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

LOC TRAN,		
Petitioner		**CIVIL ACTION**
	:	No. 04-828
v.	**:**	
	:	
BEN VARNER, et al.,		
Defendants		

MEMORANDUM OPINION AND ORDER

RUFE, J. **January 19, 2006**

Before the Court are the objections of Loc Tran ("Petitioner") to Magistrate Judge Charles B. Smith's Report and Recommendation ("R&R") in the above-captioned case. Magistrate Judge Smith's R&R ably addresses the relevant issues, sets forth the relevant factual and procedural history, and clearly states the bases for his recommendation to dismiss the Petition for Writ of Habeas Corpus. Nevertheless, the Court, as it must, has independently reviewed the record in this matter and herein addresses each of Petitioner's objections.

I. Factual Background and Procedural History

On the afternoon of August 3, 1995, Petitioner, along with Minh Nguyen ("Minh"),[1] Thanh Van Tran (called "Nghia"), Quang Van Nguyen ("Quang"), Hue Phan (called "Tony"), Phu Duc Nguyen ("Phu"), Hieu, Chau, and Diah Sant ("Diah") met in a park in South Philadelphia, Pennsylvania where they drank beer and gambled.[2] While there, Tony suggested that the group "go

[1] Although a co-conspirator of the co-defendants, Minh testified against his confederates at their joint trial as a witness for the prosecution. Minh's trial testimony intricately outlined the events that took place leading up to and during the massage parlor homicide and robberies, including the fact that Diah introduced Hieu and Chau to the rest of the group at the park on August 3, 1995. His testimony also established that Hieu and Chau resided in New York, (not Philadelphia, Pennsylvania like the others in the group), and that Diah did not disclose Hieu's and Chau's surnames when he introduced them. N.T. 2/10/1999 at 142-43.

[2] Id. at 137.

up to the massage parlor [located at 908 Arch Street in Philadelphia, Pennsylvania] and rob."[3] Trial testimony revealed that the plan entailed the group going to the massage parlor, demanding that the owner, Jackie Kim ("Kim") begin paying $500 each week, and beating people up in an effort to scare the owner into paying. Rather than ascribing specific duties to particular individuals to execute the crime, Tony outlined a fairly broad scheme for the group to "go up there" and "mess the place up."[4] However, Tony did provide some pertinent details for the plan's execution.

First, Tony explained to the group that he was unable to accompany them into the massage parlor to execute the plan because Kim would recognize him and refuse him entry.[5] Second, Tony explained that Kim employed several young women and an armed security guard, and that the massage parlor had an operational video camera.[6] Tony also directed Hieu, who had openly brandished a silver .380 caliber handgun in the park, to "take care of the security guard."[7] Finally, Tony instructed the group to follow Nghia's orders once they were inside of the massage parlor.[8]

The group adjourned their meeting in the park around sunset. After they left the park, the group went to a restaurant, and then to a karaoke bar, where they sang and continued to drink

---

[3] Id. at 143. Minh's testimony revealed that Tony had been discussing the plan to rob the massage parlor for "a couple of weeks" leading up to August 3, 1995. Id. at 145.

[4] Id. at 145. Minh's testimony reveals that he understood the phrase "mess the place up" to include inflicting physical damage on the property, as well as inflicting bodily harm on some, if not all, of the people in the massage parlor. Id. at 147.

[5] Likewise, Phu stated that Kim also knew his face, and would not allow him to enter the massage parlor. Id. at 144.

[6] Tony explained to the group that he knew these details about the massage parlor because he had previously frequented the establishment. Id. at 148.

[7] Id. at 147.

[8] Id. at 163.

beer until approximately 1:00 or 1:30 a.m.[9] After they left the karaoke bar, Tony drove Petitioner, Minh, and Hieu to the massage parlor in his van, while Phu drove Quang, Nghia, and Chau there in a two-door Acura Legend.[10] When Petitioner, Minh, and Hieu arrived at the massage parlor, they were "buzzed" in at the ground level by the security guard, Todd Manga ("Manga"), and proceeded upstairs to a waiting area on the second level of the establishment. There, they found Quang, Nghia, and Chau already seated on a sofa in the waiting area. Also seated in the waiting area were several female employees and Kim; Manga guarded the doorway leading to the stairwell to the ground level. Phu, Tony, and Diah remained outside as lookouts for police officers and/or would-be customers.[11]

