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

WELDON WALTER FELLS,	:	
	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 04-0970
LOUIS FOLLINO, et al.,	:	
	:	

SURRICK, J. **AUGUST 30, 2006**

MEMORANDUM & ORDER

Presently before the Court is Petitioner Weldon Walter Fells's Petition Under 28 U.S.C. § 2254 For Writ Of Habeas Corpus By A Person In State Custody (Doc. No. 1), Magistrate Judge Linda K. Caracappa's Report and Recommendation (Doc. No. 8), and Petitioner's Objections to the Magistrate Judge's Report and Recommendation (Doc. No. 14). For the following reasons, the objections will be overruled and the Petition will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

On July 13, 1990, a jury sitting in the Court of Common Pleas of Lancaster County found Petitioner guilty of robbery, reckless endangerment of another person, theft, and possession of prohibited offensive weapons. (Doc. No. 8 at 1.) On May 3, 1991, Petitioner was sentenced to a period of incarceration of not less than twelve and one-half years and not more than twenty-five years for these offenses. (*Id.*) Petitioner appealed his conviction to the Superior Court of Pennsylvania, which found that the identification procedure used by the police at the time of Petitioner's arrest was unduly suggestive. (*Id.*; *Commonwealth v. Fells*, No. 1784 PHL 1991 (Pa.

Super. Ct. June 3, 1992)). Petitioner's conviction was reversed, and the case was remanded. (Doc. No. 8 at 2.)

At the conclusion of a second trial, the jury again convicted Petitioner of the same four offenses. (*Id.*) On July 18, 1993, Petitioner was sentenced to a total period of incarceration of not less than ten years and not more than twenty years.[1] (*Id.*) Following this conviction, Petitioner again appealed to the Superior Court, claiming:

(1) The trial court erred in allowing the prosecution to impeach Petitioner's credibility via the introduction of evidence (including Petitioner's address book) which associated Petitioner with his co-defendant;
(2) The trial court violated the best evidence rule in admitting a copy of Petitioner's address book into evidence;
(3) The trial court erred in failing to grant a continuance based on the discovery of exculpatory evidence (a corduroy jacket) before the trial was to begin;
(4) The trial court erred in refusing to grant a mistrial after a prosecution witness's testimony referred to Petitioner's prior incarceration; and
(5) The trial court erred in failing to merge Petitioner's convictions for prohibited offensive weapons with his conviction for robbery.

(Doc. No. 7 at Ex. A, pp. 7-25.) On March 21, 1994, the Superior Court denied this appeal and affirmed the judgment of sentence. *Commonwealth v. Fells*, No. 2662 PHL 1993 (Pa. Super. Ct. Mar. 21, 1994). Petitioner filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, which was denied on May 26, 1995. *Commonwealth v. Fells*, No. 168 M.D. Allocatur Dkt. 1994 (Pa. May 30, 1995).

Petitioner then filed a Post Conviction Collateral Relief Act (PCRA) Petition in the trial court. (Doc. No. 7 at Ex. D.) Appointed counsel filed an amended PCRA Petition on

[1] Petitioner received a sentence of not less than ten and not more than twenty years on the charge of robbery, 18 Pa. Cons. Stat. § 370, and a concurrent sentence of not less than two and one-half nor more than five years on the prohibited offensive weapons charge, 18 Pa. Cons. Stat. § 908.

Petitioner's behalf on February 28, 1997. (*Id.* at Ex. E.) This PCRA alleges that comments made to prospective jurors by a trial court judge during juror pool orientation were "inappropriate and as a result, the impartiality of the pool of jurors to whom said comments . . . were expressed, were [sic] tainted or may have been tainted." (*Id.* ¶ 8(e).) The amended Petition also mentioned, without further detail, "[t]he unavailability at the time of trial of exculpatory evidence that has subsequently become available and that would have changed the outcome of the trial if it had been introduced." (*Id.*)

