross examination that they had no idea appellant was involved in sexual activity with young girls, a fact that was established at trial by way of victim testimony, defendant's admissions and the videotape.

We agree with the trial court that counsel made a reasoned determination that these witnesses would make a greater impact if called at the time of sentencing. Appellant is not entitled to relief on this claim.

Schwartz, 1697 EDA 2003, slip op. at 3-4.

Upon review of the full record, the Court concludes that the state courts' determination of this claim was a reasonable application of Strickland. Trial counsel reasonably decided that the presentation of character evidence during the guilt phase of trial would likely have little persuasive effect, especially given the nature of crimes charged and Petitioner's own concession that he engaged in certain inappropriate conduct with the victims. Trial counsel instead vigorously cross-examined the victims about their oral sex accusations and presented Petitioner's competing testimony concerning the events in question. Trial counsel's sound strategy proved successful in gaining an acquittal for Petitioner

on the more serious charges involving D.B. As the state courts reasonably found that trial counsel's decision not to call character witnesses fell within the "wide range of reasonable professional assistance," Strickland, 466 U.S. at 689, the Court declines to grant habeas relief with respect to Claim 12a.

b. Failure to obtain evidence

In Claim 12d, Petitioner argues that his trial counsel was ineffective for failing to obtain the actual tape recording of M.F.'s statement to the police, certain police reports, and a computer hard drive that stored the police reports. In rejecting Petitioner's claim on collateral review, the Superior Court concluded that Petitioner had failed to show that trial counsel's failure to obtain the challenged discovery prejudiced the outcome of his case. See Schwartz, No. 1697 EDA 2003, slip op. at 6. Having reviewed the state court record, the Court concludes that the Superior Court's ruling was a reasonable application of Strickland's prejudice analysis. Although trial counsel never obtained a copy of the actual tape recording of M.F.'s statement to the police, he did introduce a transcribed copy of her statement (in which M.F. stated that she had not performed oral sex on Petitioner) at trial. As to the police reports and the computer hard drive, Petitioner made no showing in the state courts that these materials were exculpatory in nature. Indeed, none of the materials that form the basis of Petitioner's ineffectiveness claim

were even incorporated into the PCRA record. Accordingly, the Court declines to grant habeas relief on this ground.

c. Failure to object to evidence seized from search of home

In Claim 12e, Petitioner asserts that trial counsel was ineffective for failing to object to the admission of evidence obtained pursuant to an unconstitutional search and seizure under the Fourth Amendment. The evidence in question is a videotape, seized from Petitioner's Delaware home pursuant to a search warrant, which included pornographic footage of M.F. At trial, Petitioner's counsel stipulated to the admission of the videotape, even though he had never seen the search warrant. (1/23/98 v.1 N.T. at 28-29.) Defense counsel had, however, been previously informed by a prosecutor in Delaware that the search warrant was based on statements that the victims had made to the police. (Id. at 29-30.) Relying on the prosecutor's representations, defense counsel advised the trial court that he believed the search warrant was supported by probable cause.¹⁴ (Id. at 30.)

In order to establish counsel's ineffectiveness for failing to

¹⁴ At the PCRA hearing, Petitioner testified that trial counsel had filed an unsuccessful pretrial motion to suppress the videotape seized from his home. (05/30/02 N.T. at 93.) There is no record of any such pretrial motion having ever been filed, and trial counsel's representation at trial that he believed the search warrant was supported by probable cause belies Petitioner's PCRA testimony. The Court assumes, therefore, that Petitioner mistakenly recalled his trial counsel filing a pretrial motion to suppress the videotape.

raise a Fourth Amendment claim, a petitioner must first demonstrate that counsel's performance fell below the objective standard of reasonableness set forth in Strickland. See Kimmelman v. Morrison, 477 U.S. 365, 375 (1986). The petitioner must also prove "that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." Id.

In rejecting this claim on collateral review, the Superior Court found that Petitioner had failed to establish that a motion to suppress the videotape would have been meritorious: "Although [Petitioner] aptly sets out the legal standards for search warrants and seizures in his brief, he does not draw a nexus between those standards and any facts adduced at the PCRA hearing to show the seizure was improper." (Resp.'s Ex. J at 6.) Indeed, Petitioner's appellate brief focused exclusively on the deficiency of trial counsel's performance in failing to fully investigate the suppression issue, without ever discussing whether the search warrant itself was valid under the Fourth Amendment. At the PCRA hearing, Petitioner did not seek to admit a copy of the search warrant, or the affidavit of probable cause in support thereof, instead choosing to rely only on his own speculative testimony that the search warrant was not based on probable cause. The Court concludes, therefore, that the Superior Court reasonably determined

that Petitioner did not meet his burden of demonstrating that his Fourth Amendment claim was meritorious. Accordingly, the Court declines to grant habeas relief on Claim 12e.