After several minutes in the waiting area, Kim instructed the group that "if [they did not] pick any girls, [they would] have to leave."[12] Then, Nghia, Quang, Chau, Hieu, Minh, and Petitioner stood up and walked toward the doorway leading to the ground level, where a struggle with Manga ensued. The struggle culminated in Manga being fatally shot.[13] As Manga lay on the floor dead, Hieu removed Manga's firearm and handcuffs; he gave the handcuffs to Nghia and left the massage parlor with Manga's gun.[14]

---

[9] Id. at 148-49.

[10] Minh was unable to recall who transported Diah to the massage parlor. Id.

[11] Id. at 151-55.

[12] Id. at 155-56.

[13] Conflicting testimony was presented at trial concerning who shot Manga. Minh testified that he saw Hieu, who was positioned in back of Manga, and Nghia, who was in front of Manga, each withdraw an automatic handgun and shoot Manga twice in quick success — Hieu once to his back and Nghia once to his front — killing him. Minh testified that he heard a third gunshot soon thereafter, but was unsure who fired the third shot. Detective Thomas Augustine of the Homicide Division of the Philadelphia Police Department read Quang's confession to his role in the robberies and murder, which identified Minh as the shooter. N.T. 2/16/1999 at 139.

[14] N.T. 2/11/1999 at 142.

For approximately the next two hours, Kim, her customers,[15] and her employees were held captive, intimidated, and robbed at gunpoint. Petitioner and Quang searched the room on the ground level for any other unaccounted for employees or customers. Minh and Chau remained in the waiting area and watched the female employees to ensure that they did not escape, while Nghia forced one woman at a time up to the third floor and robbed them at gunpoint .[16] Later, Quang located the video camera that Tony had mentioned in the park and retrieved its videotape.[17] Before they left, Petitioner and Quang undressed the employees and bound them with telephone cord, while Minh handcuffed Kim in a closet.[18]

Thereafter, the group met Phu outside of the massage parlor,[19] and he drove everyone in his two-door Acura Legend to a residence owned by Tony at 1256 Harold Street in Philadelphia.[20] There, the group divided among themselves the majority of the money that they had taken at the massage parlor, totaling approximately $11,000 or $12,000,[21] and discarded the videotape. Diah

---

[15] At one point, Nghia searched the third level of the massage parlor where he came across and robbed three additional female employees and a customer. At one point during the two hours of mayhem, Phu entered the massage parlor to alert the group that a customer was approaching from outside. Several minutes after the warning, the customer arrived, entered the waiting area, and was robbed of his money and jewelry. N.T. 2/10/1999 at 168. Before the marauders left the massage parlor, Nghia took all of the customers' drivers' licenses and told them not to call the police, threatening that he knew where they lived. N.T. 2/10/1999 at 174.

[16] N.T. 2/10/1999 at 164-65.

[17] N.T. 2/10/1999 at 166.

[18] N.T. 2/10/1999 at 172.

[19] Minh testified that Diah and Phu were the only ones waiting outside of the massage parlor waiting when the group returned to the street, as Tony had already left the scene. N.T. 2/10/1999 at 176.

[20] N.T. 2/10/1999 at 177.

[21] Id. at 178. Minh testified that he was unsure what amount of the stolen proceeds his confederates received, but stated that his share was approximately $1,000.

took possession of the guns. After the group divided the money, everyone left the house except for Minh and Quang, who lived there. The next morning, some of the men who participated in the massage parlor robberies met with Tony at a restaurant in South Philadelphia where he was given his share of the money.[22]

Thereafter, the Philadelphia Police Department began investigating the massage parlor incident, and arrested Petitioner for his role in the crimes on April 30, 1997. On October 23, 1997, police in Prince George's County ("PGC"), Maryland arrested Quang based on notification they received via the National Crime Information Center ("NCIC").[23] On that day, Detective Augustine and Detective Charles Permint of the Fugitive Squad of the Philadelphia Police Department's Homicide Division went to Maryland to retrieve Quang from police custody.[24] In Maryland, Detectives Permint and Augustine, along with Officer Tam Cragg of the PGC Police Department, interviewed Quang, read him his Miranda[25] rights, and took his biographical information. Certain that Quang understood his rights**,** Detective Augustine took Quang's confession. Thereafter, Detectives Permint and Augustine brought Quang back to Philadelphia. On October 27, 1997, Detective David Baker of the Homicide Division of the Philadelphia Police Department re-interviewed Quang in Philadelphia for identification purposes, reviewed with him the statement that he gave to police in Maryland, and took a second statement from Quang.[26]

---

[22] Id. at 178-83.