On April 28, 1997, the court entered an Order granting a continuance upon the request of Petitioner's counsel. The Order provided that, within ninety days of the date of the Order, counsel must either request an additional continuance or request a PCRA hearing. (Doc. No. 7 at Ex. F.) On May 4, 1998, due to counsel's failure to request a continuance or a hearing and, despite unsuccessful attempts by the court to communicate with counsel, the amended Petition was dismissed without a hearing and without prejudice. (*Id.*)

On June 23, 1998, Petitioner filed a Petition for Writ of Habeas Corpus, raising the following claims:

(1) Evidence introduced by the government from Petitioner's address book violated the best evidence rule;
(2) The government unconstitutionally failed to disclose evidence of a corduroy jacket and, in turn, the trial court's failure to grant a continuance deprived Petitioner of due process;
(3) The testimony of a government witness, which alluded to Petitioner's prior incarceration, unfairly prejudiced Petitioner;
(4) The trial court erred in failing to merge Petitioner's sentences for prohibited offensive weapons with his sentence for robbery; and
(5) The jury was unconstitutionally selected and impaneled.

(*Id.* at Ex. G.)

In their Answer, Respondents contended that Petitioner had failed to exhaust his second claim for relief, characterizing the second claim as a claim under *Brady v. Maryland*, 373 U.S. 83 (1963). (Doc. No. 6, 98-cv-3400, at 7.) Respondents argued that because such claims were never exhausted in the state courts, the Petition should be dismissed. (*Id.*)

Judge Waldman, the judge to whom this matter was previously assigned under Docket No. 98-cv-3400, assigned the Petition to Magistrate Judge Thomas J. Reuter for preparation of a Report and Recommendation. (Doc. No. 3, 98-cv-3400.) In his report, Magistrate Judge Reuter found that "while [P]etitioner did raise most of his claims in state court, he failed to raise his *Brady* claim," which was based on "the alleged failure of the prosecution to turn over a corduroy jacket." (Doc. No. 8, 98-cv-3400, at 6.) In that the *Brady* claim was unexhausted, it was recommended that the Petition be dismissed. (*Id.* at 7.) Judge Waldman issued an Order on September 15, 1998, dismissing the Petition for failure to exhaust state remedies. (Doc. No. 10, 98-cv-3400.) Petitioner subsequently filed a notice of appeal, which was denied by the Third Circuit on March 26, 1999. *Fells v. Larkins*, No. 98-1861 (3d Cir. Jan. 7, 1999) (order denying request for a certificate of appealability).

On October 29, 1999, Petitioner filed a second Petition under the PCRA, at which time new counsel was appointed. (Doc. No. 7 at Ex. J.) Petitioner alleged that the prosecution withheld evidence of a corduroy jacket, that trial counsel was ineffective for failing to preserve that issue on appeal, and that the trial court violated Petitioner's rights by refusing to grant a continuance when this evidence came to light. (*Id.* at Ex. N.) Counsel later submitted an amended PCRA Petition, which added the previously asserted allegation concerning improper statements made to prospective jurors. (*Id.*) On July 5, 2000, counsel submitted a "no merit"

letter to the PCRA court, seeking leave to withdraw as counsel pursuant to *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. Ct. 1988).[2] (Doc. No. 7 at Ex. K.) The PCRA Petition was dismissed without a hearing on August 8, 2000. (*Id.* at Ex. H.) Petitioner then appealed to the Superior Court, which vacated the order based upon the failure of the PCRA court to explain its reasoning. The case was remanded to the PCRA court. *Commonwealth v. Fells*, No. 1693 MDA 2000, mem. op. at 4-5 (Pa. Super. Ct. Aug. 28, 2001).

In an opinion addressing its reasons for dismissing the Petition, the PCRA court found no factual support for Petitioner's allegation of prejudicial statements made during juror orientation, and concluded that Petitioner's claim regarding the government's failure to disclose evidence had been previously litigated on direct appeal. *Commonwealth v. Fells*, No. 0190-1990, mem. op. at 3-6 (Pa. Ct. Com. Pl. Sept. 21, 2001). The Superior Court affirmed. *Commonwealth v. Fells*, No. 1693 MDA 2000, mem. op. at 3-6 (Pa. Super. Ct. May 17, 2002). It also found that Petitioner's *Brady* claim was "untimely as [it] was not raised in his first petition." *Id.* at 4. On November 6, 2002, the Supreme Court of Pennsylvania denied a Petition for Allowance of Appeal. *Commonwealth v. Fells*, No. 519 MAL 2002 (Pa. Nov. 6, 2002) (Order denying petition for allowance of appeal).