d. Appellate counsel failure to raise trial counsel's ineffectiveness

In Claim 12h, Petitioner argues that his counsel on direct appeal was ineffective for failing to raise his ineffective assistance of trial counsel arguments in Claims 12a through 12g. The Court has already discussed Claims 12a, 12d, and 12e in this section and has determined that they are without merit under Strickland. As the United States Court of Appeals for the Third Circuit ("Third Circuit") has stated, appellate counsel "does not become ineffective by failing to raise an issue when convincing Supreme Court case law shows it to be without merit." Parrish v. Fulcomer, 150 F.3d 326, 328-29 (3d Cir. 1998). Thus, Petitioner's claim for ineffective assistance of appellate counsel must fail insofar as it relies on counsel's failure to raise Claims 12a, 12d, and 12e on direct appeal.

To the extent that Petitioner asserts that his appellate counsel was ineffective for failing to raise Claims 12b, 12c, 12f, and 12g, any such claim is procedurally defaulted. On collateral appeal, Petitioner never challenged his direct appellate counsel's effectiveness for failing to raise Claims 12b, 12c, 12f, and 12g. The Court, therefore, declines to grant habeas relief with respect to Claim 12h.

e. Appellate counsel's failure to appeal all convictions

In Claim 13, Petitioner asserts that his appellate counsel was ineffective for failing to appeal all of his convictions in Case Nos. 2799-97, or any of his convictions in Case Nos. 2798-97 and 3632-97. Instead, appellate counsel filed an appeal only with respect to Petitioner's convictions for rape, statutory sexual assault, and involuntary deviate sexual intercourse in Case No. 2799-97. In rejecting this claim on collateral review, the Superior Court concluded that "[Petitioner] did not establish at the PCRA hearing that he requested counsel to file an appeal on any of the less serious offenses [for which Petitioner was convicted in Case Nos. 2798-97, 2799-97, and 3632-97]. Thus, counsel could not be deemed ineffective for failing to do so." Schwartz, No. 1697 EDA 2003, slip op. at 7.

In Lewis v. Johnson, 359 F.3d 646 (3d Cir. 2004), the Third Circuit held that the application of a *per se* rule that defense counsel cannot be found ineffective for failing to file an appeal when his client never instructed him to file an appeal is "contrary to" clearly established law. Id. at 659; see generally Roe v. Flores-Ortega, 528 U.S. 470 (2000). Because the parties have not addressed the applicability of Lewis to the Superior Court's determination of Petitioner's claim that his appellate counsel was ineffective for failing to appeal all of his convictions, the Court will recommit the instant action to the Magistrate Judge for

further consideration of this claim.

IV. CONCLUSION

In light of the Third Circuit's recent decision in Lewis v. Johnson, 359 F.3d 646 (3d Cir. 2004), this matter is recommitted to the Magistrate Judge for further consideration of Petitioner's claim that his appellate counsel was ineffective for failing to appeal all of his convictions. The Petition is denied in all other respects.

An appropriate Order follows.

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

MELVIN SCHWARTZ : CIVIL ACTION
 :
 v. :
 :
 RAYMOND COLLERAN, et al. : NO. 04-5399

O R D E R

AND NOW, this 11th day of August, 2005, upon careful and independent consideration of the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. No. 3) and all attendant and responsive briefing, and after review of the Report and Recommendation of the United States Magistrate Judge Jacob P. Hart, and in consideration of Petitioner's Objections to the Magistrate Judge's Report and Recommendation, and the Record before the Court, **IT IS HEREBY ORDERED** that:

1. Petitioner's Objections to the Report and Recommendation are **OVERRULED**;
2. The Report and Recommendation is **ADOPTED IN PART** and **REJECTED IN PART**;
3. In light of the Third Circuit's recent decision in Lewis v. Johnson, 359 F.3d 646 (3d Cir. 2004), this matter is **RECOMMITTED** to the Magistrate Judge for further consideration of Petitioner's claim that his appellate counsel was ineffective for failing to appeal all of his

convictions;¹ and

4. The Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 is **DENIED** in all other respects.

BY THE COURT:

s/ John R. Padova
John R. Padova, J.

¹ In considering this claim, the Magistrate Judge may request additional briefing from the parties and, if necessary, hold an evidentiary hearing.