[23] Id. at 117.

[24] N.T. 2/16/1999 at 118.

[25] See Miranda v. Arizona, 384 U.S. 436 (1966).

[26] N.T. 2/16/1999 at 74-75.

Eventually, Petitioner, along with co-defendants Quang, Nghia, Phu, and Tony, was tried in the Philadelphia Court of Common Pleas for second-degree murder, four counts of robbery, and criminal conspiracy. None of the co-defendants testified at trial. However, the Commonwealth called Detective Augustine to present as evidence Quang's October 23, 1997 statement (the "October 23rd statement") and Detective Baker to present Quang's October 27, 1997 statement (the "October 27th statement").

Just prior to Detective Augustine presenting the October 23rd statement, the prosecutor asked Detective Augustine whether he had "a redacted copy of [Quang's] statement."[27] Petitioner's trial lawyer immediately objected to the question, and requested a conference at sidebar where he moved for a mistrial.[28] At sidebar, the trial court ordered the prosecutor not to use the word "redacted" when referring to Quang's statement, but denied the motion for a mistrial.[29] Thereafter, Detective Augustine read Quang's October 23rd statement into evidence, including the following:

> We were in the park across from Veterans Stadium in South Philadelphia. I think it was around three p.m. Minh, that's M-I-N-H, and another guy had guns. We were talking and we all decided that we were going to rob the hooker shop in Chinatown.[30]

Later in the trial, the Commonwealth called Detective Baker to the stand to present as evidence the October 27th statement. Before Detective Baker presented the statement,

---

[27] Id. at 130.

[28] Id. at 130-31.

[29] Id. at 132-33.

[30] Id. at 138.

the trial court instructed the jury as follows:

> A statement made before trial may be considered as evidence only in the case of the defendant who made the statement. In this statement Quang Van Nguyen. Thus you may consider the statement as evidence against the defendant, Quang Van Nguyen. You must not, however, considered [sic] the statement as evidence against any other defendant. You must not use the statement in any way against any other defendant.

Detective Baker then read the following redacted portion of Quang's statement:

> Question: When did you plan to rob the hooker shop?
>
> Answer: They were talking about it in the park by the stadium.
>
> Question: Whose idea was it to rob the hooker shop?
>
> Answer: They were all together. I don't know exactly whose idea it was. We go to the park every day, play cards.
>
> Question: When the plans were told to you who was in the park with you?
>
> Answer: All of them.
>
> Question: Who went to the massage parlor, hooker shop, to do the robbery?
>
> Answer: Me and other guys . . .
>
> Question: Are you admitting that you along with others planned to rob the massage parlor located at 908 Arch Street?
>
> Answer: Yes.[31]

During its closing argument, the Commonwealth twice referred to the October 27th

[31] N.T. 2/17/1999 at 75-77, 82.

statement. In the first reference, the prosecutor reminded the jury: "And we were told, go mess the place up, which Quang said was a robbery. He knew that they were going there to do a robbery and so did Minh."[32] In the second reference, the prosecutor argued: "Quang said he knew it was a robbery. Quang said in his statement, we were in the park across from Veterans Stadium in South Philadelphia, I think it was around 3 p.m. We all decided that we were going to rob the hooker shop in Chinatown. He knew what a robbery was. He didn't say we were going to mess the place up. We were going to do a robbery."[33]

Following closing arguments, the trial court instructed the jury on the crimes charged, including the charge of homicide.[34] Concerning second-degree murder, the trial court instructed as follows:

> Associated alternative - killing by defendants, co-felons: I'll start . . . with some basic principles. The more serious types of crimes are called felonies. For example, robbery is a felony. Second degree murder is often called felony murder because it is a killing connected with felony.
>
> When two or more people are partners in a successful or unsuccessful attempt to commit a felony and one of them killed a third person, all partners may be guilty of felony murder. Neither partner has to intend to kill, nor anticipates that anyone be killed.
>
> You may find a defendant guilty of second degree murder, that is felony murder, that is if you are satisfied that the following four elements have been proven beyond a reasonable doubt:

---

[32] N.T. 2/24/99 at 55.