On December 13, 2002, Petitioner filed his second Petition for Writ of Habeas Corpus. Judge Waldman dismissed this Petition without prejudice on January 13, 2003, ordering Petitioner to complete updated forms and refile within thirty days. (Doc. No. 7 at Ex. Q.) After

[2] In his letter, counsel cited a failure to find any relevant evidence to support Petitioner's contention regarding improper statements made during juror orientation and the fact that Petitioner's original claim, regarding improper withholding of evidence, had previously been litigated by the state trial court. (Doc. No. 7 at Ex. K.)

the case was reassigned to this judge, a second order was issued on July 18, 2003, again requesting that Petitioner refile within thirty days. (*Id.* at Ex. R.) Rather than refile, Petitioner filed an appeal in the Third Circuit. On January 23, 2004, the Third Circuit dismissed his appeal, citing lack of jurisdiction in that this Court's Order was neither final nor appealable.[3] (Doc. No. 7 at Ex. S.) On February 18, 2004, Petitioner filed the instant Petition for Writ of Habeas Corpus setting forth grounds identical to those raised in his first habeas Petition. (Doc. No. 1 at 9-11.) The matter was assigned to Magistrate Judge Linda K. Caracappa for Report and Recommendation. (Doc. No. 3.)

On March 27, 2004, Judge Caracappa recommended that the Petition be denied, in that the claims are barred by procedural default due to Petitioner's failure to exhaust available state court remedies. (Doc. No. 8.) Judge Caracappa concluded that the PCRA's jurisdictional statute of limitations and "Previous Litigation Waiver" provisions foreclose state review of Petitioner's *Brady* claim, and, therefore, federal review is unavailable unless Petitioner could show that his default should be excused. (*Id.* (citing 42 Pa. Cons. Stat. §§ 9544, 9545).) Judge Caracappa found no grounds to excuse the default, noting that Petitioner has failed to show the required "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 would result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

In his objections to the Report and Recommendation, Petitioner argues that he has presented all of his claims to the state, either on direct appeal or in his second PCRA Petition and

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[3] *See* 28 U.S.C. § 1291; *see also Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 72 (1948) (considering criteria to determine finality of a judgment).

that he is entitled to a hearing to resolve the alleged *Brady* violation. (Doc. No. 14. at 2-5.) He also contends that his Petition should be heard on the merits due to the "inordinate delay" on the part of the PCRA court and appointed counsel in resolving Petitioner's case in the Pennsylvania courts. (Doc. No. 14. at 2 (citing *Wojtczak v. Fulcomer*, 800 F.2d 353 (3d Cir. 1986).)

II. STANDARD OF REVIEW

We review *de novo* those portions of the Magistrate Judge's Report and Recommendation to which specific objections have been made. 28 U.S.C. § 636(b) (2000); Fed. R. Civ. P. 72(b); *see also Thomas v. Arn*, 474 U.S. 140, 141-42 (1985) ("[A] United States district judge may refer . . . petitions for writ of habeas corpus to a magistrate, who shall conduct appropriate proceedings and recommend dispositions. . . . [A]ny party that disagrees with the magistrate's recommendations may serve and file written objections to the magistrate's report, and thus obtain *de novo* review by the district judge." (citations and footnotes omitted)).

Absent exceptional circumstances, a state prisoner is required to exhaust all avenues of state review of his claims prior to filing a petition for federal habeas review. 28 U.S.C. § 2254(b)(1); *O'Sullivan v. Boerckel*, 526 U.S. 838, 839 (1999); *see also Toulson v. Beyer*, 987 F.2d 984, 986 (3d Cir. 1993) ("A state prisoner may initiate a federal habeas petition only after state courts have had the first opportunity to hear the claim sought to be vindicated."). A petitioner "shall not be deemed to have exhausted the remedies available . . . if he has the right under the law of the state to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). In order for a claim to be exhausted, "both 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.*

Ct. Com. Pl., 959 F.2d 1227, 1231 (3d Cir. 1992). Where a claim was exhausted on direct appeal, petitioner "need not raise it again in a state post-conviction proceeding." *Id.* at 1230 (citing *Swanger v. Zimmerman*, 750 F.2d 291, 295 (3d Cir. 1984)). The habeas petitioner bears the burden of proving that he has exhausted available state remedies. *Toulson*, 987 F.2d at 987.

III. DISCUSSION

A. Procedural Default

According to Respondents, Petitioner failed to exhaust his claims by not filing a direct appeal from the dismissal of his first PCRA Petition and by not raising all of his current claims in his second PCRA Petition. (Doc. No. 7 at 9.) Although Respondents did not identify the specific claims that remain unexhausted, their Answer to the prior habeas Petition focused entirely on the *Brady* claim. (Doc. No. 6, 98-cv-3400, at 7.) Magistrate Judge Reuter found that Petitioner had failed to exhaust the alleged *Brady* violation, but that his other claims had been exhausted. (Doc. No. 8, 98-cv-3400, at 6.) Judge Waldman dismissed the first habeas Petition on these grounds. (Doc. No. 7 at Ex. H.)

There exists some ambiguity here. While Judge Reuter found the *Brady* claim unexhausted at the time of the first habeas Petition, the Superior Court later refused to rule on this claim not only because it was untimely, but also because it had been previously litigated on direct appeal. (*Id.* at Ex. O, p. 5 n.4.) Petitioner agrees with the Superior Court, arguing that the *Brady* violation "had in fact been raised on direct appeal; although the name citattion [sic] of *Brady* was not stated." (Doc. No. 10 at 3.) The third ground for relief in Petitioner's initial appeal states that the Court "erred in not granting [Petitioner] a continuance based on the discovery, untimely minutes before trial began . . . of critical evidence." This argument made

reference to the corduroy jacket, bears a resemblance to and is based on the same set of facts as the current *Brady* claim. (Doc. No. 7 at Ex. A, pp. 16-20; Doc. No. 1 at 10-10(b)(ii).) Apparently, the similarity resulted in the Superior Court's observation that the *Brady* issue had previously been litigated. (Doc. No. 7 at Ex. O, p. 5 n.4.)

We note, however, that for purposes of federal habeas relief, a claim is not exhausted unless it has been "fairly presented" at the state-court level "in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (internal quotations omitted). In his initial appeal, Petitioner's attorney argued that the failure to grant a continuance following the discovery of the corduroy jacket amounted to error on the part of the trial court. (Doc. No. 7 at Ex. A, p. 20.) No mention was made of *Brady*. Under the circumstances, it cannot reasonably be concluded that this claim was "fairly presented" on appeal, notwithstanding the Superior Court's footnote observation in its opinion dealing with the second PCRA Petition. *See Duncan*, 513 U.S. at 365 ("[S]tate court . . . must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.").

It is well-settled that "[i]f [a] petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred . . . there is procedural default for the purpose of federal habeas." *Coleman*, 501 U.S. at 735 n.1. Here, we are compelled to conclude that the Petition is procedurally defaulted and that Petitioner is not entitled to federal review unless he can show that his default should be excused. Such excuse is allowed only where the petitioner can show "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 would result in a fundamental miscarriage of justice." *Id.* at 750. Petitioner has neither alleged cause and prejudice, nor shown that the court's failure to consider his claims would result in a miscarriage of justice.

B. Merits of Petitioner's Claims for Relief

In any event, considering the ambiguity and the Superior Court's observation concerning exhaustion, we will discuss the merits of the PCRA Petition, notwithstanding the fact that we conclude that there has been a procedural default and no showing of cause, prejudice, or a miscarriage of justice. "In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991) (citing 28 U.S.C. § 2241 (1990)). As such, "federal habeas corpus relief does not lie for errors of state law." *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). Inquiry into a state court's adjudication on state law grounds "is no part of a federal court's habeas review of a state conviction." *Estelle*, 502 U.S. at 67. "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Id.* at 63.