[33] Id. at 82-83.

[34] See id. at 174.

> First someone killed Mr. Todd Manga; second, the killer did so while he and the defendant were partners in committing or attempting or fleeing after a certain robbery; third, that the killer did the act that killed Mr. Todd Manga in the furtherance of the robbery; and fourth, that the defendant was acting with malice.
>
> You can infer that the defendant was acting with malice if you are satisfied beyond a reasonable doubt that he and the killer were partners in committing the robbery because robbery is a crime inherently dangerous to human life. There does not have to be any other proof of malice.[35]

On March 1, 1999, the jury convicted Petitioner of second-degree murder, robbery, and criminal conspiracy. The trial court sentenced Petitioner to the mandatory term of life imprisonment for the conviction of second degree murder. The trial court also sentenced Petitioner to a ten to twenty year term of incarceration on the criminal conspiracy conviction, to run concurrently with his murder sentence, and to five to ten year terms of imprisonment for each of the four robbery convictions, to run consecutively to one another but concurrently to his murder sentence. In sum, the trial court sentenced Petitioner to life imprisonment with a total concurrent sentence of not less than twenty years, nor more than forty years at a state correctional institution.

Petitioner directly appealed his conviction to the Superior Court of Pennsylvania, arguing, among other things: (1) trial counsel was ineffective for failing to request that the trial court charge the jury that it had to determine first whether Petitioner's intent to rob preceded the decedent's murder or whether the intent to rob was formed as an afterthought to the killing; (2) trial counsel was ineffective for failing to object to the introduction of the confession of a non-testifying co-defendant; and (3) the trial court erred in not granting a mistrial where the prosecutor asked

[35] Id. at 181-82.

whether a witness referred to a redacted confession. The Superior Court affirmed Petitioner's sentence on September 5, 2002.[36] On September 23, 2002, Petitioner sought review in the Supreme Court of Pennsylvania, but that court denied allocatur on June 20, 2003. Petitioner did not pursue collateral review of his sentence pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA").[37] On February 26, 2004, Petitioner filed the instant writ of habeas corpus in federal court pursuant to 28 U.S.C. § 2254.[38]

II. Discussion

Before a federal habeas court properly grants a writ of habeas corpus to a petitioner tried in a state court, the petitioner must overcome both procedural and substantive hurdles. Procedurally, 28 U.S.C. § 2254(b) instructs: "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 unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State . . . ."[39] A petitioner "does not exhaust his state remedies if 'he has the right under the law of the state to raise, by any available procedure, the question presented.'"[40] The Third Circuit determined that a petitioner has exhausted his state remedies "when a state's procedural rules prevent a petitioner from seeking further relief in the state courts."[41] However, "[a] petitioner who has raised an issue on

---

[36] Commonwealth v. Tran, 813 A.2d 910 (Pa. Super. Ct. 2002) (table).

[37] 42 Pa. Cons. Stat. Ann. §§ 9541-9546 (1998).

[38] Document #1. Petitioner's habeas petition originally was assigned to Judge Newcomer, but the case was reassigned to this Court on September 9, 2005. See Document #20.

[39] 28 U.S.C. § 2254(b)(1)(A) (1996).

[40] Parker v. Kelchner, 429 F.3d 58, 62 (3d Cir. 2005) (quoting 28 U.S.C. § 2254(c)).

[41] Id. (citing Whitney v. Horn, 280 F.3d 240, 250 (3d Cir. 2002)).

direct appeal . . . is not required to raise it again in a state post-conviction proceeding."[42] Here, Petitioner has satisfied these procedural requirements, as he directly appealed his conviction to Pennsylvania's Superior Court, appealed the Superior Court's decision to Pennsylvania's Supreme Court, and timely filed the instant habeas petition.