Where a claim is exhausted, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, requires courts to employ a deferential, "reasonableness" standard of review to a state court's judgment on constitutional issues raised in habeas petitions. *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 903 (3d Cir. 1999); *see also Lindh v. Murphy*, 521 U.S. 320, 334 n.7 (1997) (describing AEDPA's standard of review as "highly deferential" to state court determinations). A federal court may overturn a state court's merit-based resolution of a constitutional issue only if the state court decision "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." 28 U.S.C. § 2254(d)(1). The Supreme Court has adopted a two-part standard for analyzing claims under § 2254(d)(1), establishing that the "contrary to" and "unreasonable application of" clauses have independent meaning:

> Under 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 this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under 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.

Williams v. Taylor, 529 U.S. 362, 412-13 (2000). "[A] federal habeas court may not issue the writ [of habeas corpus] simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411.

This court must also apply a deferential standard to a state court's determination of facts. A state court's determination of a factual issue is "presumed to be correct," and may be rebutted only by "clear and convincing evidence" to the contrary. 28 U.S.C. § 2254(e)(1). Habeas relief predicated on an alleged factual error will be granted only if the state court 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. § 2254(d)(2).

1. Evidence from Petitioner's Address Book

Petitioner characterizes his first ground for relief under the heading "Conviction Obtained by Uses of Evidence Gained Pursuant to an Unconstitutional Search/Seizure." (Doc. No. 1 at 9.) However, the Petition alleges only that the trial court erred in allowing the introduction of a

photocopy of Petitioner's address book at trial when the original was not in possession of the government and the government could not adequately explain their failure to produce it. (*Id.* at 9(a)(i)-(ii); Doc. No. 30, 98-cv-3400, at 2.) According to Petitioner, the admission of the photocopy violated Pennsylvania's best evidence rule.[4] (*Id.*)

Evidentiary errors allegedly committed by state courts "are not considered to be of constitutional proportion, cognizable in federal habeas corpus proceedings, unless the error deprives a defendant of fundamental fairness in his criminal trial." *Bisaccia v. Attorney Gen.*, 623 F.2d 307, 312 (3d Cir. 1980) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-43 (1974)). The Supreme Court has defined "the category of infractions that violate 'fundamental fairness' very narrowly." *Dowling v. United States*, 493 U.S. 342, 352 (1990). To qualify, the action complained of must "violate those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define 'the community's sense of fair play and decency.'" *Id.* at 353 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *Rochin v. California*, 342 U.S. 165, 170 (1952)).

When this claim was originally dismissed on post-trial motion, the trial court found that the address book had been lost, based on evidence submitted by the prosecution at an *in camera*

[4] In Pennsylvania, the proponent of written evidence is required to produce the original writing to prove its contents, unless a sufficient reason for not producing it is shown. *Commonwealth v. Cessna*, 537 A.2d 834, 838 (Pa. Super. Ct. 1988). If a copy is to be introduced, the original must be shown to be unavailable, through no fault of the proponent, and the copy must be shown to conform to the original. *Warren v. Mosites Constr. Co.*, 385 A.2d 397, 402 (Pa. Super. Ct. 1978); *Commonwealth v. Olitzky*, 133 A.2d 238, 243 (Pa. Super. Ct. 1957). Where a document cannot be produced, such as when it has been lost or destroyed, "production of the original is excused and other evidence of the contents becomes admissible." *Id.* (citing *McCormick on Evidence* § 237 (2d ed. 1972)).

hearing.[5] *Fells*, No. 0190-1990, mem. op. at 5-6. The court reasonably concluded that the absence of the original writing should be excused and a photocopy could be admitted. *Id.* at 6. This evidence was then appropriately used to impeach Petitioner's testimony, in which he claimed not to know an individual whose name appeared in the address book along with the names of several of his relatives. *Id.* at 4-5. These findings were affirmed on appeal. *Fells*, No. 2662 PHL 1993, at 4.

Petitioner now asserts that the unavailability of the address book was the fault of the prosecution and that its absence was not adequately explained. The trial court opinion belies these assertions. Petitioner has made no showing that the trial court committed an evidentiary error, nor has he shown that he was deprived of fundamental fairness. This claim cannot form a basis for the requested relief.

2. Prosecution's Failure to Disclose Evidence

Petitioner's second claim alleges an "unconstitutional failure of the prosecution to disclose evidence." (Doc. No. 1 at 10.) Petitioner cites *Wardius v. Oregon*, 412 U.S. 470 (1973), arguing that he was denied due process when the trial court failed to grant a continuance. This is the so-called *Brady* violation.[6]

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[5] In this hearing, the prosecution established that a "general request form was sent from the Lancaster County Prison to the East Lampeter Township police requesting certain items be returned . . . . [including] an address book." *Fells*, No. 190-1990, mem. op. at 5. The items were reportedly delivered to the prison by a police officer, but specific records as to who received them were unavailable. *Id.*

[6] Respondents were the first party to cite *Brady* in relation to this claim. (Doc. No. 6, 98-cv-3400, at 7), but Petitioner has also adopted this characterization in his pleadings, (Doc. No. 10 at 3; Doc. No. 14 at 4).

According to *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. In order to establish a *Brady* violation, "a defendant must show that: (1) the government withheld evidence, either willfully or inadvertently; (2) the evidence was favorable, either because it was exculpatory or of impeachment value; and (3) the withheld evidence was material." *Lambert v. Blackwell*, 387 F.3d 210, 252 (3d Cir. 2004) (citing *Banks v. Dretke*, 540 U.S. 668, 690 (2004)), *cert. denied*, 125 S. Ct. 2516 (2005). Evidence "is material only if there is a reasonable probability that, had the evidence been disclosed . . . the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). A "probability sufficient to undermine confidence in the outcome" constitutes a "reasonable probability." *Id.*

In addition, the decision of whether to grant a continuance, regardless of the extenuating circumstances, is generally reserved to the discretion of a trial judge. *Paullet v. Howard*, 634 F.2d 117, 119 (3d Cir. 1980). This decision should only be reversed on a clear showing of abuse of discretion. *Id.*

At trial, the prosecution produced a blue warm-up jacket, which Petitioner was alleged to have worn. *Fells*, No. 190-1990, mem. op. at 6. Petitioner argued that he was actually wearing a corduroy jacket, also seized by police, and he sought to produce the corduroy jacket at trial. (Doc. No. 1 at 10-10(B)(I).) Before his second trial, Petitioner requested that the corduroy jacket be returned to him. The Commonwealth was unable to locate it. (Doc. No. 7 at Ex. A, pp. 16-17.) Only on the morning of Petitioner's trial did the prosecution determine the location of the

second jacket. (Doc. No. 1 at 10(B)(i).) Petitioner sought to delay trial so that he could recover the jacket. His request for a continuance was denied by the trial court. *(Id.* at 10(B)(i).)

Petitioner first introduced this claim in his post-trial motions. *Fells*, No. 190-1990, mem. op. at 7. The trial court concluded that no due process violation had occurred in that it was not an abuse of discretion to deny the request for continuance "to find a jacket that was last seen three years ago." *Id.* (citing *Commonwealth v. Ah Thank Lee*, 566 A.2d 1205, 1206 (Pa. Super. Ct. 1989). The court stated that the actual production of the corduroy jacket "corroborated defendant's story," but that "it was not on its own exculpatory evidence." The court also pointed out that the production of the jacket would have been cumulative, in that "the defense called the attorney from the defendant's first trial to testify as to his recollection of a second jacket from the preliminary hearing." *Id.*; Trial Tr. at 145-47, 173.)