Substantively, 28 U.S.C. § 2254 provides in relevant part:

> (d) 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 . . . .[43]

"[S]ection 2254(d) firmly establishes the state court decision as the starting point in habeas review."[44] Construing this provision, the Supreme Court held in Williams v. Taylor[45] that "[u]nder the 'contrary to' clause a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable

---

[42] Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1998) (citing Evans v. Ct. Com. Pl., Delaware County, Pa., 959 F.2d 1227, 1230 (3d Cir. 1992)).

[43] 28 U.S.C. § 2254(d)(1) (1996).

[44] Moore v. Morton, 255 F.3d 95, 104 (quoting Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 885 (3d Cir. 1999) (en banc)).

[45] 529 U.S. 362 (2000).

facts."[46] The Court further held that "[u]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case."[47] Therefore, it is impermissible for a federal habeas court to issue the writ based on its conclusion that the state court erroneously applied clearly established federal law.[48] Instead, "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable."[49] Additionally, the habeas statute provides:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, 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.[50]

Against this backdrop, the Court reviews *de novo* those portions of the R&R to which Petitioner has objected.[51] Petitioner raises the following three objections to the conclusions of the R&R: (1) the Pennsylvania Superior Court's holding that trial counsel's failure to object to the jury instruction on second-degree murder did not render him ineffective was not contrary to or an

---

[46] Id. at 412-13.

[47] Id. at 413.

[48] Id. at 414.

[49] Id. at 409.

[50] 28 U.S.C. § 2254(e)(1) (1996).

[51] See 28 U.S.C. § 636(b)(1) (1993).

unreasonable application of Supreme Court precedent; (2) the Superior Court's holding that trial counsel was not ineffective for failing to object to the introduction of Quang's pre-trial confessions was not contrary to or an unreasonable application of Supreme Court precedent; and (3) the Superior Court's ruling that the trial court did not err when it denied a request for a mistrial after the prosecutor referred to a redacted statement during direct examination of a government witness was not contrary to or an unreasonable application of Supreme Court precedent.

A. Failure to Object to the Jury Instruction

Petitioner objects to the R&R's conclusion that the Superior Court's ruling on his claim of ineffective assistance of counsel based on his lawyer's failure to object to the jury charge was not contrary to or an unreasonable application of federal law.[52] In Strickland v. Washington,[53] the Supreme Court announced that a claim of ineffective assistance is comprised of two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable.[54]

Thus, the Supreme Court established a two-part inquiry that this Court must undertake to assess the merits of Petitioner's claim that his lawyer rendered ineffective assistance of counsel at his criminal trial: (1) whether Petitioner's lawyer's performance demonstrated deficiency tantamount to a denial

[52] Pet'r Objections [Document #14] at 3.

[53] 466 U.S. 668 (1984).

[54] Id. at 687.

of counsel and (2) whether the alleged errors prejudiced Petitioner by depriving him of a fair trial.

Concerning the deficient performance prong, "the defendant must show that counsel's representation fell below an objective standard of reasonableness."[55] Strickland further instructs that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."[56] But, due to the "difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."[57] Moreover, Strickland teaches that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."[58]

The Superior Court applied the following rules of Pennsylvania law to govern Petitioner's ineffective assistance of counsel claims on appeal:

> Counsel is presumed effective and the burden of proving ineffectiveness rests with the defendant.[59] In order for appellant to prevail on a claim of ineffectiveness he must demonstrate that: (1) the underlying claim is of arguable merit; (2) the particular course chosen by counsel did not have some reasonable basis designed to effectuate his interests; and (3)

---

[55] Id. at 688.

[56] Id. at 689.

[57] Id. (internal quotations omitted).

[58] Id. at 690.

[59] Commonwealth v. Tran, No. 2920, slip op. at 7 (Pa. Sup. Ct. Sept. 5, 2002) (citing Commonwealth v. Floyd, 484 A.2d 365)(1984)).