It is not at all clear that failure to grant a continuance, in order to obtain evidence located by the prosecution only at the last minute, is cognizable as a *Brady* violation. Certainly, there is nothing in this record to suggest that the Commonwealth intentionally withheld the jacket. In fact, the contrary is true. In any event, the evidence in question does not rise to the required level of materiality. Although Petitioner was aware of the existence of the second jacket, but was unable to produce it, the testimony at trial informed the jury that this second jacket had been seized by police. This corroborated Petitioner's claims that it was this corduroy jacket, and not the blue warm-up, that he had worn. The trier of fact was made aware of the second jacket's existence without its physical presence. "The trial judge thoroughly considered defendant's request and the implications of the absence of the corduroy jacket at trial." (Trial Op. Apr. 30, 1993). There is no reasonable probability that physical production of the jacket alone would

have changed the outcome of the proceedings. The trial court's findings were neither "contrary to" nor "an unreasonable application" of federal law, nor did the trial judge commit a clear abuse of discretion. As such, Petitioner's claim for relief on these grounds must fail.

3. Testimony of Government Witness

In his third ground for relief, Petitioner argues that "on direct examination, a witness for the prosecution made reference to Petitioner's incarceration." (Doc. No. 1 at 10.) Petitioner contends that this reference "clearly conveyed an improper impression to the jury" and that the trial court erred in denying Petitioner's subsequent motion for a mistrial. (*Id.*; Doc. No. 30, 98-cv-3400, at 4.)

At trial, Detective Hamill,[7] a witness for the prosecution, mentioned that he had returned certain items to the Petitioner at "the County Prison." (Doc. No. 7 at Ex. A, p. 21.) This was the sole reference to Petitioner's incarceration. Defense counsel moved for a mistrial, which was denied. *Id.* The trial judge immediately issued a "comprehensive curative instruction to the jury to disregard the statement referring to the prison." *Fells*, No. 190-1990, mem. op. at 8. On post-trial review, the court considered and dismissed the claim, pointing out that while such evidence is generally inadmissible, there is no per se rule that requires a new trial whenever reference to a defendant's incarceration is made. *Id.* (citing *Commonwealth v. Wallace*, 561 A.2d 719, 724 (Pa. 1989) (denying a mistrial despite a witness's testimony that he had met the defendant in prison); *Commonwealth v. Nieves*, 582 A.2d 341, 345 (Pa. Super. Ct. 1990)).

[7] Petitioner mistakenly identifies the witness in question as "Detective Hamilton." (Doc. No. 1 at 10.)

Upon review, we conclude that this claim does not provide Petitioner with a basis for relief. The reference to Petitioner's incarceration was "oblique at best" and was immediately met with a curative instruction to the jury that it be disregarded. *See Jackson v. Ryan*, No. 90-7557, 1991 U.S. Dist. LEXIS 10461, at *7 (E.D. Pa. July 25, 1991) (denying habeas relief based on a nearly identical claim where jury was also immediately instructed to disregard statement). Moreover, the trial record here provides overwhelming evidence to support the jury's guilty verdict.[8] *Fells*, No. 190-1990, mem. op. at 1-3. The reference to Petitioner's incarceration was "harmless beyond a reasonable doubt, and in no way deprived him of a fundamentally fair trial." *Jackson*, 1991 U.S. Dist. LEXIS 10461, at *8; *see also Arizona v. Fulminante*, 499 U.S. 279, 308 (1991).

4. Merger of Petitioner's Sentences

Petitioner alleges that "his conviction for prohibited offensive weapons and sentence of 2 1/2 -5 years should have merged with [his] robbery sentence of 10-20 years." (Doc. No. 30, 98-cv-3400, at 4.) Petitioner cites a series of Pennsylvania state cases in support of this claim. He does not raise any constitutional violation. (*Id.*)

[8] Petitioner was arrested shortly after the crime took place, exiting a vehicle that had attempted to elude the police and that matched the description of the car seen leaving the scene of the robbery. *Fells*, No. 190-1990, mem. op. at 2. In the car, police found a sawed-off shotgun, the weapon used to commit the robbery, and a ski mask similar to the one used by the perpetrator to disguise his face. *Id.* Petitioner's address book was also found in the car. Petitioner testified at trial that he was only in the car because he was hitchhiking, that the car had picked him up, and that he did not know anyone in the car. Petitioner's address book contained the name and address of Darryl Dorsey as well as the names and addresses of several of Petitioner's relatives. The car was registered in the name of Darryl Dorsey and Dorsey's driver's license was found in the car. *Id.* at 3.

Final authority to interpret Pennsylvania's criminal laws rests with the state courts of Pennsylvania. *Gillespie v. Ryan*, 837 F.2d 628, 632 (3d Cir. 1988). Inquiries into erroneous interpretations of state law by state courts are not appropriate habeas corpus challenges. *Estelle*, 502 U.S. at 67. We must, therefore, defer to the state court's findings with respect to this allegation.

The merger claim was presented on direct appeal to the Superior Court, which rejected Petitioner's contention. (Doc. No. 7 at Ex. A, p. 22; *Id.* at Ex. B, p. 4.) The court's finding was not inconsistent with prior Pennsylvania authority. *See Commonwealth v. Taylor*, 500 A.2d 110, 121 (Pa. Super. Ct. 1985) (mere possession of a firearm must be construed as violating Pennsylvania's prohibited offensive weapons statute, 18 Pa. Cons. Stat. § 908(c)).

5. Jury Selection

Petitioner's fifth ground for relief is based on alleged comments made to prospective jurors by a trial court judge during juror pool orientation. (Doc. No. 30 at 5, 98-cv-3400.) The only factual support for this allegation is an article from the *Lancaster Intelligencer Journal*, dated June 22, 1995—three years after Petitioner's conviction. (*Id.*) The Court of Common Pleas, in reviewing this allegation pursuant to Petitioner's second PCRA Petition, found that "there was no substantive proof that any such statements were ever made to [Petitioner's] jury pool" on the date that his jury was impaneled. (Doc. No. 7 at Ex. N, p. 4.)

In addition, appointed counsel filed a no-merit letter in which he addressed this claim. (*Id.* at Ex. K, p. 2.) Counsel, Russell Pugh, interviewed Petitioner's prior appointed counsel, Timothy Lanza, who stated he had never convened a hearing on Petitioner's first PCRA Petition because he was "unable to evidence Mr. Fell's contention." (*Id.*) Pugh independently attempted

to contact jurors and alternates from Petitioner's 1992 trial who had not previously been contacted by Lanza. (*Id.*) None of these individuals remembered any objectionable comments made during their orientation. (*Id.*) Based on its findings, the Court of Common Pleas dismissed this claim without a hearing. (*Id.* at Ex. N, p. 4.)

Petitioner has provided no additional evidence to bolster this claim. As per § 2254(e)(1), the state court's determination of this factual issue will be "presumed to be correct," absent "clear and convincing evidence" to the contrary. Petitioner has made no such showing. Rather, he continues to rely entirely on the newspaper article cited in his PCRA Petition. (Doc. No. 30, 98-cv-3400, at 5.) This claim is without merit and cannot form the basis for the relief requested.

IV. CONCLUSION

None of the claims alleged by Petitioner, taken alone or together, constitute a basis on which habeas corpus relief may be granted. Accordingly, for the reasons stated above, the Petition for writ of habeas corpus must be denied.

An appropriate Order follows.

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

WELDON WALTER FELLS,	:	
Petitioner	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 04-970
LOUIS FOLLINO, et al.,	:	
Respondents	:	

ORDER

AND NOW, this 30th day of August, 2006, upon consideration of the Petitioner's Petition For Writ Of Habeas Corpus By A Person In State Custody (Doc. No. 1, 04-cv-970), Magistrate Judge Linda K. Caracappa's Report and Recommendation (Doc. No. 8), and Petitioner's Objections to the Magistrate Judge's Report and Recommendation (Doc. No. 14), it is ORDERED as follows:

1. Petitioner's objections to the Report and Recommendation are OVERRULED.

2. The Petition For Writ Of Habeas Corpus is DISMISSED.

3. There are no grounds for the issuance of a certificate of appealability.

IT IS SO ORDERED.

BY THE COURT:

/s R. Barclay Surrick
United States District Court Judge