> counsel's ineffectiveness prejudiced him.[60] Additionally, counsel will not be deemed ineffective for failing to assert a baseless claim.[61]

The Pennsylvania Supreme Court, in Commonwealth v. Pierce,[62] concluded that the foregoing standard for determining ineffective assistance of counsel claims was identical to the ineffectiveness standard announced in Strickland. Therefore, since the Superior Court applied a state rule of law coextensive with the federal rule, the state appellate court's decision was not contrary to established Supreme Court precedent.[63] However, the question remains whether the Superior Court's application of the legal principles embodied in Strickland to Petitioner's ineffective assistance of counsel claim was objectively unreasonable.[64]

Petitioner argues that trial counsel was ineffective "for failing to insure that the [trial court] define both extortion and robbery in its charge, and inform the jury that if the Commonwealth's evidence proved only a conspiracy to extort then the felony murder rule was not applicable and Petitioner could not be convicted of second degree murder."[65] Petitioner's argument is unpersuasive. Petitioner was charged with second-degree murder on the basis of several underlying robberies. Petitioner was not charged with extortion. And as the R&R aptly notes, "the

---

[60] Id. (citing Commonwealth v. Pierce, 527 A.2d 973 (1987)).

[61] Id. (citing Commonwealth v. Giknis, 420 A.2d 419 (1980)).

[62] 527 A.2d 973 (1987).

[63] See Werts v. Vaughn, 228 F.3d 178, 204 (3d Cir. 2000).

[64] See 28 U.S.C. § 2254(d)(1).

[65] Pet'r Objections [Document #14] at 8.

facts of this case clearly establish the elements of the crime of robbery."[66]

Nonetheless, as the Superior Court explained, one of Petitioner's co-defendants requested a jury instruction on extortion at trial. The trial court denied the request for an instruction on extortion because: (1) the defendants were not charged with the crime of extortion and (2) extortion is not a lesser included offense of the crime of robbery. Therefore, the Superior Court concluded that "any request by [Petitioner's] counsel would have been superfluous."[67]

The trial court's jury instruction clearly and accurately outlined the necessary elements for the jury to find Petitioner guilty of second degree murder: (1) someone killed Manga; (2) "the killer did so while he and [Petitioner] were partners in committing . . . a certain robbery"; (3) the killer shot Manga in furtherance of the robbery; and (4) Petitioner acted with malice.[68] As such, the Court agrees with the R&R's conclusion that the Superior Court's ruling that Petitioner's trial counsel was not ineffective for failing to object to a jury charge that omitted the definition of a crime with which Petitioner had not been charged and that the trial court had previously ruled was inappropriate is not an unreasonable application of the legal principles contained in Strickland.

B. Failure to Object to the Confession of a Non-Testifying Witness

Petitioner further objects to the R&R's finding that his trial lawyer was not ineffective for failing to object to the introduction of redacted versions of Quang's October 23rd and October 27th statements. Petitioner contends that admission of the statements violated Bruton v. United

[66] R&R [Document #11] at 12.

[67] Tran, No. 2920 slip op. at 11.

[68] See N.T. 2/24/1999 at 181-82.

States[69] and Gray v. Maryland.[70] Bruton holds that it is a violation of the Confrontation Clause of the Sixth Amendment to admit against a criminal defendant a confession that directly implicates a co-defendant where the declarant will not testify and thus cannot be cross-examined.[71] In Bruton, the Supreme Court determined that judges' instructions to consider the confession solely against its maker will be impossible to follow.[72] Bruton, however, left open the question of whether redacting the confession could cure the Sixth Amendment problem.

The Supreme Court took that question up in Richardson v. Marsh,[73] ruling that some forms of redaction are permissible. In Richardson, the confession of a co-defendant, Williams, was redacted to omit any reference to his co-defendant, Marsh. Later in their joint trial, however, Marsh gave testimony that, despite the redacted confession, permitted the jury to infer that Marsh had participated in the crime. The Supreme Court held that, because Williams's confession became incriminating to Marsh only when linked with the testimony given by Marsh later at trial, the redacted confession fell outside Bruton's scope.

In Gray, Bell and Gray were tried jointly for manslaughter. Before trial, Bell confessed that he, along with Gray, had fatally beat a man. At trial, after the judge instructed the jury that the confession could be used as evidence only against Bell, a detective read into evidence a redacted version of Bell's confession. The redacted statement substituted Gray's name with the

---

[69] 391 U.S. 123 (1968).

[70] 523 U.S. 185 (1998)

[71] 391 U.S. at 137.

[72] Id. at 135-36.

[73] 481 U.S. 200 (1987).

words "deleted" or "deletion." After the detective presented Bell's redacted statement, he responded affirmatively to the prosecutor's question whether he was able to arrest Gray based on the confession.[74]

The Supreme Court held thatthe confession substituting the words "deleted" and "deletion" for Gray's name fell within the scope or Bruton's protective rule. The Gray Court distinguished the redacted confession there from the redacted confession in Richardson based on the fact that the confession in Gray referred directly to Gray's existence, whereas the confession in Richardson required the jury to deduce based upon other testimonial evidence that the confession referred to the declarant's co-defendant. Thus, the Court held that redactions that do no more than substitute a co-defendant's name with blank spaces or words like "deleted" are legally indistinguishable from the unredacted confession in Bruton.[75]

With these principles in mind, the Court addresses whether the Superior Court's decision on Petitioner's Bruton claim was 'contrary to' or an 'unreasonable application of' clearly established federal law. The Superior Court based its decision on Petitioner's Bruton claim on Commonwealth v. Travers.[76] In Travers, the Pennsylvania Supreme Court addressed "whether the redaction of a non-testifying co-defendant's confession in a joint trial, which replaced any direct reference to the defendant with the words 'the other man,' when accompanied by an appropriate cautionary charge, was sufficient to protect the defendant's Sixth Amendment confrontation clause

---

[74] 523 U.S. at 185.

[75] Id. at 195.

[76] 768 A.2d 845 (Pa. 2001).

rights under Bruton and Gray."[77] The Travers court ruled that the manner of redaction in that case did not "implicate Bruton concerns in the same way as a statement that incriminates the defendant on its face, either by actually naming him [as in Bruton] or by an obvious method of deletion [as in Gray] that no less certainly point the finger at him."[78]

The Superior Court held that the manner of redaction at Petitioner's trial "is the type of statement specifically approved [in] . . . Travers."[79] At the time of Petitioner's trial, Gray was the prevailing federal law governing the admissibility of Quang's redacted confession. Under Gray, the Superior Court understandably held that Petitioner's trial counsel was not deficient for failing to object to the redacted statements because the statements do not facially incriminate or refer unavoidably to Petitioner. Rather, the redactions utilized only neutral pronouns that do not specifically implicate Petitioner. Moreover, the Superior Court understandably rejected Petitioner's contention that Quang's redacted statements had a Constitutionally significant "spill over effect"[80] insofar as the applicable federal case law does not expressly limit the permissible use of neutral pronouns in redacted confessions of non-testifying co-defendants to scenarios where some, but not all, co-defendants fall within the ambit of the pronoun.[81]

---

[77] Id. at 845-46 (internal citations omitted).

[78] Id. at 850.

[79] Tran, No. 2920, slip op. at 19.

[80] Pet'r Objections [Document #14] at 13.

[81] See Priester v. Vaughn, 382 F.3d 394 (3d Cir. 2004) (holding that use of the neutral phrases "the other guy" or "another guy" is "bereft of any innuendo that ties" the phrases to the complaining co-defendant). Petitioner claims that his trial counsel's failure to object to the admission of Quang's confessions prejudiced his trial, contending that Quang's statements were the only evidence of the plan to rob the massage parlor. Pet'r Objection [Document #14] at 15. This contention is inaccurate, as Minh also testified that the plan devised in the park on August 3, 1995 was a plan to commit robbery. See N.T. 2/10/1999 at 143. Moreover, "the existence of a common

Based on the foregoing, Travers is not contrary to Gray, since the decision reached in Travers is instructed by the holding of Gray— not opposite to it. Moreover, Travers is not an unreasonable application of Gray, since it is reasonable for a court to distill from Gray the principle that, while facially incriminating redactions run afoul of Bruton, redactions utilizing only neutral pronouns to refer to non-testifying co-defendants do not. As such, the Court also agrees with the R&R's conclusion on Petitioner's Bruton claim.

C. Failure to Grant a New Trial

Finally, Petitioner objects to the R&R's conclusion that the Superior Court's affirmation of the trial court's ruling that the prosecutor asking Detective Augustine if he had a redacted statement while he was on the witness stand was not grounds for a mistrial. Petitioner claims that the prosecutor's remark violated his Sixth Amendment right to confront the witness, however, a federal habeas court reviewing claims of prosecutorial misconduct must determine "whether those remarks 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"[82] Therefore, Petitioner is alleging a due process violation, not a confrontation clause violation.

The Third Circuit teaches that "[o]n habeas review . . . prosecutorial misconduct . . . does not rise to the level of a federal due process violation unless it affects fundamental fairness

---

design when the slaying occurred may be inferred from the circumstances or acts of the slayer and accomplice[s] committed shortly after the slaying." Commonwealth v. Waters, 418 A.2d 312, 318 (Pa. 1980). Therefore, the jury could have properly considered as evidence of the common plan to rob the massage parlor the fact that immediately after Manga was slain the group began taking the female employees up to the third floor of the massage parlor at gunpoint to rob them of money and possessions and took money and jewelry from the male customers who were present at the time of the ordeal.

[82] Lam v. Kelchner, 304 F.3d 256, 271-72 (3d Cir. 2002) (quoting Darden v. Wainwright, 477 U.S. 168, 180-81 (1986)).

of the trial. Thus, habeas relief is not available simply because the prosecutor's remarks were undesirable or even universally condemned."[83] Rather, "the reviewing court must examine the prosecutor's offensive actions in context and in light of the entire trial, assessing the severity of the conduct, the effect of the curative instructions, and the quantum of evidence against the defendant."[84]

The Superior Court, although noting that "the Commonwealth's attorney . . . in making reference to the statement as redacted was inexcusable,"[85] ruled that the prosecutor's remark did not warrant a new trial for Petitioner because: (1) the remark occurred as an isolated event in the course of a month long trial and (2) the evidence against Petitioner was overwhelming.[86] As such, the Superior Court applied the correct legal rule to Petitioner's claim, and, therefore, its decision was not contrary to clearly established federal law.

Additionally, the Superior Court's decision is not an unreasonable application of federal case law. The record reveals that the prosecutor's comment, while inadvisable, was an isolated event that occurred in the context of a long, complex trial. Moreover, the statement was given in the course of providing the context and background for Quang's October 23rd statement, and did not invite the jury to draw improper inferences from the remark. The fact that the prosecutor's remark revealed that the statement was redacted provided no further information than that fact; the remark did not give the jurors impermissible insight concerning what specific information had been redacted from the statement. This point is underscored by the trial court's

---

[83] Id. (internal citations omitted).

[84] Moore, 255 F.3d at 107.

[85] Tran, No. 2920 slip op. at 19.

[86] Id. at 20-21.

decision not to give a curative instruction on the remark so as not to "highlight" the issue.[87]

Finally, the evidence against Petitioner in this case was overwhelming: several victims of the robberies identified Petitioner from the stand and gave first-hand accounts of what transpired at the massage parlor; Minh gave detailed and damaging testimony against Petitioner; and several Philadelphia police officers and detectives gave strong, corroborating testimony that bolstered the testimony of the first-hand witnesses. In light of the foregoing, the Superior Court's decision was not an unreasonable application of clearly established federal law. The Court, therefore, agrees with the R&R's conclusion on Petitioner's final claim.

III. Conclusion

For the foregoing reasons, the Court overrules Petitioner's Objections and approves and adopts the R&R *in toto*.

An appropriate Order follows.

[87] N.T. 2/16/1999 at 132.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LOC TRAN,	:	
Petitioner	:	**CIVIL ACTION**
	:	No. 04-828
v.	:	
	:	
BEN VARNER, et al.,	:	
Defendants	:	

ORDER

AND NOW, this nineteenth day of January 2006, upon careful consideration of Petitioner Loc Tran's Petition for Writ of Habeas Corpus [Doc. #1], the Response thereto [Document #6], the Report and Recommendation of United States Magistrate Judge Charles B. Smith [Document #11], and Petitioner's Objections thereto [Document #14], and for the reasons set forth in the attached Memorandum Opinion, it is hereby ORDERED that:

1. The Report and Recommendation is **APPROVED and ADOPTED**;

2. The Petition for Writ of Habeas Corpus is **DENIED**;

3. There is no probable cause to issue a certificate of appealability; and

4. The Clerk of Court shall mark this case **CLOSED** for statistical purposes.

It is so **ORDERED**.

BY THE COURT:

_____
Cynthia M. Rufe, J.